[HIGH COURT OF AUSTRALIA.]

THE MERCHANT SERVICE GUILD OF AUSTRALASIA . . . . . } CLAIMANT;

AND

THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS } RESPONDENTS.

[No. 1.]

H. C. OF A. 1920.

MELBOURNE, *June* 15, 18.

Higgins J.

IN CHAMBERS.

Industrial Arbitration—Dispute—Existence notwithstanding subsequent dispute on same subject matter—Commonwealth Conciliation and Arbitration Act 1904-1918 (*No.* 13 *of* 1904—*No.* 39 *of* 1918), *secs.* 4, 21AA, 24, 38 (*h*).

A plaint was filed in the Commonwealth Court of Conciliation and Arbitration on 21st March 1919 by which the claimant claimed (among other things) that wages at certain rates should be paid as from the filing of the plaint. The claimant in 1920 made a claim on employers for the payment, as from 1st April 1920, of wages at higher rates than those claimed in the plaint of 21st March 1919, and on an application to the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1918 it was decided that on 17th April 1920 there existed a dispute extending beyond the limits of one State as to the claim made in 1920.

Held, that notwithstanding that decision the High Court might, on a subsequent application under sec. 21AA with regard to the dispute in respect of the wages claimed in the plaint of 21st March 1919, decide that that dispute existed as to the time subsequent to 21st March 1919 and before 1st April 1920.

MOTION.

A plaint having been filed in the Commonwealth Court of Conciliation and Arbitration on 21st March 1919 wherein the Merchant Service Guild of Australasia was the claimant and the Commonwealth Steamship Owners' Association and others were respondents, the claimant applied to the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1918 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.

The application was heard by *Higgins* J., in whose judgment hereunder the material facts appear.

Robert Menzies, for the claimant.

Braham, *Owen Dixon* and *Latham*, for the various respondents.

Cur. adv. vult.

June 18.

HIGGINS J. read the following judgment:—This was an application in Chambers for a decision under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1918. A plaint was filed in the Commonwealth Court of Conciliation and Arbitration by the claimant on 21st March 1919; and the claimant wants me to decide that the alleged dispute "exists" as an industrial dispute extending beyond the limits of any one State. A difficulty arises from the fact that in the present year new claims, for higher wages than claimed in 1919, have been served on the respondents, and that it has already been decided in Chambers under sec. 21AA that a dispute "exists" as to those claims. For instance, the claim in the plaint of 1919 for the master of a vessel of 900 tons was £40 per month; whereas the claim in the dispute of 1920 is for £720 per annum (£60 per month). I am satisfied on the evidence that at the date of the filing of the plaint, 21st March 1919, there existed in fact a dispute extending beyond one State as to the claim for £40 per month; and I was satisfied on the evidence as to the new dispute that there existed in fact on 17th April 1920 (if not before) a dispute extending, &c., as to the claim for £720 per annum. Can I find that a dispute now exists as to wages lower than £720?

The claimant presses for a decision as to the plaint of 1919 because it wants to have its members paid at the rates claimed in that plaint as from 21st March 1919 till 1st April 1920; and from that date it wants the rates claimed in the 1920 log to be paid. The claim in the plaint of 1919 ended with these words: "The wages claimed herein shall be paid from the filing of the plaint."

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The claim in the 1920 log is for the observance of the conditions claimed " as from 1st April 1920."

This raises the important question, Can there be an industrial dispute within the meaning of the Act as to wages for time that is past? Can the High Court decide that an industrial dispute " exists " as to wages for a time that is past? There is no foundation for the proposition that in consequence of the new claim the former claims—at all events as to the time preceding 1st April 1920—had been abandoned. There are, in fact, several of the former claims—*e.g.*, a claim for extra wages on vessels used temporarily for towing—which have not been repeated in the recent claims; and there is no evidence of abandonment—no evidence that these claims were no longer pressed. It has been established by the case of *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1) that an award when made can cover wages and conditions before the award, as to any time to which the dispute relates. There is no doubt that the plaint of 1919 sought new rates of wages as from 21st March onwards. It is assumed by counsel for the claimant that the new dispute superseded the claims in the former dispute as to wages as for the time subsequent to 1st April 1920; but, whether the assumption is right or not, a finding is sought that a dispute " exists " now as to the wages, as well as other matters, before that date.

Counsel have not been able to find anything in the Act which limits the generality of the words used in sec. 4: " ' Industrial dispute ' means an industrial dispute extending beyond the limits of any one State and includes (I.) *any* dispute as to industrial matters "; and " ' industrial matters ' includes *all* matters relating to work, pay, wages," &c. I see no ground for the contention that a dispute as to wages must relate to future wages only—future as from the time of my decision. If a sailor signed articles for a whaler, as in the old days, on the terms of getting a share in the oil, and if he thought after the voyage that he did not get his share, would there not be an " industrial dispute "?

If immediately after the plaint was filed in March 1919 an application had been made to me for a decision under sec. 21AA, I should

(1) 28 C.L.R., 1.

have had to find, on the evidence now before me, that a dispute "exists." Again, if the decision as to the 1920 claims had not been given before this application as to the claims in the 1919 plaint, a decision that a dispute exists as to the 1919 claims would obviously have been appropriate. As I have said, no plea of abandonment of the earlier claim—at all events as to the period before 1st April 1920—can be supported. How can the fact that the application is made now, instead of before the decision as to the 1920 claims, affect the position? There is nothing in sec. 21AA to limit the time within which the application is to be made. Probably it can be made even after an award; but this is not quite clear, because of the word "exists," in the present tense. Moreover, if there is a dispute, there *must* be an award on it, as the Court of Conciliation has cognizance of it by plaint and there has been no agreement (sec. 24: the word used is "*shall*"). The only exception is where the Court of Conciliation dismisses the matter on one of the special grounds mentioned in sec. 38 (*h*). The power of the High Court to decide whether there is or is not a dispute must be coextensive with the duty to award.

I shall, therefore, decide, in the words of the Act, that the alleged dispute exists as to the matters claimed in the plaint, as to the time from 21st March 1919 onwards. I decide the point which I left undecided in the *Federated Engine-Drivers' and Firemen's Case* (1). But I must confine the decision to such respondents as were not subject to a previous award. There are some two hundred and thirty of such respondents in this case. The others must be excluded under the law as established by the decision of the Full High Court in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (2), and recently in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (3)—even though in many cases the specified term of the award has expired. I have to act on the principle that a dispute arising in 1919, with respondents A to Z as to £40 wages per month, must be treated as settled as to respondents A to H by an award made in 1916 binding respondents A to H in a dispute as to £30

(1) 28 C.L.R., 1. (2) 27 C.L.R., 72.
(3) 28 C.L.R., 209.

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per month. The specified term of the award of 1916 did not expire until the end of June 1919.

I must also reserve my decision as to those respondents who claim exemption from the jurisdiction of the Court of Conciliation under the doctrine of "State instrumentalities." The doctrine is to come under review of the Full High Court shortly in a case relating to the Amalgamated Society of Engineers [*Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1)]. I reserve my decision also as to Lever's Pacific Plantations Ltd. and other respondents who claim exemption under covering clause V. of the Constitution, as a case is to be stated in the other dispute of 1920 with regard to these respondents.

It is my duty to call the attention of the Government and Parliament to the unnecessary expense, in money and in time, which is caused to all parties owing to the manner in which sec. 21AA has been framed. That section has been of great service, as it has put an end to the practice of parties discussing the proper award on the merits for weeks, and then, if dissatisfied, applying to the Full High Court for prohibition on the ground that there is no dispute extending beyond one State. But the section involves a distinct application—an application separated from the application for an award; and that means a separate summons, a separate service of the summons on each respondent, separate trials; and the figures laid before me in the recent case of the Builders' Labourers, and in other cases, show how grievously the expenses are increased by the doubled proceedings. Arbitration must be made cheap as well as speedy. There seems to be no good reason for refusing to commit the question to be decided under sec. 21AA to the High Court Justice who is to hear and determine the merits of the dispute in the Court of Conciliation with a view to agreement or award.

Order accordingly.

Solicitors for the claimant, *Loughrey & Douglas.*

Solicitors for the respondents, *Braham & Pirani*; *Malleson, Stewart, Stawell & Nankivell.*

B.L.

(1) 28 C.L.R., 129.