

MARKS v. COMMONWEALTH¹

Defence forces—Officers commission—Right to resign—Defence Act 1903-1956 (Cth), section 17(1).

The plaintiff claimed that he, as an officer of the Australian Army, had on 17 April 1963 tendered the resignation of his Commission, giving three months notice and further that on the expiry of three months from 17 April 1963 he was entitled to have his resignation accepted by the Governor-General, but that it had not been accepted. He sought two declarations—

- (a) that his resignation 'should' have been accepted by the Governor-General on or before the expiration of three months and he was then 'bound' to accept it; and
- (b) that in law the plaintiff had ceased to be a commissioned officer on 17 July 1963.

The Commonwealth demurred to the statement of claim on the grounds that—

- (a) that the Governor-General was not bound to accept the resignation of an officer either at or before the expiry of the three months from the date when the resignation was tendered or at all; and

¹ (1964) 38 A.L.J.R. 140. High Court of Australia; Kitto, Taylor, Menzies, Windeyer and Owen JJ. This decision was applied in *O'Day v. Commonwealth* (1964) 38 A.L.J.R. 159 which dealt with the resignation of a naval commission.

- (b) that an officer does not at the expiry of three months cease to be an officer by reason only of his having tendered the resignation of his commission.

The case turned upon the meaning of section 17 (l) of the Defence Act 1903-1956 (Cth) which is as follows—

Except during time of war an officer may by writing under his hand tender the resignation of his commission at any time by giving three months notice.

The Court held unanimously that the acceptance of an officer's resignation during peace time was not automatic upon the expiry of three months from the date of the tendering of his resignation. It was held that the words 'tender his resignation' in that section meant no more than 'offer' his resignation which as a natural corollary meant that the resignation was not complete until such time as the Governor-General had accepted it. Further it was held that the specified period of time of three months did no more than give a period of grace to the Executive to fulfil the various administrative functions involved in the acceptance by the Governor-General of an officer's resignation. As to the subsidiary ground for the decision, the Court held that unless the Act specifically altered the common law as to the nature of a commission in the armed forces, then the common law applied to this particular case.

The Court considered that *Hearson v. Churchill*² and *R. v. Cuming*³ laid down the common law on this point to be that a commission in the armed forces was not unilaterally terminable by the officer but required the assent of the Crown to make it effective.

The Court then went on to hold that there was nothing in the Defence Act which specifically altered the common law position. In the words of Kitto J.—

It is enough to say of [the nature of military service] that, however unlikely it may be in the abstract that Parliament should intend no legal result to flow from its enactment, it is much more unlikely that Parliament should intend to enable a person who has accepted the Queen's commission as a military officer in a force raised for continuous service to set up a precise limit of three months to the right of the Crown to retain his services regardless of circumstances, even in time of peace.⁴

The judgement of Windeyer J. is the most detailed and studied reasoning of the Bench in this case. He too was of the opinion that section 17 (l) was decisive in favour of the Commonwealth. However his judgment would seem to be limited to the facts of this case and he appears cautious to go beyond this. 'It [the statement of claim] does not allege that the resignation has been refused. And I do not think it necessary to consider

² [1892] 2 Q.B. 144.

³ (1887) 19 Q.B.D. 13.

⁴ (1964) 38 A.L.J.R. 140, 141.

what might be the position if it did'.⁵ He then went on to hold that in the instant case there is no duty imposed on the Governor-General to accept the resignation within three months and further that the officer's commission was not automatically terminated on the expiry of three months notice. He considered that the normal practice with offices held at the pleasure of the Crown was that they had to be terminated by the acceptance of a resignation—

Yet in practice the acceptance of a resignation in whatever form it was made was a formality that was sometimes deferred but not refused.⁶

However he held that the acceptance was not a legal right of the officer and could thus not be enforced by a Court of law.

It would appear that the cautious approach taken by Windeyer J. is a logical necessity when regard is had to the terms of section 17 (1). He says no more than that section 17 (1) does not give an enforceable right to have an officer's resignation accepted within three months. There is an insinuation in his judgment however that the Governor-General cannot demand the services of a person holding an office at the pleasure of the Crown for an indefinite and unreasonable period. It would thus appear that at common law an officer would have a legal right to have his resignation accepted if it could be shown that a refusal would amount to an unreasonable detention.

It can be argued, in view of the plaintiff's submissions, that section 17 (1) has been given an unwarrantably narrow interpretation by the Court. It had been submitted that the phrases 'except during time of war' and 'by giving three months notice' would be totally meaningless unless they entitled the plaintiff to one or both of the declarations he was seeking. In support of this it may be said that section 17 (1) is ambiguous. It could mean that no resignation could be tendered by an officer during time of war, or that in peace time some other conditions are imposed upon the Governor-General in relation to tendered resignations than those existing in wartime. However it is highly improbable that the legislature would enact section 17 (1) to achieve the former result, especially as the tendering of a resignation is a voluntary act, which, impliedly at least, need not be accepted during wartime. It is to be noted that Windeyer J. alone tackled the question of the significance of the existence of this phrase in the section. He stated—'An officer may be retired during time of war . . . but he cannot tender his resignation. In peace time he can but only then by giving three months notice'.⁷ 'At common law an officer could tender his resignation at any time but section 17 (1) alters this'.⁷

This would seem to be a wrong interpretation of the section for had the legislature intended to ban the tendering of resignations in wartime (a seemingly unnecessary act in view of the discretion imposed

⁵ *Ibid.* 153.

⁶ *Ibid.* 155.

⁷ *Ibid.* 153.

on the Governor-General to reject the tendered resignation) it would not have done so by implication from a section dealing with questions of notice in all times when war is not in progress. However Windeyer J. alone dealt with this question which is essential to the proper interpretation of section 17 (1). Kitto J. did so by implication in his readiness to believe that the legislature would enact to no purpose rather than to purposes opposed to his interpretation of the meaning of section 17 (1). It is submitted that the existence of the phrase 'except in time of war' goes no further than to limit to peace time the conditions of the rest of section 17 (1), and was not intended to prohibit the tendering of resignations during wartime.

The Court held that the specification of the three month period was to enable the Executive a period of grace so that the tendered resignation could go through the proper administrative channels. However this interpretation would also appear to be illogical as it would appear that the resignation in the instant case was neither rejected nor accepted within the three month period and did not have to be. The fact that in the opinion of the Court the Governor-General does not have to accept the resignation means also that if he does accept it he does not have to do so within three months—he could readily accept it at any time. Thus, even though the Court held that the three month period is a period for administrative functions and that the section intended it to be no more than this, it is implied in the decision that this has no meaning ; for the Governor-General can accept it at any time. Thus the specified period must have some other meaning than given to it by the Court if it is to have any meaning at all.

As to the common law position it is submitted that the cases of *Hearson v. Churchill* and *R. v. Cuming* do not lay down that which the Court imputed to them. The statements of the Court in *Hearson's* case regarding officers' resignations are purely *dicta* and not of general application. The case concerned a naval engineer borne on the books of a ship and the Court expressly reserved its decisions to the facts of that situation. In the words of Fry L.J.—

Whether or not it is possible for an officer who has accepted a commission at any time to throw it up at his own will and pleasure, I do not undertake to say. I doubt whether it is so, but I am content to leave the question open.⁸

The case of *R. v. Cuming* is of interest for two reasons, first for the decision itself and secondly for the light it throws on the meaning of the three month period of notice specified in section 17 (1). This case also concerned a naval officer and was a decision concerning section 19 of the Naval Discipline Act 1866 (U.K.) which dealt with desertion by a naval officer. In that case the defendant had sent his commission to his captain and therefore pleaded that he did not come within the terms of the Act.

⁸ [1892] 2 Q.B. 144, 150.

The Court replied—

If this were so, every officer of one of the Queen's ships might with impunity abandon the ship whenever he pleased. It is obvious that such a construction would be fatal to the Act.⁹

It will be noted, first, that the question before the Court was one of statutory interpretation and thus not relevant, save for *dicta*, to the present case. Secondly, the case showed that the reason for the Court's decision was that it could not admit that an officer can simply leave his ship and not return. This is for obvious reasons. However when one compares this with section 17 (1) there is the marked difference that in that section a period of three months is provided for as requisite notice except during time of war. From this it is possible that the Court in the instant case could have given meaning to the specification of three months notice (which they did not) by holding that this period is provided for a replacement to be posted. It would seem reasonable to say that the legislature did not intend an officer to leave his post unattended, but when a period of notice is specified for his resignation the meaning would seem to be obvious: to provide a period during which the administration could fill the office that is vacated by an officer's resignation.

In conclusion it may be said that the decision of the Court in this case rendered part at least of section 17 (1) completely meaningless, and would thus appear to be inadequate, if not incorrect. Section 17 (1) can be given a meaning that is consistent with the words used; and this would seem to be that in peace time an officer can resign his commission by giving three months notice, but that in wartime he cannot.

J. B. THYNNE

⁹ (1887) 19 Q.B.D. 13, 17.