

John Howard Wigg and another - - - - - *Appellants*

*v.*

The Attorney-General of the Irish Free State - - - *Respondent*

FROM

THE SUPREME COURT OF THE IRISH FREE STATE.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 3RD MAY, 1927.

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*Present at the Hearing :*

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

VISCOUNT FINLAY.

VISCOUNT DUNEDIN.

[*Delivered by* THE LORD CHANCELLOR.]

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This is an appeal by special leave from an order of the Supreme Court of the Irish Free State, reversing (by a majority) the judgment of Mr. Justice Meredith in favour of the appellants.

The appellants, who were formerly established civil servants in the employment of the Crown in Southern Ireland, were, by the several instruments which effected or followed upon the establishment of the Irish Free State, transferred to the service of that State. They have since retired, and, being dissatisfied with the retiring allowances granted to them by the Minister of Finance, they brought this action in the High Court against the Attorney-General of the Free State, claiming a series of declarations as to the allowances to which they are entitled. Mr. Justice Meredith, by whom the action was tried, granted part of the relief claimed; but, on appeal to the Supreme Court that Court by a majority (Mr. Justice Johnston dissenting) held that the action would not lie, and dismissed it with costs. Hence the present appeal.

On the argument of the appeal before this Board two distinct questions were discussed, namely, first, whether the appellants

are entitled to any legal rights in respect of which an action for a declaration will lie against the Attorney-General, and, secondly, whether, assuming that such an action will lie, the appellants are, on the true construction of the statutes relating to superannuation or compensation for loss of office, entitled to the declarations which they claim. The questions so raised are of considerable public importance, both as bearing on the effect to be given in the Courts of the Free State to the statutes and orders of 1922, and also as affecting the interests of a large number of former servants of the Crown.

Upon the first question the respondent relied in the first place on the decisions of the English Courts which have laid it down that a servant of the Crown has no right under the Superannuation Acts to sue for his superannuation allowance; and for this purpose reference was made to the cases of *Cooper v. The Queen* (1880, L.R. 14 C.D. 311), and *Yorke v. The King* (L.R., 1915, 1 K.B. 852). Their Lordships do not question the authority of those decisions, which, indeed, was recognised by the House of Lords in *Considine v. McInerney* (L.R., 1916, 2 A.C. 162); but those cases turned entirely upon the language of the Superannuation Acts. Section 30 of the Act of 1834 (which has not been repealed) enacts that "nothing in this Act shall extend 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," and section 2 of the Act of 1859 provides that any question as to a claim for superannuation shall be referred to the Commissioners of the Treasury, "whose decision shall be final"; and, in view of these enactments, it was clear that no action could be brought to set aside or vary a decision of the Commissioners of the Treasury. But the claim of the present appellants rests, not upon the Superannuation Acts taken by themselves, but upon those Acts as modified and applied by the Agreement for a Treaty between Great Britain and Ireland and the statutes and orders of 1922. By Article 10 of the Agreement for a Treaty it was provided as follows:—

"The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of police forces, and other public servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof."

This article, taken by itself, might not have been enforceable by an individual citizen in the Irish Courts; but by a series of enactments following upon the Agreement for a Treaty, it has been made a part of the municipal law of the Free State. By the Provisional Government (Transfer of Functions) Order, 1922, clause 7, it was provided as follows:—

"(i) All officers who are on the day of transfer engaged or employed in the discharge of functions transferred under this Order to the Provisional Government shall be transferred to and become officers of the Provisional Government . . .

“(ii) Where an officer is transferred to the Provisional Government under this Order, he shall hold office by a tenure corresponding to his previous tenure, and if he is discharged by the Provisional Government, or if he retires in consequence of the change of Government effected by this Order, he shall be entitled to receive compensation from the Provisional Government and the terms of such compensation shall not be less favourable to him than such as are accorded in the like circumstances by the Government of Ireland Act, 1920.”

By Act No. 1 of 1922—the statute by which Dail Eireann enacted a Constitution for the Irish Free State—it was enacted that the Articles of Agreement for a Treaty should have the force of law; and Articles 77 and 78 of the Constitution provided as follows :—

“77. Every existing officer of the Provisional Government at the date of the coming into operation of this Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State (Saorstát Eireann), and shall hold office by a tenure corresponding to his previous tenure.

“78. Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty.”

The effect of these enactments, and particularly of Article 78 of the Constitution, was to give to every existing officer who was transferred to the Provisional Government, and afterwards to the Free State, a right by Irish law to the benefit of Article 10 of the Agreement for a Treaty with a corresponding title to enforce that right in the Courts of the Free State.

But it was argued on behalf of the respondent that, even assuming that the statutes conferred a right, they gave the appellants no more than a right to put forward their claim to the Minister of Finance (to whom the functions of the British Treasury in respect of superannuation have been transferred) and to receive such compensation as he might award to them. In support of this view it was pointed out that at most the effect of Article 10 of the Agreement for the Treaty and Article 78 of the Constitution was to give to existing civil servants transferred to the Free State the rights accorded by the Eighth Schedule to the Government of Ireland Act, 1920; that under that schedule a civil servant retiring under the statutory conditions would only have been entitled to receive such compensation as the Civil Service Committee set up by that Act might award to him in accordance with the rules contained in the schedule; and that by section 56 (6) of the Act the determination of the Civil Service Committee of any claim or question which was to be determined by them under the Act was to be final and conclusive. In consequence of the establishment of the Free State the Civil Service Committee has, so far as Southern Ireland is concerned, never been set up; and it was argued that, this being so, the right to make an award under Schedule 8 of the Act of 1920 has reverted to the Minister of Finance as the

successor to the British Treasury. Their Lordships do not agree with this reasoning. It is true that the Civil Service Committee for all Ireland has lapsed, and that by section 7 of the Irish Free State (Consequential Provisions) Act, 1922, such a Committee has been set up for Northern Ireland only; but the effect is not to transfer the functions of that Committee as regards Southern Ireland to the Minister of Finance. The right of an existing officer retiring under the statutory conditions to receive compensation in accordance with the rules contained in Schedule 8 of the Act of 1920 remains, and is converted by Article 78 of the Constitution into a legal right; and, the machinery provided by the statute for ascertaining the amount of the compensation having disappeared, the duty of ascertaining it falls, in case of need, upon the Courts.

In this connection it is desirable to mention that, with a view to obtaining assistance in the duties falling upon him in this connection, the Minister of Finance has set up a Compensation Committee, whose duty it is to advise him as to the compensation to be awarded to retiring civil servants. This Committee consists of a Judge of the Supreme Court, who is the chairman, two members appointed by the Minister and two appointed by the staff of civil servants. The constitution of the Committee is eminently fair, and there can be no doubt that its advice is of value; but it is an advisory Committee only with no statutory powers, and it was not and could not be contended on behalf of the respondent that its conclusions have a binding effect.

Upon the first point, therefore, their Lordships are of opinion that the appellants have a legal right which may be asserted in the Courts of the Irish Free State; and they see no objection to the form of the action, which is brought against the Attorney-General for a declaration of rights and is in accordance with the well-known decisions in *Dyson v. The Attorney-General* (L.R., 1911, 1 K.B. 410; L.R., 1912, 1 Ch. 158) and other cases.

Before dealing with the questions of amount it is desirable to state in a little more detail the position of the two appellants, the nature of the compensation awarded to them respectively, and the questions upon which disagreement has arisen.

Each of the appellants had many years of service to his credit, and each of them was entitled at the date of his retirement to a fixed salary and also to a supplemental salary (or bonus) varying with the cost-of-living figure; and in each case the notice of retirement, which was given in accordance with the statutory conditions specified in the Eighth Schedule to the Act of 1920, took effect after the passing of the Irish Free State Constitution Act. But there was this difference between the appellants, namely, that whereas the second appellant, Mr. Cochrane, had elected to adopt the provisions of the Superannuation Act, 1909, the first appellant, Mr. Wigg, had preferred to remain subject to the provisions of the Act of 1859. Accordingly, while the first appellant was entitled, in accordance with the Act of 1859, to a superannuation allowance equal to one-sixtieth of his annual

salary and emoluments for every completed year of service (subject to the notional increases of his salary and years of service prescribed by Part I of the Rules contained in the Eighth Schedule to the Act of 1920), the right of the second appellant was to a superannuation allowance equal to one-eightieth of his annual salary and emoluments for every completed year of service (subject to the notional increases above mentioned), together with an additional allowance of a lump sum equal to one-thirtieth of his annual salary and emoluments for every completed year of service, but not exceeding one and a half times the amount of such salary and emoluments.

In calculating the pensions to be awarded to the appellants the Compensation Committee, whose recommendations were adopted by the Minister of Finance, proceeded generally upon the above lines. They made the proper notional increases in the salary (both fixed and supplemental) and in the years of service of each appellant, and awarded to each of them a fixed pension representing the proper proportion of his fixed salary and a supplemental pension representing the proper proportion of his supplemental salary (or bonus) as so increased; but in each case they made it a condition of the award (1) that the supplemental pension should be subject to reassessment quarterly with reference to the official cost-of-living figures from time to time declared, and (2) that at no time should the supplemental pension exceed its prescribed amount at the date of the retirement, which was referred to as the "overriding maximum." Further (3) in calculating the lump sum allowance to be paid to the appellant Cochrane in respect of his supplemental salary or bonus, they calculated that allowance upon 75 per cent. only and not upon the whole of the bonus to which he was entitled at the date of retirement. It is with regard to these conditions numbered (1), (2) and (3) that the awards were questioned on this appeal.

In imposing the disputed conditions, the Advisory Committee followed the principles laid down in a Minute of the British Treasury dated the 20th March, 1922, which was adopted by the Minister of Finance on the 11th May, 1922; and it is necessary to consider whether the Minute is binding on the appellants. In their Lordships' opinion it is not so binding. The Minute was the outcome of a long discussion between the Treasury and the British civil servants as to the pensionable character of the bonus, and it is no doubt operative as to officers remaining in the service of the Crown in Great Britain; for, as to the pensions to be awarded to those officers, the Treasury has a wide discretion. But the Minute cannot affect the rights of officers who at its date had been transferred to the Government of the Free State; nor could the Minister of Finance, who (as their Lordships have held) has no discretion as to the compensation to be allowed to officers in the position of the appellants, make the Minute binding upon them by adoption. Their rights must depend upon the construction of the statutes without reference to any Minute; and the question

to be determined is whether and to what extent the disputed conditions are in accordance with the statutes.

As to the condition numbered (1) their Lordships are of opinion that upon a reasonable interpretation of the statutes dealing with superannuation allowances, the supplemental pension can be made to vary (like the bonus on which it is calculated) with the cost-of-living figure. If a transferred officer were entitled on retirement to have his pension calculated upon his current bonus, without reference to any future variation, the effect might be that he would get more by way of pension than he could have claimed if he had remained in the British service, and their Lordships do not think that this was the intention of the Acts. The pension may be made to vary as the salary would have varied.

But on the same reasoning their Lordships do not think that the condition numbered (2) can be sustained. If the pension is made to fall with the cost-of-living figure, it should also be capable of rising with that figure; and if the amount of the officer's salary at the date of his retirement is not conclusive for the purpose of preventing the application of the sliding scale under condition (1), neither should it be treated as an over-riding maximum as prescribed by condition (2).

The condition numbered (3) raises a difficult question. The additional allowance payable under section 1 of the Superannuation Act, 1909, to an officer who comes within the provisions of that Act, is to be "a lump sum equal to one-thirtieth of the annual salary and emoluments of his office, multiplied by the number of completed years he has served." There is an obvious difficulty in applying this formula to a salary which may vary up or down from year to year, and no doubt it was on this ground that the Treasury, in the Minute above referred to, directed that this allowance should be calculated on 75 per cent. only of the current amount of the bonus. But in their Lordships' opinion there is no warrant in the statute for this rough and ready way of dealing with the matter. The lump sum allowance, as Meredith, J. pointed out, is not intended as a commutation payment for the purpose of investment, but as an allowance for meeting the increased temporary expenditure connected with the officer's retirement; and accordingly it is reasonable that it should be regarded as an accession to the first year's pension and be calculated on the same basis as that pension. Upon the whole their Lordships are of opinion that this condition cannot be sustained.

The result is that their Lordships find themselves in agreement on every point with the judgment of the learned Trial Judge, and they are of opinion that the order of the Supreme Court should be set aside and the judgment of Meredith, J., restored. The respondent shall pay the costs of the appeal to the Supreme Court; but, as on the appeal to this Board the appellants contended unsuccessfully against the application of a sliding scale to their pensions, there should be no costs of that appeal. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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v.

THE ATTORNEY-GENERAL OF THE IRISH  
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DELIVERED BY THE LORD CHANCELLOR.

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