

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Leslie Williams v. Cornelius Delohery, from the Supreme Court of the State of New South Wales (P. C. Appeal No. 36 of 1912); delivered the 10th December 1912.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MERSEY.

LORD MOULTON.

[DELIVERED BY LORD MACNAGHTEN.]

This is an Appeal from an Order of the Supreme Court of New South Wales dismissing by a majority (dissentiente Sly, J.), an application on behalf of the Government asking in the alternative for a new trial, or for judgment in favour of the nominal Defendant who is now Appellant. The application was made pursuant to leave reserved at the trial of the action, when a verdict for 4,428*l.* 0*s.* 9*d.* was entered for the Plaintiff—Mr. Delohery—the present Respondent.

Mr. Delohery was formerly an officer in the New South Wales Civil Service. He resigned his position in the Service on accepting a seat upon the Public Service Board. That Board as now constituted was established by the Public Service Act of 1895, which was repealed and re-enacted by the consolidating Act known as the "Public Service Act, 1902." The duty of the Board, speaking generally, is to regulate, co-ordinate, and superintend in every detail the various branches of the Civil Service. It consists of three persons each appointed for the term

of seven years but eligible for re-appointment. The salary attached to the office, or the "recompense," as it is called in the Act, is the sum of 1,000*l.* a year, charged upon the consolidated revenue, a special appropriation for that purpose being made by the Act of 1895. A member of the Board may be suspended for a limited period by the Governor on various grounds specified in the Act, but no member can be removed from office without a Resolution of each House of Parliament. Members of the Board are not Civil Service officers. The position of an officer in the Service is incompatible with membership of the Board.

Mr. Delohery's claim in the action was for payment of arrears of the superannuation allowance payable on retirement to an officer in the Civil Service of the same standing as he was at the time when he left the Service. It is common ground that no payment on that account was ever received or ever claimed by Mr. Delohery while he was a member of the Public Service Board.

The Government have met Mr. Delohery's claim most fairly. They have not raised any question of limitation or any question as to laches on Mr. Delohery's part. They desire, as their Lordships understand, that the question should be treated merely as a question of law.

The main contention on the part of the Government is that the allowance, if any, to which Mr. Delohery was entitled was in abeyance so long as he was in the service of the Government in any capacity, and that such allowance if payable merged in the salary he received as a member of the Public Service Board. At first sight there is an air of plausibility in that view, and certainly it seems to have been at one time Mr. Delohery's view as well as the view of the Government. The point in itself is a very short one. But the situation is complicated by the events which

happened and by other matters—the failure of the fund constituted by the Civil Service Act, 1884 under the title of “the Superannuation Account,” the legislation consequent upon that failure, the attitude of Mr. Delohery himself, and the opinion expressed by Sly, J., not disclaimed though not much relied on by the learned Counsel who appeared for the Appellant. It seems to their Lordships, in these circumstances, that the best way of meeting the various points which have been raised will be to consider the following questions in their order:—

1. Did Mr. Delohery, on ceasing to be a member of the Civil Service become entitled to a superannuation allowance from the Superannuation Account as constituted by the Civil Service Act, 1884?

2. If he became so entitled, was his right recognised and confirmed by the Government when the Superannuation Account became exhausted and provision was made for the liabilities of that fund by the Public Service Superannuation Act, 1903?

3. If Mr. Delohery, on ceasing to be a member of the Civil Service, became entitled to a superannuation allowance and if his right was recognised in the Act of 1903, was such allowance receivable by him while a member of the Public Service Board?

Under the provisions of Part V. of the Act of 1884, an officer in the Civil Service is entitled at any time after having attained the age of 60 years to retire from the Service upon the superannuation allowance provided by the Act. The retiring officer is not required to do any act or to make any claim or to give any notice to perfect his right. His right under the Act of 1884 to the prescribed allowance is absolute on retirement. That is the view of the majority of the learned Judges of the Supreme Court, and their Lordships agree in it. Under the Act of 1895 the right of officers in the same position as Mr. Delohery who might be continued in the service, as he was, for 12 months after the passing of the Act is preserved and confirmed.

On the 10th of February 1900, Mr. Delohery attained the age of 60 years. On the 16th of May 1900, he was appointed a member of the Public Service Board under the Act of 1895 for the statutory term of seven years. Under the Act of 1902 the existing members of the Board were continued in office as if they had been appointed under that Act. In January 1903 Mr. Delohery resigned his office, apparently at the instance of the Government, and was at once re-appointed for another statutory term of seven years. His appointment came to an end on the 14th of January 1910.

Sly, J., who differed from his colleagues, thought that the fact of Mr. Delohery having reached the age at which an officer was entitled to retire as of right "had nothing to do with his leaving the service." "He did not," adds the learned Judge, "'retire from the Service upon the superannuation allowance,' but 'simply accepted in the place of his former position a position with a higher salary under the Crown.'" The learned Judge thought that there should be some act on the part of a retiring officer intimating to the Crown that he is retiring upon the superannuation allowance because he is over 60. In the absence of such an intimation he came to the conclusion that Mr. Delohery was not entitled to be paid out of the Superannuation Account, and that on that ground his present claim failed, and the verdict should be entered for the Defendant with costs. It may be observed that the strained construction which Sly, J., places on the expression "retire upon" the superannuation allowance finds no support in the Public Service Act of 1895 where the right to the allowance is dealt with in one section and the right to retire at the age of 60 is dealt with separately in another. But it is enough to say that the learned Judge seeks to qualify an absolute

and unqualified right by importing conditions not to be found in the Act.

Passing to the next question it seems that the scheme of the fund represented by the Superannuation Account which was formed substantially by a subvention from the Government and a deduction not exceeding 4 per cent. from the salaries of all civil servants was financially unsound. There was to be an actuarial investigation every three years and power was reserved to the Governor if the fund became insufficient to reduce allowances and gratuities *pro ratâ*. But in spite of these precautions, and in spite of the somewhat drastic provisions of the Act of 1895 it appears that in 1903 the fund was exhausted and the liability of the Account for pensions paid by the Treasurer was largely in excess of its assets. In this state of things the Government came to the rescue and the "Public Service (Superannuation) Act, 1903" was passed. The full title of the Act is significant. It is "An Act to provide that on the Superannuation Account becoming exhausted all amounts payable to and out of that Account shall be paid to and out of the Consolidated Revenue Fund; to provide for the payment of certain superannuation allowances; and to otherwise amend the Public Service Act, 1902, and the Civil Service Act of 1884." It will be observed that in the full title a distinction is drawn between "amounts payable," that is—properly payable—out of the Superannuation Account "and certain superannuation allowances," as to which it may be inferred from the language used that there had been some irregularity or at any rate that there had been or might be some question. It will be found that this distinction which is accounted for by what had actually happened is preserved in the body of the Act.

Section 2 enacts that on a certificate being given by the Governor to the effect that the superannuation account was exhausted, which was duly given upon or shortly after the passing of the Act certain provisions were to have effect. Of these only two require to be stated, subsection (b) and subsection (d).

Subsection (b) is in these words :—

“All superannuation allowances payable under the Civil Service Act of 1884 and the Public Service Act, 1902, to any persons shall continue to be paid to such persons in accordance with the provisions of the said Acts but shall be paid from the Consolidated Revenue Fund.”

It was argued that Mr. Delohery was not entitled to the benefit of that subsection inasmuch as the expression “shall continue to be paid” was inapplicable to a case where no payment at all had been made. But the learned Counsel for the Crown conceded that those words were not to be taken so literally as to exclude a contributor to the fund who might have retired on a pension but happened to die before the first instalment was actually paid. It seems to their Lordships that that concession destroys the argument on the part of the Crown, for if in the one case regard is to be had to the right and not to the actual fact of payment there is no reason why a person who is entitled but for some reason or other neglects to receive payment should be in a worse position than a person whose death prevents any payment being received by the annuitant. The sentence is no doubt awkwardly expressed, but it is to be observed that the subject of the sentence is “all superannuation allowances payable under the Civil Service Act of 1884, and the Public Service Act of 1902.” There is no change in the subject of the sentence from first to last and the final words of the subsection where the predicate is found declare that all allowances

which are the subject of the sentence "shall be paid from the Consolidated Revenue Fund." Probably at the time there was widespread uneasiness felt by members of the Service and especially by those who had retired on pensions. The words interposed between the first words of the sentence and the last were probably introduced in order to assure all persons in receipt of pensions that things would go on just as they were meant to go on under the Act of 1884, without any diminution in the scale of payment or any levy or stoppage to make good any existing deficiency. Possibly the words "payable and shall be paid" have dropped out after the words "continue to be." At any rate in their Lordships' opinion the meaning is the same as if those words were supplied.

Subsection (*d*) is in these words :--

" Every person who having been in the Civil Service
 " had a superannuation allowance computed or assigned at
 " any time before the commencement of this Act consequent
 " on his acceptance of another office under the Crown which
 " he now holds, but who is not receiving such allowance
 " shall, upon retirement from such office, be paid from the
 " Consolidated Revenue Fund such allowance in accordance
 " with the provisions of the Civil Service Act of 1884, and
 " the Public Service Act, 1902."

In their Lordships' opinion Subsection (*d*) does not apply to the case of any person whose right to a superannuation allowance is absolute under the Act of 1884. It applies to a very limited class of persons members of the Civil Service not entitled to retire on a superannuation allowance who were employed in some other department by the Government of the day under a promise (for which there was no statutory authority) that their rights under the Civil Service Act should be preserved. "It has been the practice," says the Attorney-General in a memorandum of the 16th of October 1899,

“ when an officer left the Civil Service to take
“ up some other public position for the Executive
“ as an act of grace to allow him to retain
“ such rights under the Civil Service Act
“ as had accrued at the time of his ceasing to
“ be a member of the Civil Service.” Then
the Attorney-General gives instances and advises
the Cabinet that promises of that sort exceeding
the Executive Minute have no legal validity but
recommends that in order to preserve continuity
of administration engagements made in the past
to that effect should be validated. So far as can
be gathered from the statutes to which their
Lordships have been referred there is no such
thing required by law as the “ assigning of a
“ pension ” in the case of a person entitled as of
right to a retiring allowance. It seems to their
Lordships that Mr. Delohery was mistaken in
thinking it necessary to apply for “ an assign-
“ ment ” of his pension when the Bill for the
Act of 1903 was in progress.

There remains the last question : was Mr.
Delohery's retiring allowance in abeyance while
he was a member of the Public Service Board ?
Their Lordships think that it was not. In order
to take away a right given in clear terms by
statute or to suspend such a right there must
be found in the words of the legislature a
provision to that effect equally clear. There is
no such provision in the Civil Service Acts in
force while Mr. Delohery was a member of the
Service. Such a provision would seriously
hamper the choice of the Executive in filling a
very difficult and responsible office.

In the result their Lordships are of opinion
that the Appeal must be dismissed and their
Lordships will humbly advise His Majesty
accordingly.

The Appellant will pay the costs of the
Appeal.



In the Privy Council.

JAMES LESLIE WILLIAMS

v.

CORNELIUS DELOHERY.

DELIVERED BY LORD MACNAGHTEN.

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