[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN WORKERS' UNION . CLAIMANTS;

AND

THE PASTORALISTS' FEDERAL COUNCIL AND OTHERS . . . . . RESPONDENTS.

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SYDNEY, *April* 16-20, 23-25, 30.

Higgins J.

IN CHAMBERS.

Industrial Arbitration—Dispute, proof of existence of—Plaint by organization of employees—Dispute alleged between organization and employers—Necessity of proof of dispute between employers and their employees—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (XXXV.)—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 4, 21AA.

Where, by a plaint in the Commonwealth Court of Conciliation and Arbitration, a dispute is alleged to exist between an organization of employees and a number of employers who are named as respondents, it is not necessary in proceedings under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 to prove that the dispute exists between employees who are members of the organization and their respective employers who are respondents; it is sufficient to prove that the organization is in dispute with the respective respondents.

Held, therefore, that where by the plaint a dispute was alleged to exist between the organization and the respondents as to the conditions of labour of employees who were general hands engaged throughout the year in the pastoral industry, it was sufficient to prove that that dispute existed between the organization as such and the respondents who employed employees of that class.

Colliery Employees' Federation of the Northern District, New South Wales, v. Brown, 3 C.L.R., 255, distinguished.

SUMMONS.

Proceedings in the Commonwealth Court of Conciliation and Arbitration were instituted by a plaint in which the Australian Workers' Union, an organization of employees, were claimants, and

the Pastoralists' Federal Council and a large number of persons, firms and companies were respondents. An application was made by motion to the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 for a decision on the question whether the alleged dispute or any part thereof existed, or was threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State. At the request of *Barton* J., acting as Chief Justice, and of all parties appearing, the motion was taken by *Higgins* J., who, with the assent of all the respondents who appeared, directed that the application should be treated and heard as a summons in Chambers, and it was so treated and heard.

The material facts are stated in the judgment of *Higgins* J. hereunder.

Campbell K.C. (with him *Armstrong*), for the claimants.

Knox K.C. (with him *Kelynack* and *Pitt*), for the respondents.

Cur. adv. vult.

April 30.

HIGGINS J. read the following judgment:—This is an inquiry under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*. It is admitted by the respondents who have appeared that there is a dispute extending beyond the limits of any one State as to the operations of shearing; and I find accordingly. But it is denied that there is any dispute as to the conditions of labour of the general hands engaged in the pastoral industry throughout the year —the station hands. I have to decide this issue of fact, having been requested by both sides and by the Acting Chief Justice to do so. Following the decisions of the High Court, as expressed by the majority in their judgments, I take it that when one party tries to get some terms from another and the other refuses, and neither party yields, there is a dispute (*Builders' Labourers' Case* (1)).

The precise issue which I have to determine is whether the dispute alleged in the plaint, or any part thereof, exists or is "threatened

(1) 18 C.L.R., 224.

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or impending or probable " (see sec. 21AA, and the plaint). Now, on looking at the plaint, I find it alleged that the Australian Workers' Union is in dispute with the respondents in respect of certain industrial matters : " The Australian Workers' Union, an organization of employees, being in dispute with " &c. I must find on this issue, whatever may be the consequences of the finding. If I find in the affirmative, the question will still remain whether such a dispute gives jurisdiction to the Court of Conciliation. It is contended by Mr. *Knox* that there can be no industrial dispute within the Constitution and the Act unless it be proved that there is a dispute between the respondents respectively and some one or more of that respondent's employees. In the case of most of the employers, the organizers have obtained from one or more of the station hands written authority for the Union to present demands to his or their employers ; but in many cases no such authority has been obtained. The causes of this failure are various, but the principal cause is found in the nature of the occupation. Stations are wide, and station hands relatively are few ; the station hand is often at a distant part of the station when the organizer comes on his round, and it would sometimes take days to find a particular boundary rider and to get his signature to the authority. But the practical difficulty of establishing the fact of dispute does not in any way relieve the claimant Union of the burden of proving that each respondent employer is in dispute with one of his station hands, if Mr. *Knox's* contention is correct.

As I have pointed out, I must find whether it is true, as alleged in the plaint, that there is a dispute between the Union and each respondent. The Union by its general secretary made a demand as follows : " I have been authorized by the Australian Workers' Union and the members of the said Union employed at your station to demand " &c. It is not contended that this demand, refused and persisted in, if made by or by the authority of an employee, would not constitute a dispute. Indeed, no employer has given any evidence, or called any evidence, to contradict or qualify the evidence given by the claimants' witnesses as to the fact of dispute. But it is contended that so far as it is made by the Union without such authority, it does not constitute a dispute. Why not ? There

is nothing that I can find in the Constitution to limit "industrial disputes," in sec. 51 (xxxv.), to disputes between actual employers and their actual employees. A dispute between a Union and an employer is much more serious in its effect on industry than a dispute between an individual employee and his employer; and it would be strange indeed if a dispute of the former kind were to be treated as outside the purview of the constitutional power. No doubt, the Act, which was passed under this power, could have limited the class of disputes to be prevented or settled; but it has not done so. By sec. 4, "industrial dispute" means an industrial dispute extending beyond the limits of any one State and includes "(1) any dispute as to industrial matters, and (2) any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State, and (3) any threatened or impending or probable industrial dispute." These words certainly do not limit the class of disputes to be dealt with under the Act. In the Act as it originally stood, before the amendment of 1911, the *only* industrial dispute that could be dealt with (under a plaint), was a dispute to which an organization of employees is a party; for, under sec. 4, an "industrial dispute" was defined as one arising between an employer or an organization of employers on the one part *and an organization of employees on the other part.* The amendment added to, did not subtract from, the class of industrial disputes. Thereafter it included, for the remedial purposes of the Act, disputes where the disputing employees are not united in an organization, and disputes which are merely threatened, impending or probable. There is not the slightest indication of an intention to take out of "industrial disputes" that kind of industrial dispute which theretofore had been the sole kind of industrial dispute that could be the subject of a plaint. What, then, is the subject of the dispute in which the Union is one of the disputing parties? The Union insists (*inter alia*) that any of the respondents who employs, now or hereafter, any of its members as a boundary rider shall be forbidden to pay him less than "40s. per week and found." This is a dispute of real substance: nothing is so likely to lead to the stoppage of industry. I need not consider the case of a bystander,

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out of pure benevolence to employees, demanding of the employer an increase of wages to be paid to his employees ; for we are dealing with an industrial organization of employees, of persons " whose usual occupation is that of employee in any industry " (see definition of " employee," sec. 4). The members of the organization have a direct personal interest in maintaining or in increasing the minimum rates ; they form the union for this very purpose. The Act recognizes unions, and makes unionism a part of its scheme. One of the " chief objects " of the Act is " to facilitate and encourage the organization of representative bodies of employees " (sec. 2 (VI.)) ; and Part V. of the Act is specially devoted to the constitution of organizations for the purposes of the Act. No plaint can be submitted to the Court except by an organization (sec. 19 (*b*)) ; it is the organization that is empowered, in the case of a plaint, to make any agreement for the settlement of the dispute (sec. 24). The organization cannot be treated as a mere agent, or as the nominal claimant (as in the case of the public officer of a bank) ; for it is bound by the award, with all its members ; it is liable in its funds for breaches of the award (secs. 29, 38 (*c*) (*d*) (*e*)). The remedy of arbitration being substituted for the remedy of strike, the organization, as well as the actual employees, is made liable to a penalty for anything in the nature of a strike (sec. 6). If I am free to follow my own view of the Act, I should not hesitate to say that a union or organization is not excluded by the Act from being a party to a dispute for the purposes of the Act—a party principal, not a mere agent or figurehead ; and that the dispute alleged in this plaint and now proved—a dispute between the Union and employers—is a dispute within the meaning of the Act. But I should have to find in the case of each employer that there is a real dispute—a dispute of " real substance " ; and I could not make this finding in the case of employers who employ no station hands, who do all the station work themselves.

But I find myself confronted with the case of the *Colliery Employees' Federation of the Northern District, New South Wales*, v. *Brown* (1), which is said to establish that an Arbitration Court has no jurisdiction to entertain an industrial arbitration, at the instance

(1) 3 C.L.R., 255.

of a union, unless there is in existence a dispute between employees members of the union and their actual employers. Now, in the first place, that was a decision as to another Act—a State Act of New South Wales—the *Industrial Arbitration Act* of 1901 ; and it is not binding on me as to the interpretation of the Commonwealth Act, although any principles enunciated deserve full attention and respect. In the second place, the only dispute alleged in *Brown's Case* was a dispute between certain of the employees (members of the union), and their employer. There was no dispute alleged as between the union and the employer, no dispute of the character alleged here. This appears in the statement of the case (1), and in the judgment of the High Court (2). Moreover, under the New South Wales Act, the meaning of the word "employee" is confined to "person employed in any industry" (sec. 2)—that is, actually employed ; whereas under the Commonwealth Act "employee" means not only any employee in any industry, but "any person *whose usual occupation* is that of employee in any industry." The New South Wales Act, in effect, required a subsisting actual relation between employee and employer as such, whereas the Commonwealth Act concerns itself also with a possible relation. Yet as any decision that I may give in this case under sec. 21AA appears to be final, not subject to any appeal or question, as to either law or fact, I asked both parties whether they desired that I should state a case as to the interpretation of the Act ; and neither party desires me to do so. I cannot say that I feel any doubt as to the interpretation ; and it is my opinion that even if the principles said to be established in *Brown's Case* did apply to this Act, I should still have to make an award binding on the same employers as if those principles did not apply.

For it has been held by the Full High Court that the Commonwealth Court of Conciliation can take cognizance, for purposes of conciliation and (if necessary) arbitration, of a dispute which is "threatened or impending or probable" (*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (3)). These words—"threatened or impending or probable"— are not found in the Constitution (see sec. 51 (xxxv.) ; but they appear

(1) 3 C.L.R., at p. 256. (2) 3 C.L.R., at p. 262. (3) 16 C.L.R., 591.

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in the Act (sec. 4) by virtue of the power in the Constitution to make laws (for conciliation and arbitration) for the *prevention*, as well as for the settlement, of industrial disputes. You prevent an industrial dispute by intervening and by procuring either a voluntary agreement or by making what is in effect a compulsory agreement, an award, before the parties come to an actual dispute. The power to prevent industrial trouble is obviously one of the most useful functions of our Court. Now, I should be prepared to find an actual dispute existing as between the employers who refuse to accede to the demands of their actual employees, members of the Union—demands made through the Union on the authority of the actual employees—on the one side and their actual employees on the other side. I should be prepared also to find a *probable* dispute as between those employers who actually employ station hands, and from whom members of the Union are likely to seek employment as station hands. But in those numerous cases in which the work of the station is done by the employers themselves, or by their sons, relatives, or the like, I cannot find that a dispute is "probable." The burden of proving that the dispute is either actual or probable falls upon the claimant Union; and the Union has not proved it. At the most, the Union shows that such a dispute is possible. I propose to make an order accordingly.

The application under sec. 21AA was originally made in the form of a motion to the High Court; but as certain of my learned brothers, in the case of *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (1), expressed the view that that section does not give finality to a finding of the Court, but only to the finding of a Justice of the Court in Chambers, and with the assent of all the respondents who appeared, I directed that the application should be treated and heard as a summons in Chambers; and it has been so treated and heard. The order is to be drawn up as made in Chambers.

Order accordingly.

Solicitor for the claimants, *A. C. Roberts.*

Solicitors for the respondents, *McLachlan & Murray.*

B. L.

(1) 22 C.L.R., 103.