

BROWNE *v.* COMMISSIONER FOR RAILWAYS.

1935.

Nov. 13, 14;
Dec. 13.

Government Railways Act, 1912 No. 30, s. 82—Officer—Misconduct—Suspension—Prescribed manner—Wages during suspension.

Jordan C.J.
Stephen J.
Bavin J.

By s. 82 of the Government Railways Act, 1912, it is provided that where an officer in any branch of the service has been guilty of misconduct, "the officer at the head of such branch may in the prescribed manner—(a) dismiss or suspend him" No regulation or by-law had been made prescribing the manner in which the head of a branch could dismiss or suspend an officer. The plaintiff was adjudged guilty of misconduct by the head of his branch and suspended. He thereupon brought an action against the defendant for wages accruing during his suspension. The defendant pleaded that the plaintiff had been duly suspended under the provisions of s. 82. To this plea the plaintiff demurred on the grounds (1) that the plea did not allege that the plaintiff had been guilty of misconduct, (2) that suspension did not involve loss of wages and (3) that a head of a branch could not suspend the plaintiff since no manner had been prescribed for so doing by any by-law or regulation. Upon demurrer,

Held, (1) that misconduct in s. 82 of the Government Railways Act meant misconduct in the opinion of the head of the branch and such a finding could only be challenged by appeal provided by the statute and not in a Court of Justice, and (2) that suspension *prima facie* involves loss of wages.

Held, however, that since there existed no prescribed manner, the head of the branch had no power to suspend, and there must be judgment for the plaintiff on the demurrer.

The following statement of facts is taken from the judgment of the Chief Justice :—

In this action the plaintiff sues his employer to recover wages claimed to be due for the period from 2nd to 13th November, 1933. In reply to this claim the defendant by his second plea alleges that the plaintiff was a railway officer and was adjudged guilty of misconduct within the meaning of s. 82 of the Government Railways Act, 1912, as amended, by the officer at the head of his branch, who thereupon duly suspended him, that the plaintiff did not appeal in manner prescribed, that he was thereafter permitted to resume and did resume his duties, and that the plaintiff's claim is for wages during the period of suspension. The plaintiff demurred

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to the second plea ; and made an application for particulars to enable him to plead to it. This application has been referred to the Full Court and has come on to be heard with the demurrer. The particulars asked for include particulars of the alleged misconduct, of the manner of the suspension, and of the manner in which the plaintiff was permitted to resume his duties.

It is contended on behalf of the plaintiff that he is entitled in the action to contend that he was guilty of no misconduct, and that any purported suspension was therefore inoperative because groundless, and that in any event he is entitled to contend that he was not in fact suspended, because any purported suspension was not effected in the proper manner. It is for these reasons that the particulars are asked for. It is also contended that whether the suspension be valid or not a suspension under s. 82 does not deprive an officer of the right to receive salary during the period of suspension.

C. Evatt and Dwyer, for the plaintiff, in support of the demurrer. It is admitted that at all relevant times there were no rules or regulations made under s. 82. The fullest power is given to the Commissioner to suspend an employee, but the head of a branch has no such power since s. 82 has not been made operative. They referred to *Seymour v. Railway Commissioners* (19 S.R. 30) ; *Hunkin v. Siebert* (51 C.L.R. 538) ; *Commissioner for Railways (N.S.W.) v. Cavanough* (53 C.L.R. 220) ; *Wallwork v. Fielding and Ors.* ([1922] 2 K.B. 66).

Bradley K.C. and Chambers, for the defendant. The action attempts to bring a domestic dispute into a Court of Law when the legislature by a domestic code has provided for the settlement of such matters by other means : *Cf.* ss. 70-90 of the Government Railways Act, 1912. The officer at the head of the branch alone is the judge of whether there has been misconduct. The person suspended has a right of appeal to an appeal board, and the question is not open to any other tribunal. The power to suspend is conferred by the s. 82. The prescribing of a manner for the exercise of the power is only a matter of procedure and if no rules are prescribed the matter can be dealt with without special procedure. They referred to *The Queen v. Commissioner for Special Purposes of Income*

Tax (21 Q.B.D. at pp. 318, 319); *Holmes v. Angwin* (4 C.L.R. 297 at p. 307); *Gardner v. Municipality of Kogarah* (25 S.R. 597); *Wright v. Hartigan* (34 S.R. 368 at p. 372); *Commissioners of Inland Revenue v. Joicey* ([1913] 1 K.B. 445); *A.-G. for Ontario v. Daly* ([1924] A.C. 1011); *Passmore v. Oswald-thistle Urban District Council* ([1988] A.C. 387); *Knight v. Municipal Council of Rockdale* (20 N.S.W. Eq. 32 at p. 62). If these propositions are correct, the plaintiff is not entitled to the particulars asked for and the plea is good.

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Evatt, in reply. This is a claim for non-payment of salary and the appeal board is not a wages board. The plaintiff is entitled to notice of suspension and to know why he was suspended. Even if the plaintiff was properly suspended, he does not lose his right to salary: *Cavanough's Case* (53 C.L.R. 220).

Cur. adv. vult.

JORDAN C.J. [after stating the above facts, continued:] The questions arise out of a particular relationship of employer and employee. By the common law, a contract of employment with a private employer, if it is for a fixed period which has not expired, or for an indefinite period which is not terminated by reasonable notice, cannot lawfully be put an end to in the absence of legal justification. If the employee is guilty of serious misconduct, this justifies the employer in treating himself as discharged from the further obligations of the contract and if he exercises this right the contract is at an end save to the extent to which, in the circumstances of the case, particular liabilities or obligations arising under it may be enforceable in favour of the innocent party: *Harold Wood Brick Co. Ltd. v. Ferris* ([1935] 2 K.B. 198; *Konski v. Peet* ([1915] 1 Ch. 530)—distinguishing *General Billposting Co. Ltd. v. Atkinson* ([1909] A.C. 118). But, in the absence of express provision, a breach of contract between private persons confers no right on the injured party to suspend the contract: *Hanley v. Pease and Partners, Ltd.* ([1915] 1 K.B. 698 at pp. 705-706). If such a right be reserved, it is construed as a right which, if exercised, produces a temporary suspension of all rights and obligations under the contract: *Wallwork v. Fielding and Ors.* ([1922]

1935. 2 K.B. 66 at pp. 71-2, 74-5) ; unless, in the context, the right to suspend is seen to be intended to have a more limited operation : *Zinc Corporation Ltd. v. Hirsch* ([1916] 1 K.B. 541 at pp. 554-556, 561, 563). At common law, where the Crown is the employer, and the office is not an ancient office with special incidents, the employment, whether it be permanent or temporary, is during pleasure only, and the Crown servant may be dismissed at any time without notice : *Shenton v. Smith* ([1895] A.C. 229 at pp. 234-5) ; *Dunn v. The Queen* ([1896] 1 Q.B. 116) ; *Carey v. The Commonwealth* (30 C.L.R. 132) ; or may be temporarily suspended from his office : *Hunkin v. Siebert* (51 C.L.R. 538 at pp. 541-2). This right in the Crown exists, notwithstanding any provision in the contract of employment to the contrary : *Hales v. R.* (34 T.L.R. 341, 589) ; *Denning v. Secretary of State for India* (37 T.L.R. 138) ; unless, in a particular case, it is excluded by Statute. Such exclusion may be implied where a Statute prescribes special conditions for dismissal : *Gould v. Stuart* ([1896] A.C. 575) ; *Young v. Waller* ([1898] A.C. 661) ; *Le Leu v. The Commonwealth* (29 C.L.R. 305 at 311) ; *Reilly v. The King* ([1934] A.C. 176) ; or suspension : *Hunkin v. Siebert* (51 C.L.R. 538 at pp. 541-2), as the case may be. Where there is a suspension of an officer, this may operate not to vacate the office, but to relieve the officer from the performance of his duties whilst leaving him absolutely or conditionally entitled to his salary, *ibid.* at p. 541-2 ; or it may operate as a temporary suspension of the whole contract of employment.

In the present case, however, the conditions of employment are regulated by Statute. By the Government Railways Act, 1912, No. 30 as amended by No. 61, 1931, s. 2, and No. 31, 1932, s. 4, it is provided that the Commissioner for Railways shall be a body corporate under the name of "The Commissioner for Railways," which, for the purposes of any Act, shall be deemed a statutory body representing the Crown. The Commissioner is the authority to carry out the Government Railways Act : s. 4. The property in the railways is vested in him, for an estate in fee simple as regards land : s. 11. He is required to maintain the railways, and act as a common carrier : s. 33. He is required, also, to appoint or employ such officers to assist in the execution of the Act as he thinks necessary,

and every officer so appointed shall hold office during pleasure only ; he is required, further, to pay them such salaries, wages and allowances as Parliament appropriates for that purpose : s. 70. All persons employed in the railway service, except supernumeraries, shall be deemed to be employed in a permanent office : s. 72 (1). The Commissioner is empowered to remove any officer : s. 78. In certain circumstances an officer must be removed and is incapable of re-employment : s. 79. In others, he is deemed to have vacated his office : s. 80. Whenever any officer in any branch of the railway service is guilty of misconduct or of breaking any rule, by-law or regulation, he may be dealt with in the following manner—(1) the officer at the head of the branch may in the prescribed manner (a) dismiss or suspend him or (b) fine him a sum not exceeding £5, or (c) reduce him in rank, position or grade and pay : s. 82 ; (2) any officer in charge of a railway station may temporarily suspend at such station any subordinate until the officer at the head of the branch has dealt with the suspension : s. 83 (1) ; and (3) a charge may be brought against him before a Board, which otherwise acts as an appeal board, and this Board may (a) suspend him, or if he has already been suspended, may further suspend him for a period not exceeding six months without salary or wages, or (b) may inflict a fine to be deducted from his pay, or (c) may dismiss him : s. 83 (2). An officer may appeal from the head of the branch to the Board : s. 82. Every such appeal must be lodged within seven days of the date of the decision appealed against, and must be heard within 30 days of being lodged : s. 91. The appellant is entitled to be represented at the hearing : s. 92 (2). The Board may confirm or modify any decision appealed against, or make any such order thereon as they think fit : s. 92 (3). Every decision of the Board is final and conclusive, unless punishment is thereby imposed involving dismissal, or reduction of rank, position, grade or pay, in which case the officer may within seven days after being informed of the decision appeal to the Commissioner, who may “confirm, modify, or otherwise determine such appeal,” and whose determination is final and conclusive : s. 93 (2).

It has been held that these provisions supply a code : *Steph v. Railway Commissioners* (42 W.N. 181). It is therefore un-

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necessary to consider whether, in their absence, the Commissioner ought to be regarded as standing in the same position as the Crown as regards the power of dismissal and suspension : *Railway Commissioner v. Orton* (36 C.L.R. 422 at pp. 428-9). And it is necessary to examine the provisions of the Act to ascertain in what circumstances an officer may be suspended, how a suspension may be effected, and what its consequences are.

I deal first with the contention that in order to succeed in his defence the defendant must establish that the plaintiff was guilty of misconduct which justified the suspension relied on. Where the rights and duties of the parties are regulated by the common law, and it is alleged in response to an action for wrongful dismissal that the plaintiff was dismissed for misconduct, the burden of proof is on the defendant to prove the existence of an act of misconduct justifying the dismissal. But we are here concerned with the provisions of a Statute. I am of opinion that the proper construction of s. 82 is that whenever an officer is in the opinion of the head of his branch guilty of misconduct the head of his branch may in the prescribed manner suspend him. There is nothing in the form of the language used which prevents such a construction, as is seen by reference to such cases as *Local Board of Health of Perth v. Maley* (1 C.L.R. 702); *Manning v. Williams* (9 S.R. 703); and *Gardner v. The Council of the Municipality of Kogarah* (25 S.R. 597). There is a parallelism between s. 82 and s. 83 (2) where it is clearly the Board which determines the matter of misconduct; and there is the fact that an appeal lies from the head of the branch to the Board, and from the Board to the Commissioner. These provisions are quite inconsistent with the question of misconduct, for any of the purposes of s. 82, being determined by any other person than the head of the branch, subject to the right of appeal provided for by that section. The section has been described as investing an administrative officer with an authority which is not absolute, but is subject to review by an administrative Board: *Grady v. Commissioner for Railways (N.S.W.)* (53 C.L.R. 229 at p. 232). It is a provision by Statute of what the parties had provided consensually in *Kelmar v. Adelaide United Friendly Societies* ([1913] S.A.L.R. 121). I am of

opinion that the plaintiff cannot in a Court of Justice challenge the correctness of a finding by the head of a branch under s. 82 that he has been guilty of misconduct. If he wishes to challenge it, it is for him to appeal in the prescribed manner.

I am also unable to agree with the contention that suspension under s. 82 cannot involve any loss of salary. It is obvious that the powers conferred by this section are punitive. They include power to fine, to reduce in pay, and even to dismiss, as well as to suspend. I am of opinion that the power to suspend given by s. 82 is punitive, and enables the head of a branch to suspend by way of punishment for a period. It may well include also the power to suspend provisionally pending the determination of a charge before the Board under s. 83. However this may be, suspension involves, *prima facie*, at any rate, loss of salary or wages during the period of suspension. It may be that if there is an appeal the suspension may be annulled, so that a right to receive salary during the suspension period may arise. But unless and until an effective suspension is nullified there is no right to salary during the period of its operation. I am not impressed by the argument based on the presence of the words "without salary or wages" in s. 83 (2) and their absence from s. 82. There is a parallelism between the two sections. Section 83 (2) seems to contemplate that an officer who has been already to some extent dealt with under s. 82 and has been suspended under that section, may come up before the Board to be further dealt with. The provision that if he has been already suspended he may be further suspended without salary or wages rather goes to suggest that the further suspension is of the same kind as that contemplated as already existing.

There remains the question whether the plaintiff was ever suspended at all : *cf. Kelmar's Case* ([1913] S.A.L.R. 121). If he was not, it is obvious that there is no substance behind the second plea. Section 82 provides that the officer at the head of the branch may "in the prescribed manner" suspend an officer who is guilty of misconduct or of breaking any rule, by-law or regulation. By s. 3, unless the context or subject matter otherwise indicates or requires, "prescribed" means prescribed by regulations or by-laws made under the Act.

By s. 102, the Commissioner is required to make regulations (j) for carrying into effect any provision of the Act : such

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regulations if confirmed by the Governor must be published in the Gazette ; they take effect from 7 clear days after publication unless a later date be specified, and are subject for a limited time to disallowance by either House of Parliament. By s. 64 the Commissioner is empowered to make by-laws, which are subject to similar confirmation, publication and disallowance. It is admitted that no regulations or by-laws have ever been made by the Commissioner prescribing how heads of branches may deal with officers under s. 82, and that no manner has ever been prescribed in which they may be dealt with. It is contended that so long as these conditions exist s. 82 is unavailable, and there can be no suspension under that section. The Act undoubtedly contemplates that there shall be a prescribed manner in which heads of branches are to act in exercising their administrative powers. There is no similar provision in the case of original proceedings before the Board under s. 83 (2) ; perhaps this was because reliance was placed on the qualifications prescribed for the chairman by s. 87 (1) ; but in the case of appeals from the head of a branch to the Board, s. 88 (3) empowers the Governor to make regulations, which must be published in the Gazette, as to the proceedings of the Board. Since an officer has a right of appeal against anything done under s. 82, and since every appeal to the Board must be lodged within 7 days of the date of the decision appealed against (s. 91), it is evident that every act adversely affecting an officer under s. 82 must at least include a decision so formulated as to indicate its nature and so announced as to give the officer an opportunity of becoming acquainted with it. Can the head of the branch proceed in the absence of any prescribed procedure ? The section deals with matters in respect of which, except for dismissal, the Commissioner is not by the Act invested with any original power ; and, in the case of suspension, there is no appeal from the Board to the Commissioner under s. 93.

It may well be that it was contemplated by the Legislature that the Commissioner would participate in dealing with officers under s. 82 by prescribing the general conditions under which they were to be dealt with. Certainly no power is given to the heads of branches to prescribe a manner for themselves. So far as Courts are concerned, it has been held that

if jurisdiction is conferred upon a Court, it may and should exercise that jurisdiction; and if no procedural machinery has been provided, it is for the Court to provide such machinery as best it can: *Regina v. Justices of the Central Bailiwick, Ex McEvoy* (7 V.L.R. Law 90 at pp. 93-4); *In the Will of Todd* (13 V.L.R. 185 at p. 189); *A.-G. for Ontario v. Daly* ([1924] A.C. 1011 at p. 1015). If it is provided by Statute that an application may be made to a Court within the time and in the manner and on the conditions directed by rules of Court, this is regarded as creating a right in the applicant to make, and a duty in the Court to hear, the application, irrespectively of whether any rules have been made. In such a case, there is a power in the Court to prescribe conditions by rules, but until it does so, the Court must deal with applications as justice and common sense demand: *Inland Revenue Commissioners v. Joicey* ([1913] 1 K.B. 445 at 451, 454-6); *H.M.S. Archer* ([1919] P. 1 at p. 5); *White Transit Co. Ltd. v. Metropolitan Transport Trust* (Cor. Harvey J. 5-6-31). It has been said also that where an Act provides that something is to be done by a public officer of a judicial or quasi-judicial nature, and no machinery is provided, he must do the best he can with the means he has available: *Edgar v. Greenwood* ([1910] V.L.L. 137 at pp. 144-5). But the matter in question in the present case is the deprivation of an officer of certain legal rights to which he is entitled by virtue of a permanent office in the railway service which he holds during pleasure. Section 82 says, in effect, that the head of his branch may in certain circumstances deprive him of these rights in the prescribed manner. Only the Commissioner, subject to approval by the Governor and disallowance by Parliament, can prescribe the manner; and no such manner has been prescribed. In these circumstances, the position of the head of a branch differs radically from that of a tribunal which there is nothing to prevent from providing its own machinery. I think that the prescription of a manner must be regarded as intended by the Legislature to be an essential condition of action under the section.

For these reasons, I am of opinion that the authorities to which we have been referred on behalf of the Commissioner are not really in point, and that the decision in *Gramophone Co.*

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1935. *Ltd. v. Leo Feist Incorporated* (41 C.L.R. 1) provides a more helpful analogy. By the Imperial Copyright Act, 1911, s. 19, it is provided that if a person proves that he has (*inter alia*) paid royalties in the prescribed manner to the owner of the copyright of a musical work, the making by him of gramophone records of the work shall not be deemed to be an infringement of the copyright. No manner of paying royalties covering the case in question had been prescribed. It was held that it followed that records could not lawfully be made in reliance upon s. 19; see pp. 13-14, 17. In the case now before us I am of opinion that the rights of officers cannot be interfered with by heads of branches under s. 82 for alleged misconduct unless and until the Commissioner in accordance with the Act provides a prescribed manner in which they may be dealt with.

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In view of the admission made at the hearing of these matters, it is now necessary to read the second plea as containing an allegation that no manner has been prescribed for the purposes of s. 82. So read, I am of opinion, for the reasons above stated, that the plea is demurrable; and that there should, therefore, be judgment for the plaintiff on the demurrer. In these circumstances it is unnecessary to make any order in the application for particulars, except that the defendant should pay the costs of the application.

STEPHEN and BAVIN JJ. concurred.

Solicitors : *A. Landa & Co.* ; *F. W. Bretnall* (Solicitor for Transport).
