

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA.

D U N N

V.

THE COMMONWEALTH OF AUSTRALIA
AND ANOTHER

REASONS FOR JUDGMENT.

MR. JUSTICE WILLIAMS

Delivered at SYDNEY,

on MONDAY, 23rd APRIL, 1945.

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER

Judgment

Williams J.

The plaintiff's claim is that the appointment of the defendant Hanlon by the Governor-General on 28th March last to be one of the Commissioners of the Australian Broadcasting Commission was a breach of sec.117 of the Australian Soldiers Repatriation Act 1920-1943. The Commission, which is a body consisting of five Commissioners, was incorporated by the Australian Broadcasting Act 1942. Sec.117 provides, so far as material, that notwithstanding anything contained in any law of the Commonwealth preference shall, in the appointment of persons to the public service of the Commonwealth or to the service of an authority of the Commonwealth, be given to persons who have been members of the forces and have served outside Australia and who are competent for the work required.

It is admitted that at all material times the plaintiff was a member of the forces who had served outside Australia, that Hanlon never was such a member, and that, there being a vacancy on the body, the plaintiff duly applied to be appointed to the vacancy but that Hanlon was appointed. The only question of fact not covered by the admissions is whether the plaintiff was competent to do the work required. The defendants did not admit his competency, but did not dispute it and made no objection to the plaintiff tendering paragraphs 1 and 7 of his affidavit of 9th April 1945 and did not cross examine the plaintiff on these paragraphs. The Australian Broadcasting Commission Act does not expressly require the Commissioners to have any special

qualifications; the powers and functions are not such that such qualifications can be implied so that the military, political and business experience to which the plaintiff deposes in these paragraphs is sufficient, I think, to prove that he is competent to do the work required.

As I said on the motion for the interlocutory injunction, the section, if it applies to the instant appointment, does not give the plaintiff a right to be appointed to be a Commissioner. It merely gives him a right, if he is competent to do the work required, to be appointed in preference to Hanlon. It creates for the benefit of a returned soldier competent to do the work required a duty binding on any person to whom the section applies not to appoint a person who is not a returned soldier in preference to the returned soldier. It is a statutory right which is enforceable in an action such as the present brought by a returned soldier who has applied for the work against the appointor and the person wrongly appointed: per Vaughan Williams L.J. in *Groves v. Lord Wimbourne* 1898 2 Q.B. 402 at pp.415-6: c.f. *Leicester Permanent Building Society v. Butt* 1943 1 Ch. 308. It is a material ingredient in the cause of action that the plaintiff should prove that he is competent to do the work required and the question of competency is, in my opinion, a question of fact for the Court to decide: *Davis v. Western Suburbs Hospital* 42 S.R.(NSW) 26. The crucial question, on which the defendants have rested their case, is whether the appointment is one to which the section applies. The plaintiff contends that it applies to all appointments whether they are of persons to be an authority or a member of an authority of the Commonwealth or of a person to be an officer or servant in the employment of that authority, whereas the defendants contend that the section only applies to the latter class of appointments.

The section gives a preference in the appointment of persons to the public service of the Commonwealth or to the service of an authority of the Commonwealth. Sub-sec.3 provides that, for the purposes of the section,

"authority of the Commonwealth" includes any Commission, Board or other body created by or under any law of the Commonwealth. It is clear that the Australian Broadcasting Commission is an authority of the Commonwealth. There are many Commonwealth Acts which constitute authorities for various purposes. These authorities consist in some instances of one person and in others of several persons, and this person or these persons are sometimes incorporated as in the instant case. The principal Act relating to the public service ~~of~~ of the Commonwealth is the Commonwealth Public Service Act 1922-1941. This Act creates a Public Service Board, the members of which are appointed by the Governor-General, to administer the Act and make appointments to the public service. The public service comprises the Commonwealth Service and the Provisional Service and confers preferences upon returned soldiers in appointments by the Governor-General to the Board and by the Board to both branches of the service: see secs. 11, 83, 84 and 104 of that Act. The preference is confined to men who joined the forces prior to the conclusion of hostilities in the last war on 11th November 1918. The question does not directly arise in this action as to the extent to which sec.117 applies to the Commonwealth Public Service Act because the plaintiff does not contend that Hanlon's appointment was an appointment to the public service of the Commonwealth. But the nature of the appointments to the public service that are subject to the section throws some light, I think, on the meaning of appointments to the service of an authority of the Commonwealth. And it seems to me that it could not be said that appointments to the Public Service Board are appointments to the public service of the Commonwealth. Indeed, sec.11(6) provides that if any officer of the Commonwealth is appointed a member of the Board, his service as member shall, for the purpose of determining all his existing and accruing rights, be counted as public service in the Commonwealth. In its application to the Commonwealth Public Service Act, therefore, sec.117 would appear to apply only to appointments by and not to the Public Service Board.

The plaintiff's contention is that Hanlon's appointment was an appointment to the service of an authority of the Commonwealth. An authority of the Commonwealth is created to perform certain functions and duties and exercise certain powers on behalf of the Commonwealth. In order to fulfil its purposes the authority, whether it be an individual or a body of individuals and whether it ~~be~~ incorporated or not, must be given a considerable discretion and must in many instances be supplied with executive officers and servants. The Acts therefore provide ^{in many instances} for the appointment of officers and servants sometimes by the Governor-General and sometimes by the authority itself. It would be difficult to say that an authority consisting of a single person, especially if that person was not incorporated, was appointed to the service of himself, but if the Act which constituted the authority authorised the engagement of officers and servants who were to be subject to his instructions, then these officers, whether they were appointed by him or by the Governor-General, would be appointed to his service. The Repatriation Act provides for the creation of several authorities of the Commonwealth, namely the Repatriation Commission, a Repatriation Board for each State, War Pensions Entitlement Appeals Tribunals, and Assessment Appeal Tribunals, the members of which are appointed by the Governor-General, ~~and~~ The sections which relate to appointments to these authorities appear to form a complete code in themselves; they contain specific provisions binding upon the Governor-General with respect to the appointment of returned soldiers some of which are discretionary and some mandatory, and it is difficult to conceive that sec.117 was ever intended to have any application to these appointments.

There is also sec.22 of the Act which provides that the Commission may appoint such officers as it thinks necessary for the purposes of the Act and that in the appointment of officers in pursuance of this section the Commission shall, where the qualifications of the applicants are equal, give preference to persons who have been members of the forces within the meaning of sec.108 of the Act.

This section applies to appointments to the service of an authority of the Commonwealth in the sense contended for by the defendants but does not confer the same preference as sec.117. Possibly the sections have been left in this inconsistent condition by inadvertence because sec.117 was added to the Act by amendment at a late stage. As at present advised it seems to me that the form of preference granted by sec.117 would override that granted by sec.22, but it would certainly be advisable to amend the Act to make the intention of Parliament clear.

Giving to sec.117 the best consideration that I can, the crucial words 'appointment to the service of an authority of the Commonwealth' ^{in their ordinary grammatical sense} do not appear to me to be wide enough, in the absence of a definition such as that which occurs in the Officers Rights Declaration Act 1928-1940 sec.4, to include appointments to be an authority or a member of an authority of the Commonwealth, but ^{to extend} only to appointments which cause the appointees to enter the service of such an authority, or, in other words, in the case of the Australian Broadcasting Commission to appointments made by the Commission under sec.17 of its Act. So construed there is no intrusion by sec.117 upon the earlier sections of the Australian Soldiers Repatriation Act. The plaintiff is in substance asking the Court to construe the section as though it referred to appointments to or to the service of an authority of the Commonwealth.

For these reasons I am of opinion that the action fails, and I ^{must} therefore order that judgment be entered for the defendants with costs including reserved costs.