[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION . . . . . } APPLICANT;

AND

PRAHRAN AND MALVERN TRAMWAYS TRUST . . . . . } RESPONDENT.

H. C. OF A. 1918.

MELBOURNE, *Sept.* 16, 17.

Barton, Higgins and Gavan Duffy JJ.

Employer and Employee—Agreement—Interpretation—Termination of service—Charge against employee—Right to have inquiry—Breach of agreement—Commonwealth Conciliation and Arbitration Act 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 24, 38.

By an agreement made between an organization of employees and an employer, certified and filed pursuant to sec. 24 of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, it was provided (clause 29) that "Except in case of grave misconduct the services of an employee shall not be terminated without one week's notice on either side or (if the employer terminates the service) one week's pay in lieu of notice," and (clause 30) that "When a charge involving suspension or dismissal is made by any person whether inside or outside the service of" the employer "against an employee of three months' service or over, the employee shall be forthwith notified of the charge in writing and shall be permitted to call evidence in his defence, and, as far as it lies in the power of" the employer, "he shall be confronted with the person making the charge. At the inquiry the man charged shall be entitled (if he choose) to be represented by an officer or member of the Association duly authorized by the Association."

Held, that where a charge was made against an employee which, if proved, would have justified the employer in dismissing him, the employer was bound to hold an inquiry and to allow the employee to avail himself of the provisions of clause 30, notwithstanding that the employer had under clause 29 lawfully terminated the service of the employee by giving him one week's notice.

CASE STATED.

On an application by the Australian Tramway Employees' Association to the Commonwealth Court of Conciliation and Arbitration to impose a penalty on the Prahran and Malvern Tramways Trust for an alleged breach of an agreement made between the Association and the Trust, *Higgins* J. stated the following case for the opinion of the High Court :—

1. The Commonwealth Court of Conciliation and Arbitration had cognizance under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 of an industrial dispute in which the above-named Association was claimant and the Prahran and Malvern Tramways Trust and other tramway trusts and companies were respondents.

2. Before the hearing of the dispute an agreement was made between the said Association and the said Trust. A memorandum of the terms of the agreement was made in writing and certified by the President and filed in the office of the Registrar under sec. 24 of the said Act, and has the same effect as, and is deemed to be, an award.

3. On 8th January 1918 a charge was made by Signalman Bent, an officer in the service of the Trust, against one Winduss, a motorman, an employee of the Trust of more than three months' service and a member of the claimant organization. Winduss was forthwith notified of the charge in writing, and by the direction of the chief inspector answered the charge in writing.

4. The charge was a charge of grave misconduct involving suspension or dismissal.

5. On 10th January 1918 the Trust, through its traffic superintendent, gave to Winduss one week's notice terminating his service. Winduss said he would like an inquiry as he had witnesses to prove that he was not guilty, but the Trust refused to allow him to call evidence or to confront him with Bent or to let him be represented as provided in clause 30 of the agreement.

6. On the expiration of the week's notice Winduss left the service of the Trust.

7. The Trust would not have terminated the service but for the said charge. In a letter dated 14th January to the secretary of the

H. C. OF A. 1918.

AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION v. PRAHRAN AND MALVERN TRAMWAYS TRUST.

branch of the Association, the engineer and manager stated that the service of Winduss was "deemed unsatisfactory" and that it had therefore been dispensed with after one week's notice.

8. The charge, with the reply of Winduss, is entered on the record of his service with the Trust and is indorsed "one week's notice 10/1/18."

9. It is contended for the Trust that clause 30 does not apply to a case of termination of service by notice under clause 29.

10. As this is a test case involving other cases and affecting other tramways trusts and companies which have made agreements to the same or a similar effect, I state this case for the opinion of the High Court upon the questions hereinafter stated.

11. The questions arise in the proceeding, and are in my opinion questions of law.

The questions are :—

(1) On the facts stated is the Trust guilty of a breach of the agreement ?

(2) Do the provisions of clause 30 of the agreement apply to a case where an employee charged with grave misconduct involving suspension or dismissal is merely notified that his service will be terminated after a week ?

The material clauses of the agreement referred to in par. 2 of the case were as follows :—"29. Except in case of grave misconduct the services of an employee shall not be terminated without one week's notice on either side or (if the employer terminates the service) one week's pay in lieu of notice. 30. When a charge involving suspension or dismissal is made by any person whether inside or outside the service of the Trust against an employee of three months' service or over, the employee shall be forthwith notified of the charge in writing and shall be permitted to call evidence in his defence, and, as far as it lies in the power of the Trust, he shall be confronted with the person making the charge. At the inquiry the man charged shall be entitled (if he choose) to be represented by an officer or member of the Association duly authorized by the Association."

Starke, for the Prahran and Malvern Tramways Trust. Clause 30 of the agreement only applies to cases where the Trust wishes to use the power of dismissal or suspension, and has no application to a case where the Trust has properly terminated the service of the employee under clause 29.

T. C. Brennan, for the Australian Tramway Employees' Association. Clause 30 is entirely independent of clause 29, and is inserted for the benefit of the employees. Even if the Trust chooses under clause 29 to terminate the service of an employee against whom a charge of the nature stated in clause 30 has been made, the Trust must under clause 30 notify him of the charge, and hold an inquiry, and afford the employee an opportunity of making his defence.

Starke, in reply. If clause 30 is interpreted as providing that whenever a charge is made which, if proved, would justify the Trust in dismissing or suspending an employee the employee must be notified and an inquiry must be held even if the Trust does not propose to act on the charge, then the clause has no business efficacy; for nothing will result from the inquiry. There is no obligation on the Trust to give any decision.

Cur adv. vult.

Sept. 17.

BARTON J. In the Commonwealth Court of Conciliation and Arbitration there was a dispute under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act*. Before the hearing the Prahran and Malvern Tramways Trust and the Australian Tramway Employees' Association made an agreement, a memorandum of the terms of which was certified by the President and filed in the office of the Registrar under sec. 24. That agreement then had the same effect as, and was deemed to be, an award, and proceedings were instituted as for a breach of it. A signalman named Bent and a motorman named Winduss were both employees of the Trust, Bent being a superior officer to Winduss, who was a member of the Association and had been employed "for three months and over," and came under the terms of the agreement. A charge

H. C. OF A. 1918.

AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION v. PRAHRAN AND MALVERN TRAMWAYS TRUST.

Barton J.

was made by Bent against Winduss, who was forthwith notified of it in writing by the Trust and answered it in writing. The charge was one of grave misconduct "involving suspension or dismissal," that is, one on proof of which the Trust could forthwith dismiss him. On 10th January the Trust, under clause 29 of the agreement, which I will presently read, gave Winduss a week's notice of the termination of his employment. He said that he would like an inquiry as he had witnesses to prove that he was not guilty. No opportunity, however, was given to him to call witnesses, and he was not confronted with Bent or allowed to be represented as provided in clause 30, and on the expiration of the week he left the Trust's service. We are told that the Trust would not have given notice to terminate the service of Winduss if the charge had not been made. I do not think that that is material if the agreement is as I understand it. Four days after the date I have mentioned, 10th January, a letter was written by the engineer and manager of the Trust to the secretary, stating that the service of Winduss was deemed unsatisfactory and that it had therefore been dispensed with after one week's notice. The charge, with the reply of Winduss to it, was entered on the record of his service with the Trust, on which is also indorsed "one week's notice 10/1/18." There was that, but no more, to show that Winduss had met the charge.

The two material clauses of the agreement are these:—"29. Except in case of grave misconduct the services of an employee shall not be terminated without one week's notice on either side or (if the employer terminates the service) one week's pay in lieu of notice. 30. When a charge involving suspension or dismissal" (which has been construed by the learned President as the "grave misconduct" referred to in clause 29, a construction from which I am not disposed to differ) "is made by any person whether inside or outside the service of the Trust against an employee of three months' service or over, the employee shall be forthwith notified of the charge in writing and shall be permitted to call evidence in his defence, and, as far as it lies in the power of the Trust, he shall be confronted with the person making the charge. At the inquiry the man charged shall be entitled (if he choose) to be represented by

an officer or member of the Association duly authorized by the Association."

The Trust contend that clause 30 of the agreement does not apply to a termination of services by notice under clause 29. The Association have applied for the enforcement of this agreement in respect of clause 30, that is to say, they have asked the President to penalize the Trust as for a breach of the agreement in not giving Winduss an opportunity of giving evidence and calling witnesses.

When Winduss had been notified of the charge, the obligation under sec. 30, as I regard it, that he shall be permitted to give evidence, must mean that he, being a servant of the Trust, who are to permit it, is to be afforded some opportunity of calling his evidence, and if he is not allowed to give evidence in his defence it is of no use for him to go on to ask to be confronted with the person making the charge or to be represented by an officer of the Association, because, once he is denied the opportunity of calling evidence, then the other things would be futile. An inquiry with that opportunity refused would be no performance of the obligation of the Trust.

Let us look at the two obligations. Under clause 29 the obligation on the employers is that they shall not dismiss without a week's notice on their side, but if that is not given they must give one week's pay in place of it. Then, under clause 30, when a charge involving suspension or dismissal is made, there is an obligation on the Trust, first, to notify the employee of the charge, and, next, if the employee wishes to call evidence in his defence, to provide him with the opportunity of bringing forward his witnesses, of being confronted with his accuser and of being represented. It appears to me that these two obligations are not mutually overriding or exclusive. They both exist. The employers have the right to give one week's notice. On the other hand, when the charge is one "involving suspension or dismissal," that is, one which would place it in the power of the employers to dismiss or suspend if proved—and this was such a charge, as laid—they must notify the employee of the charge and allow him to call evidence, so far as is in their power confront him with his accuser, and allow him to be represented. The last paragraph of clause 30 uses the words "at

H. C. OF A. 1918.

AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION v. PRAHRAN AND MALVERN TRAMWAYS TRUST.

Barton J.

the inquiry," which no doubt is contemplated by the clause. It was therefore competent for the Trust to issue one week's notice to Winduss and at the end of the week his employment would terminate. But that does not end the matter. The Trust were under an obligation, having notified Winduss of the charge, to give him an opportunity of calling witnesses, being confronted by his accuser and being represented. They did none of these things, and in respect of these matters it seems to me they have broken their obligation under the agreement and are liable for that breach. Under these circumstances in my opinion both of the questions asked should be answered in the affirmative.

HIGGINS J. read the following judgment:—I concur in the opinion. Clause 29 makes the contract of service a contract from week to week; but always subject to the usual right of the employer to dismiss for grave misconduct. Clause 30 is meant as a protection to the character, not directly to the tenure, of the employee. I take the words "a charge involving suspension or dismissal" as equivalent to "a charge sufficiently serious to justify in law instant suspension or dismissal if the employer choose to execute the power." The clause does not provide that "*before* suspension or dismissal on any charge" there is to be notice of the charge and an opportunity for evidence, &c. The character of the employee is not to be taken away by *ex parte* statements of officials or of the public; but there need be no inquiry for trivial charges such as could not possibly justify immediate dismissal. The Trust cannot, by abstaining from instant dismissal and merely giving an ordinary week's notice, evade the obligation under clause 30 to allow the employee to call evidence in his defence when a charge is made against him.

GAVAN DUFFY J. Clause 30 of the agreement provides that [His Honor read the clause and continued:—] Mr. *Starke* has argued that the whole clause is to be read as supplemental to clause 29, and that its provisions are operative only where the Trust proposes to suspend or dismiss an employee because of a charge which, if well founded, would justify his suspension or dismissal. He invites us to say that in addition to what is expressed in clause 30 there

is an implied condition that the right conferred by the clause shall arise only as a condition precedent to the suspension or dismissal of the employee, and he says that without that implication the clause would not be workable as a business agreement. I see no reason to make such an implication. It may very well be that the employees desired, and bargained for, the procedure provided by clause 30 in cases where the Trust did not propose to act on the charge, or intended to act on it only by exercising the right conferred by clause 29, because the employees thought that it would prevent the making of ill-founded charges and would enable an employee to clear his character if such a charge were made against him. I see no necessity for making the suggested implication. I think Winduss was entitled to the inquiry which he asked for and which has been denied him. I agree that both questions should be answered in the affirmative.

Questions answered in the affirmative.

Solicitors for the Australian Tramway Employees' Association, *Frank Brennan & Rundle.*

Solicitors for the Prahran and Malvern Tramways Trust, *G. L. Skinner & Co.*

B. L.