

WZLR
IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

A. No. 1164/70

No Special
Consideration

IN THE MATTER of the Declaratory
Judgments Act, 1908

- AND -

IN THE MATTER of the Public Service
Regulations 1964

BETWEEN CHARLES VICTOR HARRIS
and JACK ALAN CAMERON
both of Auckland, Public
Servants

Plaintiffs

146
1X
A N D THE ATTORNEY-GENERAL
(sued in respect of the
Justice Department, the
Defence Department and
the State Services
Commission)

Defendant

Hearing: 24th May, 1971.

Counsel: Barker and Maclaren for Plaintiffs.
Bridger for Defendant.

Judgment: 28th May, 1971.

JUDGMENT OF HENRY, J.

This is an action by two officers of the Public Service who are asking for a declaration concerning the respective dates on which they will be required, by reason of Regulation 71 (2) of the Public Service Regulations, 1964, (S.R. 1964/115), to retire from the Service. Except as to dates, about which there is no dispute, each had similar service with the Royal New Zealand Navy and retired therefrom on superannuation. By reason of Section 26 (1) of the Public Service Amendment Act, 1964, neither, whilst so serving, came within the provisions of the State Services Act, 1962, because that enactment omitted the Navy Department from the "Departments "of the Public Service" to which the principal Act applied. So the position is that each Plaintiff had retired from the Navy Department but on superannuation from the Superannuation Fund

which applies to all Public Service employees generally. After retirement each Plaintiff, by a subsequent appointment, became an officer of a department of the Public Service to which the State Services Act, 1962, and the said Regulations applied. Each Plaintiff contends that the provisions for compulsory retirement do not apply until he reaches the age of 65 years. The Departments, represented by Defendant, contend that earlier service in the Navy and later service with the Departments of State Services must be added together and that when a total of 40 years' service has expired then the provisions as to compulsory retirement come into effect. The dates and periods which make the difference are not important. The answer to the questions asked depends upon what is comprehended in the term "service" in Regulation 71 (2).

Regulation 71 (2) reads:-

" 71. (2) Every officer whose continuous service commenced before the 1st day of August, 1964, and who is not a contributor to the Government Superannuation Fund, shall, on completion of 40 years' service, be required to relinquish his office at such date (not being later than the date on which he attains the age of 60 years) as the Commission directs. A non-contributor to the Fund as aforesaid whose length of service at the age of 60 years does not exceed 40 years shall be required to relinquish his office at the date on which he completes 40 years' service or at the age of 65 years, whichever is the earlier. "

It is not disputed that each Plaintiff's service commenced before August 1st, 1964, and that each is not a contributor to the Government Superannuation Fund, so the Regulation unquestionably applies. The sole question is whether "service" is confined to their later appointment to a department of the Public Service (that is after retirement from the Navy) or whether it includes also the earlier service with the Navy. "Service" is defined in Regulation 2 but only in relation to calculation of retirement leave, and so does not help.

"Public Service" is also defined but by reason of the amending Act of 1964 (cited supra) the Navy Department, with which each Plaintiff earlier had service, is not included. The Court therefore must consider the natural meaning of the word "service" in Regulation 71 (2), or, if there be an ambiguity, resolve that ambiguity.

Prima facie "service" must in the context mean service to which the Act and the Regulations apply. It would require clear language to extend the term to other service and it is nothing to the point that there may be service with the Government which does not come within the ambit of the Act and the Regulations. It is, I think, clear beyond peradventure that the "continuous" "service" of each Plaintiff is confined to the period since each was re-engaged in his later employment. The earlier engagement or service with the Navy had come to an end and there was in each case a new and completely different basis of employment which had no reference to earlier service and was in no way dependent upon or referable to it. In my judgment the word "service" wherever it appears in Regulation 71 (2) has a similar meaning.

Counsel for defendant has argued that an "instruction" issued under Section 73 must be read in conjunction with Regulation 71 (2) and that, when so read, the prior service with the Navy ought to be included in the calculation of the period of service. Section 73 reads:-

" 73. Instructions: Subject to this Act and any regulations made or continuing in force thereunder, and without restricting the powers of the Commission, it is hereby declared that the Commission may from time to time issue in the form of a Public Service Manual instructions which shall be observed by all employees. "

Section 74 makes all such Instructions notice to and binding upon all employees. The relevant Instruction is as follows:-

" N10 Service for retirement purposes:

Service in any branch of the Government Service, e.g. Railways, Post Office, Armed Forces, Teaching, Police, is regarded as service for compulsory retirement purposes. For the purpose of this instruction, "Armed Forces" service means any Regular Force service that was being served on 1 April 1947 or was served subsequent to that date. It does not include Regular Force service which was terminated prior to 1 April 1947. Any other armed forces service, except that which has been purchased for superannuation purposes is also to be excluded. "

In my judgment there is no power under Section 73 which enables the Commission to alter, extend or define the provisions of a Regulation (such as Regulation 71 (2)). These Regulations are made under Section 72 which empowers the Governor-General by Order in Council to make Regulations. Section 72 (p) expressly gives the Governor-General by Order in Council authority to make Regulations prescribing conditions of retirement. No sub-delegation of that power has been pointed to. The Commission has not been given any powers under Regulation 71 (2). If there be conflict then Regulation 4 determines any conflict in favour of the Regulations. I can find no basis upon which the said Instruction can be used either to construe or to extend the meaning of the word "service" in Regulation 71 (2). The authorities cited do not apply because there is no legislative nexus between the Regulations and the Instruction. Each stands as a separate and distinct exercise of subordinate legislative power and rests upon, and is limited by, its own source of authority.

In the result I hold that "service" in Regulation 71 (2) refers to service of each Plaintiff upon re-engagement after his retirement from the Navy and that such earlier service in the Navy is not to be included in any calculation of the periods referred to in Regulation 71 (2). If a more specific date is required Counsel may apply. Defendant to pay costs \$75.00, plus disbursements. Declarations accordingly.

Solicitors:

Finlay, Shieff, Angland & Maclaren, Auckland, for Plaintiffs.
Crown Law Office, Auckland, for Defendant.