[HIGH COURT OF AUSTRALIA.]

POTTER . . . . . APPELLANT;
RESPONDENT,

AND

MELBOURNE AND METROPOLITAN TRAMWAYS BOARD . . . . . } RESPONDENT.
PROSECUTOR,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 10, 11;

SYDNEY, *July* 2.

Dixon C.J., Webb, Kitto and Taylor JJ.

Certiorari—Duty of appeal board to hear and determine appeals by officers etc. of tramways board against "reductions in rank, grade or pay or other punishments inflicted" by the tramways board—Reduction in grade in ordinary course of administration independently of discipline—Whether within jurisdiction of appeal board—Whether in province of appeal board to determine conclusively that reduction amounted to punishment—Melbourne and Metropolitan Tramways Act 1928 (*No.* 3732) (*Vict.*), *s.* 17 (5)—*Melbourne and Metropolitan Tramways Act* 1930 (*No.* 3902) (*Vict.*), *s.* 2—*Melbourne and Metropolitan Tramways (Appeal Board) Act* 1946 (*No.* 5206) (*Vict.*), *s.* 2.

Section 17 of the *Melbourne and Metropolitan Tramways Act* 1928, as amended, provides:—"(5) . . . (*b*) . . . the Appeal Board shall hear and determine (i) all appeals by officers, servants and employees of the Melbourne and Metropolitan Tramways Board against dismissals, fines, deductions from wages, reductions in rank, grade or pay or other punishments inflicted by the Tramways Board (other than suspension for only one day or the loss of only one day's pay or the deprivation of only two days' good-conduct holidays as to any of which punishments there shall be no appeal) and in its determination the Appeal Board may confirm quash or vary (whether by increasing or decreasing any such punishment or otherwise as it thinks fit) any decision of the Tramways Board in respect of which such an appeal is made."

Held, that the jurisdiction conferred on the appeal board to entertain appeals extends only to appeals against dismissals etc. inflicted by way of punishment.

Held further that is is not within the province of the appeal board to determine conclusively whether or not the action of the tramway board in any given case amounts to an infliction of punishment so as to found its jurisdiction to entertain an appeal.

Decision of the Supreme Court of Victoria (*O'Bryan* J.): *R.* v. *Melbourne and Metropolitan Tramways Appeal Board*; *Ex parte Melbourne and Metropolitan Tramways Board* (1957) V.R. 651, affirmed.

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APPEAL from the Supreme Court of Victoria.

Victor Eric Potter, an employee of the Melbourne and Metropolitan Tramways Board, appealed, by notice dated 25th September 1956, to the Tramways Appeal Board against his reduction in grade from that of a one-man operator on a weekly wage of £17 7s. 6d. to the position of conductor on a weekly wage of £15 5s. 0d.

The appeal was heard before the appeal board on 19th October 1956 when evidence was called by each of the parties. At the conclusion of the hearing the chairman, a stipendiary magistrate, delivered the findings of the board as follows: "The board has considered both aspects of this matter—firstly, whether the right to appeal lies, and secondly, whether or not the appeal is justified. In the view of the board, the right to appeal is upheld, on two grounds: (a) what has happened to the appellant is a punishment, in fact; (b) under the heading 'punishments' in the award in cl. 17, de-grading is listed as such, with qualifying words, but still nominated as punishment. That being so, on the evidence, the board finds the appellant has been punished by de-grading and loss of pay, and that course has not been justified. Therefore, the appeal will be allowed and the order of the Melbourne and Metropolitan Tramways Board will be quashed."

On 19th November 1956 the Melbourne and Metropolitan Tramways Board, as prosecutor, obtained from the Supreme Court of Victoria an order nisi for a writ of certiorari to remove the record of the proceedings of the appeal board on the appeal into the Supreme Court for the purpose of having the decision quashed on the following grounds: (a) that the appeal board had no jurisdiction to hear and determine the matter; (b) that no punishment had been inflicted upon the appellant; (c) that the transfer of the appellant from the position of one-man-bus operator to that of conductor was not a punishment within the meaning of: (i) s. 17 (5) (*b*) of the *Melbourne and Metropolitan Tramways Acts*; (ii) cl. 17 of the award made under the *Conciliation and Arbitration Act* 1904-1952 (No. 718 of 1952); (d) that the appeal board was wrong in holding that such transfer of the appellant was a punishment.

The return of the order nisi came on for hearing before *O'Bryan* J. who, in a written judgment delivered on 25th February 1957, ordered that the order nisi be made absolute: *R.* v. *Melbourne and Metropolitan Tramways Appeal Board*; *Ex parte Melbourne and Metropolitan Tramways Board* (1).

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

(1) (1957) V.R. 651.

P. D. Phillips Q.C. (with him *E. A. H. Laurie*), for the appellant. The matters set out in s. 17 (5) (*b*) of the *Melbourne and Metropolitan Tramways Act* 1928 as amended such as dismissals, fines, deductions from wages etc. are by Parliament indicated to be punishments because of their punitive effect upon the recipient. It is conceded that looking at the matter from the point of view of the motive of the individual who imposes the dismissal it may or may not be punitive. If it is necessary for the appeal board to determine as a condition of the exercise of jurisdiction whether a given dismissal is or is not punitive the decision of the board on the question is not subject to correction by certiorari. The question is one of statutory construction. [He referred to *Ex parte Silk*; *Re Chapman Engine Distributors Pty. Ltd.* (1); *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (2); *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (3).] The jurisdiction of the board is not examinable, firstly because of the nature of the question, involving, as it does, an examination of facts and an investigation of motives etc., secondly because the kind of question to be investigated is peculiarly one for which the specialised tribunal is suitable and thirdly because of the ease of access to, and informality and inexpensiveness of, the tribunal.

E. R. Reynolds Q.C. (with him *S. H. Collie*), for the respondent. There is a distinction between acts done properly in the administration of the undertaking and part of the managerial function and acts which are also part of that function but which are punitive in nature. *O'Bryan* J. has found as a fact that what was done in the present case was not punitive in its nature. If the legislature intended to give the board jurisdiction over all dismissals etc., punitive or otherwise, it would have been unnecessary to use the word " punishment " and the language used is not appropriate to confer such a jurisdiction. [He referred to *R.* v. *Melbourne and Metropolitan Tramways Appeal Board*; *Ex parte Earl* (4).] The board cannot conclusively determine the facts on which its jurisdiction depends. There are no words in the Act to indicate that the legislature intended it to have that power. Even if the Act did declare that the decision of the board was to be final that would not exclude certiorari. [He referred to *R.* v. *Nat Bell Liquors Ltd.* (5); *Re Gilmore's Application* (6).] The criterion to be applied in this

(1) (1939) 39 S.R. (N.S.W.) 42; 56 W.N. 13.
(2) (1938) 59 C.L.R. 369, at pp. 391, 392.
(3) (1888) 21 Q.B.D. 313, at pp. 319, 320.
(4) (1925) V.L.R. 301, at p. 305.
(5) (1922) 2 A.C. 128, at pp. 159, 160.
(6) (1957) 1 All E.R. 796, at p. 802.

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case is set out in *Colonial Bank of Australasia* v. *Willan* (1). [He referred also to *Ex parte Mullen*; *Re Hood* (2); *R.* v. *Blakeley*; *Ex parte Association of Architects etc. of Australia* (3).]

P. D. Phillips Q.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This appeal comes by special leave from an order of *O'Bryan* J. making absolute an order nisi for a writ of certiorari (4). The writ was directed to the Appeal Board constituted under s. 17 (5) of the *Melbourne and Metropolitan Tramways Acts* and to members thereof. The purpose of the writ was to bring up for quashing a decision of the board allowing an appeal by the appellant in this Court against his reduction in grade in the service of the respondent the Melbourne and Metropolitan Tramways Board. It will be convenient to call the respondent the tramways board.

The appellant Victor Eric Potter has been in the service of the tramways board for many years and since 1940 has acted as a one-man-bus operator. Owing to a somewhat lengthy record of failing to keep to the timetable of his route his case was at length considered by the traffic manager of the tramways board who decided to move the appellant from the employment of a one-man-bus operator to that of a conductor. This involved a reduction in grade and a reduction in his pay by £2 2s. 6d. a week. The appellant thereupon lodged a notice of appeal against the decision to the appeal board. The appeal board is constituted by sub-s. (5) of s. 17 of the *Melbourne and Metropolitan Tramways Act* 1928 as amended by s. 2 of Act No. 3902 and s. 2 of Act No. 5206. Sub-section (1) of s. 17 confers general powers upon the board which include that of appointing officers, servants and persons, such officers, servants and persons to assist in the execution of the Act as it thinks necessary and removing any officer, servant or person appointed or employed by it under the Act. Sub-section (5) provides that there shall be an appeal board consisting of three persons. One of the persons is to be appointed by the board, another by the officers, servants and employees of the board and the third by the Governor in Council. Sub-paragraph (*b*) (i) of sub-s. (5) is in its present form to be found in Act No. 3902. It contains the statement of the duty of the appeal board. The board is to hear and determine all appeals by officers,

(1) (1874) L.R. 5 P.C. 417, at pp. 442, 443.
(2) (1935) 35 S.R. (N.S.W.) 289, at p. 300; 52 W.N. 84.
(3) (1950) 82 C.L.R. 54, at pp. 90, 91.
(4) (1957) V.R. 651.

servants and employees of the Melbourne and Metropolitan Tramways Board against dismissals, fines, deductions from wages, reductions in rank, grade or pay or other punishments inflicted by the last-mentioned board (other than suspension for only one day or the loss of only one day's pay or the deprivation of only two days' good-conduct holidays as to any of which punishments there shall be no appeal) and in its determination the appeal board may confirm quash or vary (whether by increasing or decreasing any such punishment or otherwise as it thinks fit) any decision by such last-mentioned board in respect of which such an appeal is made. By sub-par. (*b*) (ii), which in its present form is to be found in Act No. 5206, the appeal board is to hear and determine also all appeals by such officers, servants and employees who are aggrieved by not being selected for promotion or by the promotion of another or by promotions being unreasonably withheld, and in its determination the appeal board may refuse or allow any such appeal. The appeal board is given authority to administer an oath to any witness, the hearing of an appeal is to be open to the press unless the board unanimously otherwise determines ; and on any such appeal a full record is to be taken of all the evidence submitted thereat. The determination of the appeal board in every case is to be reported to the Minister and is to be binding on the Melbourne and Metropolitan Tramways Board and every appellant, and is immediately to be given effect to by the latter board and may be enforced in any court of competent jurisdiction.

Upon the hearing of the appeal before the appeal board the tramways board was represented by counsel, who objected that the appeal board's authority was confined to hearing appeals from what amounted to the infliction of punishment and that in the case of the present appellant nothing had been done by way of punishment ; his reduction was purely a matter of staff administration and had been based only upon his unsuitability for the work he was doing. The appeal board, however, in the result allowed the appeal and quashed the order of the tramways board. That board obtained the order nisi for certiorari on grounds directed to the contention that the authority of the appeal board is confined to cases where punishments are inflicted upon officers, servants or employees and that the reduction of the appellant in grade and pay was not done by way of punishment. *O'Bryan* J., after hearing evidence as to what had occurred, held that the appellant had not been punished. His Honour said : "In the case of Mr. Potter, I am thoroughly satisfied, despite the board's finding that it never was intended to inflict any punishment or penalty upon him. No matter of misconduct was alleged against him. He was not dealt with by the

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discipline officer. Facts were reported to Mr. Misson the traffic manager for the prosecutor. Mr. Misson came to the conclusion, rightly or wrongly, that Mr. Potter was unsuitable as a one-man-bus operator and that it was not in the best interests of the service or of his fellow operators that he should continue to be employed as a one-man operator. It was in the interests of the efficiency of the tramway operations that Mr. Misson who had the deciding voice in the matter determined to reduce him in grade to that of conductor " (1). This finding of fact was not impugned in this Court by the argument for the appellant. On the question of law *O'Bryan* J. held that the true meaning of the section was that the authority of the appeal board should extend only to dismissals, fines, deductions from wages, reductions in rank, grade or pay if inflicted by way of punishment, and held, further, that it was not within the province of the appeal board to determine conclusively whether or not what the tramways board had done amounted to an infliction of punishment (2). In our opinion the decision is correct.

The first matter to determine is the correct construction of the sub-section. Does it mean that all dismissals, fines, deductions from wages, reductions in rank, grade or pay are subject to the revisory authority of the appeal board, or is that authority confined to such as are punishments ? If sub-par. (*b*) (i) is examined it will be seen that the list of things which may be done by the board is followed by the words " or other punishments inflicted ". Then the exceptions from the appeal described in the bracketed words are described as punishments. The exceptions consist of suspension for a day, loss of a day's pay or deprivation of two days' holiday. Next you find a similar and even stronger indication in the bracketed words which follow the expression " confirm quash or vary ". The power of the appeal board described by this expression is explained by the words in brackets as enabling that board to increase or decrease any such " punishment ". All these expressions combine to indicate that the sub-section was dealing with punishments only and not with assigning employees to particular work and with other analogous administrative actions. The contention of the appellant, however, is that from the words referring to punishments and the infliction of punishments, a different inference as to the meaning of the sub-paragraph should be drawn. It is said that the clause should be construed as meaning to cover all dismissals, fines, deductions from wages, reductions in rank, grade or pay whatever the ground, but as treating these things as always amounting to punishments, even though they were not so intended by the tramways

(1) (1957) V.R., at p. 661. (2) (1957) V.R., at p. 660.

board and not in any way the result of disciplinary action. This view does not seem tenable. One of the express powers of the tramways board is to employ such officers as it thinks necessary. There is an express power also to pay such salaries, wages and allowances to those officers and servants as it thinks reasonable though of course the exercise of this power is in fact controlled by Commonwealth awards. It is obvious that it may be necessary to retrench the service or change the capacities in which persons are employed on grounds which have nothing to do with their conduct or with anything but administrative exigencies. There is no reason to think that such matters were to be placed under the revisory power of the appeal board and it would be a strained interpretation of s. 17 (5) to treat it as meaning that every action which the tramways board may think necessary in order to maintain any particular section of the service at its proper strength or in an efficient state should be treated as a punishment if it operates in any way to the prejudice of officers or servants or employees.

It was, however, contended that whenever an appeal was instituted in purported pursuance of sub-s. (5) of s. 17 from any particular action of the tramways board the question whether that action amounted to a punishment so that the appeal lay is one which it is intended that the appeal board itself should determine conclusively. It is, of course, clear enough that, although the power of a tribunal may be expressed as depending upon a state of fact, it may be left to that tribunal itself to determine finally whether that state of fact does or does not exist: see per Lord *Esher* M.R. in *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (1); per *Jordan* C.J. in *Ex parte Silk*; *Re Chapman Engine Distributors Pty. Ltd.* (2); cf. *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (3).

For the appellants it is contended that there is a manifest inconvenience in allowing a decision of the appeal board to be questioned on the ground that any given action of the tramways board brought by way of appeal before the appeal board does not in truth amount to a punishment. It is suggested accordingly that the statutes intend the tramways board to be bound by the determination of the appeal board and to carry them into effect, any question of their validity being precluded, at all events on such a ground. The terms of the provision do not support this argument. It is evident that the appeal board has a limited power and wherever those limits may be drawn it seems impossible to suppose that it was

(1) (1888) 21 Q.B.D. 313, at pp. 319, 320.
(2) (1939) 39 S.R. (N.S.W.) 42, at p. 44; 56 W.N. 13, at p. 14.
(3) (1938) 59 C.L.R. 369, at pp. 391, 392.

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intended that by its own authority the appeal board should exceed them. It must not be overlooked that it is part of the very description of the appeal board's functions that restricts its power of reviewing actions of the tramways board to the infliction of punishments. For, according to the construction which we have adopted of sub-s. (5), an appeal is only given in the case of actions of the tramways board amounting to the infliction of punishment. To speak of it as a collateral matter tends to obscure this important consideration. It forms the very description of the subject matter of the appeal board's authority. The appeal board is not a court administering the general law of the land but is a special administrative tribunal. Its special functions enable it to deal with a special class of matter arising in the general administration of the tramways board undertaking. The provision uses no words which justify the inference that the authority of the appeal board was to extend to anything which appeared to that tribunal to amount to a dismissal, deduction from wages, reduction in rank, grade or pay or other punishment inflicted so that, notwithstanding that the appeal board has travelled outside its province, the tramways board should be governed by its decisions. The words do not relate to what the appeal board supposes to fall within that category but in terms speak of what in fact falls within the category. There is, we think, no warrant for construing s. 17 (5) as authorising the appeal board to deal with anything which in fact falls outside the conception of punishment. No doubt that conception is not to be narrowly understood. For example a dismissal for incompetence as well as dismissal for misconduct may sometimes be a matter of discipline and therefore within the conception of punishment. But what is done in the ordinary course of the general administration of the service independently of discipline can hardly be so. In the present case the finding of fact of the learned judge was not challenged and accordingly the appellant's case cannot be brought under the requisite description. It is only necessary to add that no question was raised as to the appropriateness of the remedy of certiorari to the case.

For these reasons the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Dall & Allaway.*
Solicitors for the respondent, *Darvall & Hambleton.*

R. D. B.