Privy Council Appeal No. 74 of 1926.

Wellesley Robert Gorges Walsh - - - - - - *Appellant*

v.

The Crown - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JANUARY, 1927.

Present at the Hearing:
VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT HALDANE.]

The question which their Lordships have to consider in this appeal, brought from a judgment of the Supreme Court of Western Australia, is whether the appellant, who was a member of the teaching staff of the Education Department of the State, was entitled to a superannuation allowance. His claim had been disallowed by the Governor in Executive Council. It was considered that the point, that a free discretion was open to the Governor in Council, had been determined by a judgment of the High Court of Australia, and the question now raised in independent proceedings was raised in order to have the correctness of that decision reviewed by the Judicial Committee of the Privy Council.

In May, 1922, when about to retire from his employment, the appellant applied for a superannuation allowance. His application was disallowed by the Director of Education on the suggested ground that no provision had been made for any retiring allowance to teachers who had joined the service since the 17th April, 1905, the date when Section 83 of the Public Service Act, 1904, came into operation. The appellant had joined in 1907. In February,

1923, the appellant had formally applied for a superannuation allowance.

In order to understand the question raised it is necessary to refer to the provisions of the relevant statutes. The Superannuation Act of 1871, passed by the Legislature of Western Australia, provides, subject to exceptions which are not relevant, that persons who have served in an established capacity in the permanent Civil Service should be entitled to certain superannuation allowances. But by a proviso to Section 1, which grants such allowances, it is enacted :—

> "that if any question should arise in any department of the public service as to the claim of any person for superannuation under this clause it shall be referred to the Governor in Executive Council, whose decision shall be final."

Section 12 provides that :—

> "Nothing in this Act contained shall extend to or be construed to extend, to give any person an absolute right to compensation for past services, or to any superannuation or retiring allowance under this Act, or to deprive the Governor of the power and authority to dismiss any person from the public service without compensation."

The Public Service Act, 1904, enacts, by Section 5, that the Act, unless otherwise provided, is not to apply to the teaching staff of the Education Department. By Section 6 it enables the Governor to appoint a Public Service Commissioner, who is, under Section 9, to supervise the public service and to report proposals for improvement and as to redundancies to the Governor. Section 83 enacts—

> "The provisions of the Superannuation Act shall not apply to any person appointed to the Public Service after the commencement of this Act ; and nothing in this Act contained shall be deemed to confer on any person whomsoever any right or privilege under the said Act."

Section 10 provides that any officer dissatisfied with any proposal of the Commissioner, either particular or general in regard to grade affecting him, or to the classification of the work performed by or assigned to him, may appeal to an Appeal Board constituted as thereinafter provided. By Section 51 the Appeal Board, of which the Commissioner is to be chairman, is constituted, and, by Section 52, is to inquire into every appeal, and its decision is to be "reported to the Governor and shall be final." There is, in their Lordships' opinion, nothing in the Act which places questions as to the grant of superannuation allowances within the class of matters as to which the Commissioner is given jurisdiction. Nor is such jurisdiction by the terms of the statute entrusted to the Appeal Board.

In the case of *Laffer* v. *The Minister of Justice for Western Australia* (35 C.L.R., 325), which was analogous in its facts to the present case, and which went on appeal to the High Court of Australia, it was decided by a majority, Gavan Duffy and Starke, JJ., Isaacs J. dissenting, affirming Northmore J. of the Supreme

Court of Western Australia, that the finding of the Board that a person is qualified under the Superannuation Act to receive superannuation allowance does not, as matter of law, affect the right of the Governor in Council to refuse, in the exercise of his discretion, the grant of such an allowance. All the three judges of the High Court agreed in holding that Section 83 of the Act for the Regulation of the Public Service of 1904 had no application to the teaching staff of the Education Department. With this conclusion their Lordships agree for the reasons given by the High Court. But the real question, which was the subject of the dissenting judgment of Isaacs J., arises under a later Act, the Public Service Appeal Board Act, 1920, passed by the legislature of Western Australia in that year. This Act expressly applies to the teaching staff of the Education Department, and provides that if an appeal relates to matters with which the teaching staff of the Education Department only is concerned the Board is to consist of a Judge of the Supreme Court, who is to be chairman, of one member to be appointed by the Governor, and of one member to be elected by members of the State School Teachers' Union of Western Australia. The jurisdiction of the Board so constituted is, by Section 6, to hear and determine (*inter alia*) any appeal by a public servant or class of public servants, from the Public Service Commissioner or the Minister of Education, in respect of the classification, reclassification, salary or allowances, of such public servant or class of public servants, or his or its office or officers, or any decision involving the interpretation or application of the provisions of any Act or regulation governing the service of such public servant or class of public servants.

By Section 6 (4) it is enacted that if any question shall arise, or at the commencement of the Act is pending, in any department of the public service, as to the qualification of any person claiming a superannuation allowance under Section 1 of the Superannuation Act, it shall be referred to the Board, whose decision shall be final. By Section 10 the decision of the Board is in each case to be reported in writing by the Board to the Governor, and is to be final, and effect is to be given to every such decision.

In their Lordships' opinion, if the Superannuation Act of 1871 can be taken by itself, the plain meaning of the proviso to Section 1 and of Section 12 is that the Governor in Council has a discretionary power to reject absolutely any claim made by any person for superannuation allowance, and that the exercise of his discretion in making such a rejection is not under the control of any Court.

They are unable to accept the more restricted construction put on the Act itself by Isaacs J. They agree with Gavan Duffy and Starke JJ. in thinking the true view is that the Act confers an authority on the Crown "to grant superannuation or retiring allowances in certain cases, but makes the grant dependent on the discretion and bounty of the Crown," if the claim is questioned. Do the subsequent statutes affect this conclusion? Their

Lordships think that they do not. Section 10 of the Public Service Act of 1904 does not appear to them to restrict this power of the Crown, nor do they think that Section 52 does, inasmuch as its scope is restricted to questions arising by way of appeal from the decisions of the Commissioner on the matters referred to in Section 10, which do not extend so far.

The provisions of the Public Service Appeal Board Act, 1920, are not so simple, but in their Lordships' view they do not really modify the principle. They bring in (Section 3 (*b*)) the staff of the Education Department, and they give the Board jurisdiction to determine any appeal from the Commissioner or the Minister of Education in respect of classification, reclassification, salary or allowances, or of the interpretation or application of any Act or regulation governing service (Section 6 (1)). They provide (Section 6 (4)) that if any question arises as to the qualification of a person claiming a superannuation allowance under Section 1 of the Act of 1871, it is to be referred to the Board, whose decision is to be final. Section 10 provides that the decision of the Board is to be reported in writing to the Governor, and is to be final and to have effect. The Acts of 1871 and of 1904 are to be construed, subject to these provisions. No doubt when the Board reports to the Governor on any such point as is specified in Section 6 (4) as to qualification or length of service, the decision so reported is binding on the Crown, but there are no words which take away the discretion of the Crown to grant or withhold conferred by the Act of 1871. It may be, as Isaacs J. held, remarkable that the statutes of 1904 and 1920 should leave this discretion intact. But the words employed appear to their Lordships clear, and with the reasons for the policy adopted in using them, no Court of law has any concern. The conclusion on the point of construction to which the Judicial Committee have come is the same as that of the majority in the *Laffer* case.

The conclusion disposes of the appeal, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

WELLESLEY ROBERT GORGES WALSH

v.

THE CROWN.

DELIVERED BY VISCOUNT HALDANE.

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