

AUSTRALIAN EDUCATION UNION v DEPARTMENT OF EDUCATION AND CHILDREN'S SERVICES (A4/2011)

Court appealed from: Full Court of the Supreme Court of South Australia
[2010] SASC 161

Date of judgment: 28 May 2010

Date special leave granted: 11 February 2011

Since the passage of the *Education Act 1972 (SA)* ("the Act"), the Minister of Education of South Australia purported to appoint teachers engaged on a temporary basis under the then s 9(4) of the Act which provided:

The Minister may appoint such officers and employees (in addition to the officers of the Department and of the teaching service) as he considers necessary for the proper administration of this Act or for the welfare of the students of any school.

There was a more specific power for the appointment of permanent and temporary teachers under s 15 of the Act which provided, inter alia:

- (1) *Subject to this Act, the Minister may appoint such teachers to be officers of the teaching service as he thinks fit.*
- (2) *An officer may be so appointed on a permanent or temporary basis...*
- (4) *No officer appointed on a permanent basis shall be dismissed or retired from the teaching service except in accordance with the provision of this Act.*

The practice of appointment under s 9(4) was ultimately discontinued in 2005. All temporary appointments are now made under s 15. As a result of the former practice, a number of teachers had been excluded from the long service leave regime and associated potential entitlements under Pt 3 of the Act. The appellant brought proceedings in the Industrial Relations Court of South Australia on behalf of two temporary relief teachers who, having been purportedly appointed under s 9(4), claimed long service leave entitlements. The parties stated two questions of law on agreed facts, being whether the Minister was entitled to appoint the teachers under s 9(4) and if not, whether the teachers' long service leave entitlements were to be calculated under Pt 3 of the Act.

The Industrial Relations Court (Jennings SJ, McCusker J and Gilchrist J) found that the very wide and general powers conferred on the Minister under Part 2 suggested that it was Parliament's intention to empower the Minister, subject to the constraints imposed by the Act, to do whatever was necessary to make proper provision for education in the State. This called for a "generous construction that allow[ed] for flexibility." The only limitation on the Minister when appointing officers and employees was the considered necessity for the proper administration of the Act or the welfare of the students at any school.

The appellant's appeal to the Full Court of the Supreme Court (Nyland, Gray and Vanstone JJ) was dismissed. Gray J, with whom Nyland J agreed, found that, insofar as the powers in ss 15 and 9(4) both related to the appointment of

“teachers”, s 9(4) was an auxiliary power to that conferred by s 15. The purpose of s 9(4) was clear: to provide power of additional appointment to address the diverse and unpredictable employment requirements necessary for the proper administration of the Act and the welfare of students. There was no good reason why teachers should be excluded from that process. Thus, s 9(4) at the time it was in force authorised the Minister to appoint officers to be engaged as teachers independently of s 15 of the Act.

Vanstone J found that the matter was finely balanced and that the appellant’s argument that the specific provisions addressing appointment of teachers in Pt 3 should be read as implicitly excluding the use of the Pt 2 powers for that purpose had some attraction. However, her Honour could not find in the language of the section or the structure of the Act any clear indication that the Minister was to be restricted to appointing teachers under s 15.

The grounds of appeal include:

- the Court erred in law in holding that s 9(4) of the Act authorised the Minister of Education to appoint officers to be engaged as teachers independently of s 15 of the Act and ought to have found that the Minister was never empowered to appoint teachers under s 9(4) of the Act.