

[HIGH COURT OF AUSTRALIA.]

COMMISSIONER FOR GOVERNMENT }
TRANSPORT } APPELLANT ;
DEFENDANT,

AND

CHAPMAN RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Transport (N.S.W.)—Officer—Retirement—Leave—Payment in lieu of leave—*
1957. *Entitlement—New South Wales Tramways and Omnibus Award 1952, cl. 34 (d)*
SYDNEY, *—Transport Act 1930-1952 (N.S.W.) (No. 18 of 1930—No. 39 of 1952), s. 123—*
Government Railways and Transport (Amendment) Act 1953 (N.S.W.) (No. 31
of 1953), s. 3.
April 8, 9;
July 2.
Dixon C.J.,
McTiernan,
Fullagar,
Kitto and
Taylor JJ.

C., being about to attain the age of sixty-five years, was retired from the service of the Department of Railways on 13th November 1953 after more than forty years' service. His retirement at this age was in accordance with departmental policy and the approval of the acting staff manager of the department to C.'s retirement was duly notified to him. Prior to retirement C. had become entitled to but had not had the benefit of two months long service leave, twenty-eight days' annual leave and twenty-one days' leave in lieu of public holidays worked and he was accordingly informed that after retirement a lump sum payment equivalent to the value of two months' retiring leave and accumulated holidays would be made to him as an allowance or gratuity in consequence of his retirement. In making this lump sum payment the department was apparently complying with cl. 34 (d) of the *New South Wales Tramways and Omnibus Award 1952*. The leave referred to had become due to C. under s. 123 of the *Transport Act 1930-1952 (N.S.W.)*. On 20th November 1953 C. received from the department a cheque for £270 4s. 7d. as such lump sum payment. This was accepted by C., who on 8th December 1953 also accepted without question his first payment of superannuation computed as payable from 14th November 1953. On 11th December 1953 s. 123 of the *Transport Act* was amended to give certain new rights with respect to leave to "every officer who whether before or after the commencement" (of the amending Act) "has had fifteen years service". C. claimed that at the date of the amendment he was still an officer of the department and accordingly entitled to the additional leave benefits granted by the amending Act.

Held, that it was the inevitable conclusion from the facts proved that C.'s employment terminated on 13th November 1953 upon which date he accordingly ceased to be an "officer" of the department. His claim therefore failed.

Clause 34 (d) of the *New South Wales Tramways and Omnibus Award 1952* confers upon an employee subject to the Award a right to receive payment in lieu of leave in the circumstances therein specified. H. C. OF A. 1957.

Observations of Latham C.J. in *Shugg v. Commissioner for Road Transport and Tramways (N.S.W.)* (1937) 57 C.L.R. 485, at p. 492, approved by Dixon C.J., McTiernan, Fullagar and Taylor JJ. COMMIS- SIONER FOR GOVERN- MENT

Per Kitto J. : The word "retirement" in s. 123 of the *Transport Act 1930-1952* (N.S.W.) is used in a sense incompatible with the continuance of the transport TRANSPORT v. CHAPMAN.

Decision of the Supreme Court of New South Wales (Full Court) : *Chapman v. Commissioner for Government Transport* (1956) 74 W.N. (N.S.W.) 80, reversed.

APPEAL from the Supreme Court of New South Wales.

On 20th January 1955 George Nears Chapman instituted proceedings in the District Court of the Metropolitan District holden at Sydney against the Commissioner for Government Transport claiming the sum of five hundred and sixty-eight pounds (£568). By his particulars of claim he alleged (a) that he was an officer within the meaning of the *Transport Act 1930-1953* who had attained the age of sixty-five years and retired; (b) that he had as such officer completed a period of service exceeding forty years; (c) that he was as such officer entitled to an amount of leave on full or half pay calculated on the basis of six months or twelve months respectively for each completed period of twenty years' service as such officer; (d) that all conditions precedent to his right to receive the amount of the said leave on full or half pay as aforesaid or to compensation or gratuity in lieu thereof from the commissioner had been fulfilled; and (e) that the commissioner had failed to grant the leave as aforesaid or to pay the compensation or gratuity in lieu thereof. The claim so made was based upon s. 123 (2) of the *Transport Act 1930-1953* (N.S.W.).

To these particulars of claim the commissioner pleaded never indebted and not guilty by statute, particularising the *Transport Act 1930* (N.S.W.) as amended, the whole Act and especially ss. 123, 232, 233; the *Ministry of Transport Act 1932* (N.S.W.) as amended, the whole Act and especially ss. 16 and 17; and the *Transport (Division of Functions) Act 1932* (N.S.W.) as amended, the whole Act and especially ss. 27 and 28.

The action was tried by *Curlewis D.C.J.*, who in the course of his judgment noted that the following facts were agreed on by counsel for the parties: The plaintiff attained the age of sixty-five years on 15th November 1953. The commissioner retired the plaintiff from the service on 13th November 1953. The plaintiff had joined the service in May 1913 and had forty years and six

H. C. OF A.

1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

months' service as at 13th November 1953. The Act under which the plaintiff makes his claim came into force on 11th December 1953. At 13th November the plaintiff had worked twenty-one days of holidays and had not received pay in lieu thereof, and had twenty-eight days of annual leave accrued. Between 13th November and 11th December 1953 there were twenty working days. From 13th November 1953 the plaintiff received superannuation payments and received a cheque for all leave and holidays up to 13th November 1953. His Honour concluded that s. 123 (2) of the *Transport Act* 1930-1953, upon which the plaintiff based his claim, did not enable the plaintiff to extend the term of his employment beyond the date of his retirement in order to reap its benefits, and accordingly he entered a verdict for the commissioner.

From this decision Chapman appealed to the Full Court of the Supreme Court of New South Wales (*Owen, Herron and Manning JJ.*) which allowed the appeal, set aside the verdict and judgment for the commissioner and entered in its stead a verdict and judgment for Chapman in the amount claimed: (1).

From this decision the commissioner by special leave appealed to the High Court.

Further facts and the relevant statutory provisions appear in the joint judgment hereunder.

B. P. Macfarlan Q.C. (with him *H. L. Cantor*), for the appellant. The act of retirement of the respondent terminated the employment relationship between him and the commissioner and thereafter it is not possible to regard him as a person on leave. [He referred to *Shugg v. Commissioner for Road Transport and Tramways (N.S.W.)* (2); *Christensen v. Railway Commissioners for New South Wales* (3).] Where there has been a termination of service which can be done at the will of the commissioner then the commissioner cannot grant nor can an officer claim entitlement to leave. [He referred to s. 123 (2), (3), (4) and (7) of the *Transport Act* 1930-1952.] The retirement in sub-s. (7) does not mean retirement in the fullest sense, but contemplates retirement from active work to be followed by complete retirement at the expiration of the period of leave. There is nothing in s. 123 prior to the 1953 amendment which justifies the view of the Full Court that the section contemplates leave being taken by an employee after final retirement. So far as s. 123 after the amendment is concerned, upon its proper construction leave cannot be taken after retirement. Irrespective of the view taken of s. 123, s. 100 authorises termination of the service of an

(1) (1956) 74 W.N. (N.S.W.) 80.

(2) (1937) 57 C.L.R. 485, at pp. 488, 492, 495, 496, 497, 499.

(3) (1921) 21 S.R. (N.S.W.) 141, at p. 146; 38 W.N. 7, at p. 9.

officer at will and this the commissioner has here done. The words "retires or is retired" is sub-s. (3) of s. 123 after the amendment speak only as to the present and future not to the past, and the respondent having retired before the amendment came into force does not answer the description of one "who retires or is retired". The Full Court erred in its decision and the appeal should be allowed.

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

N. H. Bowen Q.C. (with him *N. J. Mannix*), for the respondent. When the respondent ceased work in November 1953 there was no provision enabling the commissioner to pay him a lump sum in lieu of leave. He was entitled to leave and the commissioner intended to allow him to take such leave after retirement and regarded him as still an officer by supplying him with a free travelling pass. He retired in November 1953 in the sense that he withdrew from active work and his retirement would not become complete until his leave expired. During the period of his leave he had the entitlement given him by s. 123 and such entitlement was increased by the amendment. When the amendment came into force the respondent was an officer on leave. A consideration of the terms of s. 123 both before and after the amendment shows that it was contemplated that an officer would take leave after retirement, and "retirement" as used therein should be construed not as involving a final severance of the employment relationship but only a withdrawal from active service with the department. The documents exhibited show that the intention was not to sever the employment relationship on 13th November 1953. The retirement of the respondent seems to have been carried out by the acting staff manager, and it does not appear that there was any delegation of authority by the commissioner to that officer under s. 211. *Obee v. Railway Commissioners for New South Wales* (1) illustrates that the whole conception of entitlement to leave is a conception that the man is entitled to remain in the employment so that he may earn his statutory wages during the period of the leave. Clause 34 (d) of the *New South Wales Tramways and Omnibus Award* 1952 does not direct payment in lieu of leave nor does it confer a right in the employee to any such payment. It does no more than indicate to what persons payments are to be made in the cases there enumerated, the law having already created a right to or authorised the payments. *Shugg's Case* (2) does not assist, for the matter was there decided apart from the award in question which was not canvassed. [He then moved for the

(1) (1930) 30 S.R. (N.S.W.) 201, at pp. 205, 206; 47 W.N. 71, at p. 73.

(2) (1937) 57 C.L.R., at pp. 489, 492, 493.

H. C. OF A.
1957.

COMMISS-
SIONER FOR
GOVERN-
MENT
TRANSPORT
v.
CHAPMAN.

rescission of the order of the Court made on 19th November 1956 granting special leave to the appellant to bring the present appeal.]

B. P. Macfarlan Q.C., in reply. [He opposed the rescission of the order.] The contentions of the respondent as to his retirement and the authority of the staff manager to effect such retirement on the commissioner's behalf ought not to be entertained in view of the fact (*inter alia*) agreed upon by counsel at the trial, namely that "the commissioner retired the plaintiff from the service on 13th November 1953". The respondent was given payment in lieu of leave because the view was taken that cl. 34 (*d*) of the award so required.

Cur. adv. vult.

July 2.

The following written judgments were delivered :—

DIXON C.J., McTIERNAN, FULLAGAR AND TAYLOR JJ. The respondent, as the plaintiff in a district court action, sued the appellant to recover the sum of £568 as and for the monetary value of a period of long service leave which, it was alleged, accrued due to him as an officer in the service of the appellant and which was not granted to or availed of by him prior to retirement.

It appears from the facts of the case that the respondent entered the service of the appellant in the month of May 1913 and that he was retired from such service on 13th November 1953 after more than forty years service. There is no question that prior to his retirement he had become entitled to, and had not had the benefit of, two months' long service leave, twenty-eight days' annual leave and twenty-one days' leave in lieu of public holidays upon which he had worked, and that, upon his retirement, he was paid the aggregate monetary value of such leave, namely, the sum of £271 8s. 1d. The claim of the respondent in the action was, however, that, in view of subsequent events, he became entitled to another four months' long service leave and that the amount so paid to him was, therefore, inadequate. Accordingly his action was brought to recover the monetary equivalent of an additional four months' leave. In the action judgment was entered for the appellant but on appeal to the Supreme Court by the respondent the latter was successful. This appeal is now brought by special leave from the order of the Supreme Court which directed that judgment should be entered for the respondent for the amount claimed.

At the time of the respondent's retirement his right to long service leave was governed by s. 123 of the *Transport Act* 1930-1952. The terms of this section are of importance in considering the respondent's submission and the material provisions should be set out in full :—

"123. (3) Every officer who at the commencement of the Transport (Amendment) Act 1942, has completed twenty years of actual service, but who has not, before such commencement, had at least one month's extended leave on full pay, shall be entitled to at least one month's extended leave on full pay and shall—

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

Dixon C.J.
McTiernan J.
Fullagar J.
Taylor J.

(a) if he retires or is retired before the termination of the said war, be entitled, upon such retirement, to at least two months retiring leave on full pay;

(b) if still employed as an officer at such termination, be entitled to at least two months further extended leave on full pay.

(6) Any extended leave to which an officer is entitled under this section shall, if taken before the retirement of such officer, be so taken at such time as the exigencies of the transport service permit.

(7) The Commissioner for Road Transport and Tramways may, if he is satisfied that exceptional circumstances warrant him so to do, grant permission to an officer who is entitled under this section to retiring leave to take such leave by way of extended leave before his retirement."

We are told that the respondent had qualified for extended leave under sub-s. (3) (b) and that payment in respect of the appropriate period was included in the total sum of £271 8s. 1d. paid to him upon his retirement.

Shortly after that event, namely, on 11th December 1953, the *Government Railways and Transport (Amendment) Act 1953* became law. By that Act the above and other sub-sections of s. 123 were repealed and the following provisions enacted in their place:—

"(2) Every officer who whether before or after the commencement of the *Government Railways and Transport (Amendment) Act, 1953*, has had fifteen years service shall be entitled to three months leave on full pay or six months on half pay, and on the completion of twenty years service shall be entitled to a further three months leave on full pay or six months on half pay. After completion of further service after twenty years and up to a total service of forty years in all, he shall be entitled to a further proportionate amount of leave on full pay or half pay calculated on the basis of six months or twelve months respectively for twenty years service: Provided that an officer entitled to leave in pursuance of the provisions of this subsection shall not be entitled to leave in pursuance of the provisions of subsections two to nine, both inclusive, of this section as enacted immediately before the commencement of the *Government Railways and Transport (Amendment) Act, 1953*, and any leave taken by an officer before such commencement in pursuance of the provisions of the said subsections two to nine as enacted immediately before such commencement shall be deducted

H. C. OF A.
1957.

COMMISS-
SIONER FOR
GOVERN-
MENT
TRANSPORT
v.
CHAPMAN.

Dixon C.J.
McTiernan J.
Fullagar J.
Taylor J.

from the leave to which such officer is entitled under this subsection.

(3) Any officer who has acquired a right to leave under subsection two of this section, has attained the age of sixty years and retires or is retired shall be paid forthwith in lieu of such leave the money value thereof as a gratuity in addition to any gratuity to which he may be otherwise entitled.

(4) Any leave to which an officer is entitled under subsection two of this section shall, if taken before the retirement of such officer, be so taken at such time as the exigencies of the departmental services permit.

(5) Where an officer has acquired a right under subsection two of this section to leave and dies before entering upon it, or after entering upon it, dies before its termination, his widow, or in the case of a widower leaving children, his children, or their guardian, or other dependent relative, or their legal representative, shall be entitled to receive the money value of the leave not taken, or not completed, computed at the rate of pay the officer received at the time of his death :

Provided that where payment of the money value of leave has been made under this subsection no action may be brought for payment of any amount in respect of such leave.

(6) No officer shall be entitled to benefits under subsection two of this section as well as to benefits of the like nature under the provisions of any other enactment for the same period of service.

(7) For the purposes of this section 'service' includes service with the Department of Railways, the Department of Government Transport and the Department of Motor Transport or any authority which before the establishment of any such Department exercised or discharged any of the powers, authorities, duties or functions exercised or discharged by such Department."

It is by virtue of this amendment that the respondent made his claim to an additional payment. In effect, it is said, he was still an officer in the service of the appellant at the time when the new provisions became operative and so became entitled to the additional leave in question.

The commencing point in the respondent's argument is that the word "retirement", as used in s. 123 in its original form, was used in a very special sense. When an employee "retires", or is "retired", his term of service as employee comes to an end. The relationship of employer and employee may, of course, come to an end in any one of a number of ways and the word "retired" is used to indicate the particular method by which that relationship has been terminated. And, of course, the termination of the relationship means the end of those rights and obligations which previously

governed that relationship. Consequently, it may be said, leave whether accrued due in respect of long service or otherwise, can be taken only whilst that relationship continues to exist. As *Ferguson J.* pointed out in *Christensen v. Railway Commissioners for New South Wales* (1) it is impossible for a person whose employment has been terminated "to get leave of absence" from that employment. But the respondent points to the provisions of s. 123, and particularly to sub-ss. (6) and (7), to indicate that its language contemplates the possibility of extended leave accrued thereunder being taken *after* retirement. Only in exceptional circumstances, it is said, was it intended that such leave should be taken before retirement. The consequence of this is that, within the contemplation of the section, an officer may "retire" or be "retired" and thereafter "be on leave on full pay" for the period of his accrued leave. The relationship involved in this notion, it is said, is quite inconsistent with the view that "retirement", as used in the section, means an immediate destruction of the relationship of employer and employee; the word, it is asserted, is used in a qualified sense and means no more than a cessation of duty preparatory to a period of leave which constitutes the residue of the term of service.

Applying this proposition in the present case it is said that when the respondent was retired on 13th November 1953 he did not, thereupon, cease to be an officer within the meaning of the amendment subsequently enacted. That is to say, that he must be considered to have been on leave on 11th December 1953 and, accordingly, as not having ceased to be an officer "employed or appointed by" the appellant (*Transport Act*, s. 4). That being so, it is further said that, as such an officer, he thereupon became entitled to a further period of leave pursuant to the amendment which became operative on that day. Point is added to the respondent's submissions by the fact that s. 123 in its original form made no provision for the payment, either before or upon retirement, of a sum of money in lieu of leave and, needless to say, a good deal of reliance is placed upon this circumstance. This view commended itself to the members of the Full Court of the Supreme Court who, after adverting to the inconsistency involved in the concepts of "retirement" and "leave after retirement", finally resolved the problem by holding that an officer "who is 'retired' and thereafter enjoys the leave to which s. 123 in its earlier form entitled him, remains an officer during the period of that leave" (2).

The difficulty in the way of accepting this view is that it avoids, if it does not altogether ignore, the events which are said to have

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

Dixon C.J.
McTiernan J.
Fullagar J.
Taylor J.

(1) (1921) 21 S.R. (N.S.W.) 141, at p. 146; 38 W.N. 7, at p. 9.

(2) (1956) 74 W.N. (N.S.W.) 80, at p. 82.

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

Dixon C.J.
McTiernan J.
Fullagar J.
Taylor J.

resulted in the respondent's retirement. Neither s. 123 nor any other section of the Act authorises, in terms, the voluntary or compulsory *retirement* of an officer; the power to effect the latter is to be found in s. 100 which provides that every officer appointed under the provisions of that section "shall hold office during pleasure only". No retiring age is fixed by the Act but, apparently, it has been the policy of the department for officers to be retired at the age of sixty-five years. Reference to this policy is made in the memorandum of 8th September 1952 from the staff manager of the appellant. The memorandum is in the following terms:—

"Staff over 65 years of age.

The Staff Manager is authorised to approve of the retirement of employees on the wages staff and salaried officers up to but not including the classification of 3rd grade clerk or equivalent, when the employee or officer makes the request or when the retirement is recommended by the Medical Officer. Other cases are submitted to the Commissioner for determination.

Following a discussion with the Minister, the Commissioner on September 1, 1952, directed that immediate steps were to be taken to retire all salaried and wages staff over 65 years of age and the employees concerned have been advised of this decision.

However, it will be necessary for submissions to be made in each individual case and in order to facilitate the action, it is recommended that authority be delegated to the Staff Manager enabling him to approve of the retirement of the several officers and employees over 65 years of age who are covered by the Commissioner's direction.

(Sgd.) G. H. Staff Manager."

The recommendation in the final paragraph appears to have received the approval of the appellant. Thereafter, on 6th October 1953, it was reported to the acting staff manager that the respondent would attain the age of sixty-five years on 15th November 1953 and that "in accordance with present policy (he) will be due to be retired from the service at the completion of his shift on the 13.11.53". It was pointed out that the respondent was entitled to certain periods of leave and it was recommended that "he be retired from the service at the completion of his shift on the 13.11.53, and that the monetary value of two months extended leave and accumulated holidays be paid in a lump sum, after retirement, as an allowance or gratuity in consequence of his retirement." The recommendation was approved by the acting staff manager and the respondent was informed accordingly by letter. The letter addressed to him was dated 12th October 1953 and was as follows:—

"I have to inform you that as you are approaching the age of 65 years it is necessary to consider the question of your future

employment in the Department and in accordance with departmental policy covering all employees attaining 65 years of age approval has been given for your retirement as from November 13, 1953.

After retirement a lump sum payment equivalent to the monetary value of two months' retiring leave and accumulated holidays will be made as an allowance or gratuity in consequence of your retirement. You will also be entitled to a Tramway and Omnibus pass for two months, a Railway holiday pass for one month and a further pass to cover annual leave due.

The papers relating to the matter will be forwarded to the Railway Service Superannuation Board so that consideration may be given to any claims you may have on the Superannuation Fund.

Acting Staff Manager."

Thereafter on 20th November 1953, the respondent was paid by cheque the sum of £270 4s. 7d. made up as follows :—

	Gross	Payable
" 49 holidays and 2 months Long Service Leave	£271 8 1	
Approved to be paid in a lump sum after retirement as an allowance or gratuity in consequence of retirement.		
Deduction		
Income Tax £1. 3. 6	1 3 6	
		£270 4 7 "

The first payment on account of the respondent's superannuation allowance, or pension, was made to him on 8th December 1953 and it was computed on the basis that it became payable as from 14th November 1953.

From what has been said it would be apparent to a person unfamiliar with the curious features of s. 123 in its original form that it was intended that the respondent's employment should cease on 13th November 1953 and that, on that date, he should cease to be an officer in the employment of the appellant. The intention was that he should be "retired from the Service", not that he should enter upon a period of final leave prior to retirement, and that he should receive "the monetary value of two months extended leave and accumulated holidays" in a lump sum "after retirement as an allowance or gratuity in consequence of his retirement", and not that he should receive payment of his wages or salary in advance in respect of a period of leave to be taken by him. Finally it may be said that it was intended that his superannuation allowance, which was not of course payable during the period of his employment, should forthwith become payable. But even when the

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

Dixon C.J.
McTiernan J.
Fullagar J.
Taylor J.

H. C. OF A.
1957.

COMMISS-
SIONER FOR
GOVERN-
MENT
TRANSPORT
v.
CHAPMAN.

Dixon C.J.
McTiernan J.
Fullagar J.
Taylor J.

curious features of s. 123 are borne in mind there is no justification for concluding that the "retirement" intended by the acting staff manager and accepted by the respondent was not completely unequivocal and final. Nor is the respondent's case on this particular aspect of the matter carried any further by asserting that s. 123 did not authorise the appellant to make a payment to the respondent in lieu of his accumulated leave for it is one thing to assert that something which has been done lacks lawful authority and another to assert that it has not, in fact, been done at all.

It is not possible, however, to say that the payment in question was made without lawful authority. The respondent's employment, in part, was regulated by what has been called the *New South Wales Tramways and Omnibus Award* which was made on 24th August 1953 and this award made certain supplementary provision with respect to annual and long service leave. In particular cl. 34 (d) was as follows:—

"(d) Payment for any holidays or leave standing to an employee's credit and long service leave due under State Law, shall be made as follows in each case where an employee resigns, retires, dies or is dismissed—

(i) In the case of resignation, retirement or dismissal—to the employee,

(ii) in the case of death—to the employee's widow, or if he does not leave a widow, to his legal personal representative.

Provided that the Department may deduct from moneys due the value of any loss suffered by it for which an employee who resigns or is dismissed is responsible."

It is the respondent's contention that this clause does not confer a *right* to a payment in lieu of leave in the circumstances specified; all the clause does, it is said, is to specify the person or persons to whom payment shall be made in cases where the law has created a right to such a payment or authorises any such payment to be made. This view commended itself to the Supreme Court but it is in our view unsound. In the first place the award applies only to employees of "the Department of Government Transport or the Department of Motor Transport, New South Wales" and a review of the legislation shows that there has never been any provision of the *Transport Act*, or, indeed, elsewhere, which called for supplementary provision of the limited character suggested; until the amending Act of 1953 no relevant statutory provision existed authorising the making of such payments. Secondly, it is difficult to conceive the existence of a provision operating to create a right to a money payment in lieu of leave without a specification of the person or persons intended to benefit. Such provisions are not

unusual ; they are simple in form and examples are to be found in sub-ss. (3) and (5) of s. 123 as amended in 1953. We have no doubt that cl. 34 (*d*) of the award was intended to supplement the then existing statutory provisions to the extent of creating a new right, that is, a right to a money payment in lieu of leave in the circumstances specified. It was a right which was of advantage to employees who, upon their retirement, became entitled to superannuation allowances since, immediately upon their retirement they might receive payments in lieu of leave accrued and become entitled, forthwith, to receive periodical payments of such allowances. The conclusion which we have expressed on this point is in accordance with the observations made by *Latham C.J.* in *Shugg v. Commissioner for Road Transport and Tramways (N.S.W.)* (1). With those observations we fully agree.

In the circumstances of the case the conclusion is, we think, inevitable that when the sum of £271 8s. 1d. was paid to the respondent it was paid and received with the mutual intention that it should satisfy the respondent's right under cl. 34 (*d*) of the Award and that, whether the acting staff officer had authority or not to "retire the respondent", the events which happened resulted in the termination of his employment. In the result therefore we are of opinion that the respondent was not an "officer" within the meaning of s. 123 when the amending Act of 1953 came into operation and, therefore, that his claim to an additional payment must fail.

As already appears the appeal to this Court was brought by special leave and upon the hearing the respondent's counsel moved to rescind the order granting such leave on the ground that the decision in the case would not, as previously suggested, govern the rights of other employees in the service of the appellant. After hearing the discussion on this motion we are satisfied, even if s. 232 of the Act has operated to bar other like claims, that the case is of sufficient importance in the administration of the service to warrant the granting of special leave. Similar considerations, however, resulted in the order for special leave being made conditionally, that is, upon the appellant submitting to such order as to costs as the Court should think fit to make. In the circumstances the appeal should be allowed and the appellant should be directed to pay the respondent's cost of the appeal. The costs of the District Court action and of the appeal to the Supreme Court should be borne by the respondent.

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

Dixon C.J.
McTiernan J.
Fullagar J.
Taylor J.

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.

KITTO J. The amendments made to s. 123 of the *Transport Act* 1930-1952 (N.S.W.) by s. 3 of the Act No. 31 of 1953 gave certain new rights with respect to leave to "every officer who whether before or after the commencement of (the 1953 Act), has had fifteen years service". The reference is to an officer of the transport service which is administered by the appellant commissioner. A person who had ceased to be an officer before the commencement of the 1953 Act (11th December 1953) was plainly not intended by that Act to benefit by its provisions. The respondent was an officer from May 1913 until, at least, 13th November 1953. On that day he ceased work, but his case is that he did not cease to be an officer either then or at any time before 11th December 1953. The commissioner, on the other hand, contends that on 13th November 1953 the respondent's employment in the service ceased, and that therefore he was not an officer when the 1953 Act came into force.

The relevant facts are few. On 8th September 1953 the commissioner, having already given a general direction that steps be taken to "retire" all salaried and wages staff over sixty-five years of age, delegated (presumably pursuant to s. 11 (5) of the Act No. 3 of 1932) to the staff manager the power to approve of the "retirement" of individual officers covered by that direction. On 8th October 1953 the acting staff manager approved of the respondent's being "retired from the Service" at the completion of his shift on 13th November 1953, that being the last working day before he would attain the age of sixty-five. No point is made of the fact that on that day he would not be "over" sixty-five years of age. He in fact accepted the situation as being that after that day he was "retired", in the sense in which that word had been used by the commissioner and the acting staff manager, taking from the commissioner without question certain payments to which I shall now refer.

The acting staff manager's approval of 8th October 1953 extended to the payment to the respondent, "after retirement, as an allowance or gratuity in consequence of his retirement", of the monetary value of two months' extended leave not taken, twenty-one days' leave in lieu of bank and public holidays worked, and twenty-eight days' annual leave not taken; and the payment so approved was made to the respondent and accepted by him. All the leave referred to had become due to the respondent under s. 123 of the *Transport Act* 1930-1952 (N.S.W.). On 12th October 1953 the acting staff manager sent a memorandum to the respondent stating that the latter's "retirement" as from 13th November 1953 had been approved, that "after retirement" payment of a lump sum equivalent to the monetary value of his leave and accumulated holidays

would be made, and that he would be entitled to a tramway and omnibus pass for two months and a railway holiday pass for one month and a further pass to cover annual leave due. On 20th November 1953 the chief accountant informed the respondent by letter of the amount of the lump sum payable to him, and referred to his "retirement from this Department on 14th November 1953". The respondent was informed by a letter from the Railway Service Superannuation Board, dated 8th December 1953, of the amount of the yearly superannuation allowance due to him, "to date from 14th November 1953". Finally, a letter dated 14th January 1954 from the chief engineer to the respondent began by saying "With reference to your retirement from the Service, I forward herewith a Certificate of Service covering the period of your employment with this Department." The period shown ended on 13th November 1953, and then there appeared the note: "Retirement 14.11.53".

At the trial it was agreed that the commissioner "retired" the respondent "from the service" on 13th November 1953. If, nevertheless, the respondent should be considered as having remained an officer for a period after that date equal even to the twenty-one days to which he had been entitled as for bank and public holidays worked, he would have been still an officer on 11th December 1953, for there were only twenty working days between 13th November 1953 and that date. The appellant, however, had always held office "during pleasure only": s. 100. The crucial question, therefore, is whether the "retirement" which the action of the commissioner and (under him) the acting staff manager brought about on 13th November 1953 was a termination of his office taking effect on that date, or was merely a de facto retirement, a retirement from work, not operating as a termination of his employment until the end of the period of the leave of various kinds then standing to his credit.

The learned judges of the Supreme Court gave "retirement" the latter of the two meanings, for the reason that s. 123 as it stood before the 1953 amendment appeared to their Honours to require acceptance of the notion, *prima facie* paradoxical though they realised that it was, that the retirement of an officer to whom leave was due under that section would not terminate his employment: he would remain an officer until the period of the leave had expired. It is not altogether clear whether their Honours thought that the word "retirement" was used by the appellant in this special sense, thinking that it had that sense according to a departmental usage arising out of or fostered by the language of s. 123, or thought that it was used by the appellant in its ordinary sense but that s. 123 operated to make the intended retirement a retirement *sub modo*

H. C. OF A.
1957.

COMMISSIONER FOR
GOVERNMENT
TRANSPORT
v.
CHAPMAN.
Kitto J.

H. C. OF A.
1957.

COMMISS-
SIONER FOR
GOVERN-
MENT
TRANSPORT
v.
CHAPMAN.
—
Kitto J.

only, i.e. subject to the completion of the leave due under that section : (1).

In support of the view that on 11th December 1953 the respondent was still an officer, it was contended on his behalf that the payment which was made to him on his "retirement" should be regarded, not as a payment in lieu of leave, but as a payment of wages in advance for a period of leave to be taken during a continuing employment. It was said that the commissioner had authority under the Act to pay salary or wages for periods of service, but no authority to pay money in lieu of leave ; and that it should not be taken that in relation to the respondent he exceeded his authority. Similarly it was said that the commissioner had no power to issue the tramway and omnibus pass or the railway passes if the respondent was not still an officer after 13th November 1953. The question of the passes may be put aside at once, for whether or not any authority existed, their issue in respect of a period of leave standing to an officer's credit at the date on which the commissioner had purported to "retire" him would give no real foothold for a conclusion that the commissioner was admitting that what he had done by "retiring" the officer had not worked a termination of his employment. The making of the payment, however, might be thought to bear the significance which the respondent seeks to attach to it, if it were not that his employment was governed not only by New South Wales statutes but by a federal award, the *New South Wales Tramways and Omnibus Award* 1952, which provided by cl. 34 (d) that in the case of "retirement" payment for any holidays or leave standing to an employee's credit should be made to the employee. This does not appear to me, as it did to the learned judges of the Supreme Court, to prescribe only the person to whom any amount payable for holidays or leave should be made. I read it as entitling the employee to receive the payment upon "retirement". The clause makes corresponding provisions for cases of resignation, death and dismissal ; and in the context "retirement" seems clearly to refer to a mode of termination of the relationship of employer and employee. Even if the construction adopted in the Supreme Court is correct, at least the other might reasonably be supposed by the commissioner to be correct, and there is nothing to suggest that his making the payment is not to be explained, as a matter of history, by a supposition that the award required that it be made. Accordingly there is no foundation for a conclusion that the payment made to the respondent constituted wages paid in advance for a period of leave during a continuing employment, instead of being, as it purported to be, a

payment made after the employment had ended in lieu of leave not taken during the employment.

It is necessary, then, to consider whether the respondent's contention is supported, as he claims that it is, by the terms of s. 123, as they stood before the 1953 amendment. The section was inserted by the amending Act No. 32 of 1942. The provisions in it to which the Supreme Court referred were in sub-ss. (2), (3), (4), (6) and (7). They dealt with two kinds of leave, called retiring leave and extended leave. Retiring leave was the subject of par. (a) in each of the sub-ss. (2), (3) and (4), together with sub-s. (7). Extended leave was the subject of the body and par. (b) of each of the sub-ss. (2), (3) and (4), together with sub-s. (6). Each of the three pars. (a) applied only to a class of officers who should retire or be retired before the termination of the war which was being waged when the 1942 Act was passed, and it entitled such an officer (apart from any extended leave), "upon such retirement, to at least two months retiring leave on full pay". Sub-section (7) enabled the commissioner in exceptional circumstances to grant permission to an officer to take his retiring leave under the section by way of extended leave "before his retirement". It is said that these provisions showed that "retirement" means something less than a termination of the employment—something which leaves it still possible for the "retired" officer to be on leave and therefore still an officer. The form of expression used undoubtedly creates a difficulty of interpretation, and some departure from the ordinary meaning of the words is inevitable. It seems to me, however, that the difficulty is to be resolved, not by attributing a special and unnatural meaning to the word "retirement", but by understanding the references to being entitled to retiring leave "upon" retirement and to retiring leave being taken in exceptional circumstances "before" retirement as relating, the one to leave taken with a view to a retirement which is to take effect immediately thereafter and the other to leave taken with a view to resuming work thereafter. The description given to the leave by way of title, "retiring leave", points strongly to its being leave which in ordinary circumstances is introductory to retirement. It is in accordance with ordinary usage to speak of a person as having an accrued right to retiring leave where he has a right, when his retirement shall have been decided upon either at his own instance or at his employer's, to cease work at such time as will allow of his taking the leave so that it will expire immediately before the retirement becomes effective. That is the sense which the language seems plainly to bear in s. 123. Accordingly the expression "if he retires or is retired" should be taken in its ordinary sense as referring to the

H. C. OF A.
1957.

COMMISS-
SIONER FOR
GOVERN-
MENT
TRANSPORT
v.
CHAPMAN.
—
Kitto J.

H. C. OF A.
1957.

COMMISS-
SIONER FOR
GOVERN-
MENT
TRANSPORT
v.
CHAPMAN.
Kitto J.

termination, in two of the possible ways, of the officer's employment in the service.

There is no similar difficulty with respect to extended leave, until one reaches sub-s. (6) which provides that any extended leave under the section shall, "if taken before the retirement of such officer", be so taken at such time as the exigencies of the transport service permit. Again, it seems to me, the case that is being referred to is that in which an officer takes his leave while still included in the working staff of the service—not so that at the end of the leave his retirement will take effect immediately.

It seems to me, then, that in s. 123 before its amendment in 1953 "retirement" was used in a sense incompatible with the continuance of the employment. I see nothing in the 1953 amendment to require, or even to support, a different view. Reference was made in the argument to sub-s. (4) which provides that any leave to which an officer is entitled under sub-s. (2) shall, "if taken before the retirement of such officer", be so taken at such time as the exigencies of the departmental service permit. The language resembles that of the old sub-s. (6), from which doubtless it was derived; but it is to be accounted for, I think, not by the notion that "retirement" leaves the employment on foot during the period of leave which has accrued due under sub-s. (2), but by the practical consideration that if an officer is to take such leave while he is (so to speak) to continue on the department's active list after the leave has been taken, he cannot be allowed to take it without regard to departmental exigencies.

In my opinion the proper conclusion from the facts proved is that the respondent ceased to be an officer on 13th November 1953, and therefore must fail in his present claim.

I agree that the motion to rescind special leave should be refused, and that the appeal should be allowed.

Appeal allowed. Order of the Supreme Court set aside and in lieu thereof order that judgment in the action be entered for the appellant and that the respondent pay the costs of the appellant in the action in the District Court and of the appeal to the Supreme Court. Further order that the appellant pay to the respondent his costs of the appeal to this Court.

Solicitor for the appellant, *R. W. Scotter*, Solicitor for Government Transport.

Solicitor for the respondent, *J. D. Mahony*.

R. A. H.