

IN THE HIGH COURT OF AUSTRALIA

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ORIGINAL

THE KING

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V.

THE PUBLIC SERVICE BOARD OF THE  
STATE OF VICTORIA.

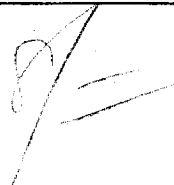
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Ex parte Ward, Prosecutor.

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REASONS FOR JUDGMENT

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ORIGINAL

Judgment delivered at SYDNEY.

on Friday, 20th August, 1948.

THE KING

v.

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EX PARTE WARD.

ORDER.

Order nisi discharged. No order as to costs.

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THE KING

v.

THE PUBLIC SERVICE BOARD OF THE STATE OF VICTORIA  
EX PARTE DONALD HERBERT  
WARD.

REASONS FOR JUDGMENT.

LATHAM C.J.

THE KING

v.

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EX PARTE DONALD HERBERT WARD.

REASONS FOR JUDGMENT.

LATHAM C.J.

The prosecutor Donald Herbert Ward obtained in the Supreme Court of Victoria an order nisi for a writ of mandamus directed to the Public Service Board of the State of Victoria commanding the Board to hear and determine an appeal by Ward against the non-recommendation of him by the Secretary to the Law Department for appointment to a position as Clerk of Courts and to appoint Ward to one of certain positions advertised. The ground of the application was that Ward was entitled to the appointment as against the other applicants by reason of the Victorian Discharged Servicemen's Preference Act 1943. He claimed that his rights were unaffected by the Commonwealth Re-establishment and Employment Act 1945. The Chief Justice of the Supreme Court directed that the case be argued before a Full Court of the High Court - Judiciary Act 1903-47, sec. 18.

Ward is a Victorian public servant in the Courts Branch of the Law Department. He is a "discharged serviceman" within the meaning of the Victorian Act and is also a "member of the forces" and a "person entitled to preference" within the meaning of the Commonwealth Act. He was an applicant for one of six positions which were vacant for clerks of courts. He is qualified for the position which he seeks. The Public Service Board has, however, appointed, or proposes to appoint, other applicants for promotion on the ground that if Ward were promoted he would gain seniority over other discharged members of the forces who, under the Commonwealth Act, sec. 16, were or are entitled to be reinstated in their employment under conditions not less favourable to them than those which would have been applicable to them if they had remained in the employment of the State instead of leaving  
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that employment for a time for purposes of war service. This was the interpretation of the right to re-instatement which the decision of the Board placed upon the decision of this Court in Commissioner for Railways v. McCulloch, 72 C.L.R. 141, where it was held that the Commonwealth Act, sec. 16, required re-instatement with preservation of relative seniority.

It is unnecessary, in my opinion, to consider in this case how far the decision in McCulloch's case goes in limiting or preventing changes in seniority after reinstatement. Ward's claim depends entirely upon sec. 10 of the State Act. If that provision is operative he is entitled to promotion in preference to four of the other applicants who are not within the provisions of the Victorian Act because the places where they served were not in prescribed areas within the meaning of that Act. If, on the other hand, sec. 10 is inoperative as being inconsistent with the Commonwealth Act, Ward has no case. For reasons which I have stated in Wenn v. The Attorney-General for the State of Victoria, I am of opinion that sec. 10 is inoperative. In my opinion, therefore, <sup>for this reason</sup> the writ of mandamus should not issue and the order nisi should be discharged. It is not necessary for me to consider other objections to the issue of the writ.

A.K. Brown is a public servant in the same branch of the Public Service as Ward. He was served with the order nisi by direction of the Supreme Court. He is one of the persons whom the Board proposes to appoint to one of the vacant positions. It was contended for him that the facts show that if he were appointed there would not be a promotion within the meaning of the State Discharged Servicemen's Preference Act because what had happened was that the classification of a position which he already held had been raised. If this was not a "promotion", sec. 10 of the Victorian Act had no application to give any person a preference over him. This contention was not disputed by any other party to the proceedings. But as, in my opinion, the order should be discharged for the reasons which have been stated, it is unnecessary to examine the arguments presented on his behalf.

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JUDGMENT

RICH J.

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JUDGMENT

RICH J.

As I consider that sec. 10 of the Discharged Servicemen's Preference Act, 1943 of Victoria, is inconsistent with the Federal Re-establishment and Employment Act 1945 and therefore invalid, this application fails and the order nisi should be discharged. With regard to costs I agree with the order proposed by my brother Dixon.

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EX PARTE WARD.

JUDGMENT.

DIXON J.



R. v. THE PUBLIC SERVICE BOARD OF VICTORIA

EX PARTE WARD.

JUDGMENT.

DIXON J.

The application for a mandamus directed to the Public Service Board is founded wholly upon sec. 10 of the Discharged Servicemen's Preference Act 1943 of Victoria. The prosecutor's contention is that the Board did not give full or proper effect to the section because of the view they adopted concerning the influence upon the decision they should give of sec. 16 of the federal Re-establishment and Employment Act 1945. In Wenn's case I have given reasons for the conclusion that sec. 10 of the State Act is invalid for inconsistency with the Commonwealth Act. In this view the foundation of the prosecutor's application disappears. Nothing remains but to discharge the order nisi.

As the failure of the application arises from the invalidity of the Victorian legislation, I think that the Public Service Board of the State may properly be left to bear its own costs, as of course will the interveners.

The parties who came in under or in consequence of the order of 5th May 1948 made by Herring C.J. stand in an unusual position. I do not think that in the circumstances we should order the prosecutor to pay their costs.

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EX PARTE DONALD HERBERT WARD.

JUDGMENT

MCTIERNAN J.

I agree with the judgment of the Chief Justice.