[HIGH COURT OF AUSTRALIA.]

H. V. McKAY PROPRIETARY LIMITED . APPELLANT;
DEFENDANT,

AND

HUNT . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *Oct.* 5, 18.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Industrial Arbitration—Inconsistency between Commonwealth law and law of State—Award of Commonwealth Court of Conciliation and Arbitration—Determination of State Wages Board—Minimum wages—Higher minimum fixed by Wages Board—Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 28, 30—*Factories and Shops Act* 1915 (*Vict.*) (*No.* 2650), *secs.* 222, 226—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 109.

High Court — Jurisdiction — Appeal from Court exercising Federal jurisdiction —Conviction for offence against State law—Conflict between Commonwealth law and law of State—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 73, 109—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 39.

An employer, who had paid his employee wages at the minimum rate prescribed by an award of the Commonwealth Court of Conciliation and Arbitration, was prosecuted before a Court of Petty Sessions of Victoria for the offence, created by sec. 226 of the *Factories and Shops Act* 1915 (Vict.), of not having paid the employee wages at the higher minimum rate prescribed by a Wages Board appointed under that Act. The employer raised the defence that the determination of the Wages Board was inconsistent with the award of the Commonwealth Court of Conciliation and Arbitration and invalid, but he was convicted.

Held, (1) that an appeal from the conviction lay to the High Court under sec. 39 of the *Judiciary Act* 1903-1920, and (2) that the determination of the Wages Board was inconsistent with the award and was invalid.

Troy v. *Wrigglesworth*, (1919) 26 C.L.R. 305, and *Clyde Engineering Co.* v. *Cowburn*, (1926) 37 C.L.R. 466, followed.

Appeal from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Sunshine before a Police Magistrate an information was heard by which William Hunt, an Inspector of Factories and Shops, charged that H. V. McKay Pty. Ltd. did, after the coming into operation of a determination of the Carters and Drivers Board, being a Wages Board appointed under the powers conferred by the Factories and Shops Acts of Victoria, in respect of the week ending 23rd January 1926, unlawfully employ one A. C. Barrett, within the Metropolitan District, as a driver driving one horse, within the meaning of the determination, at a lower rate of wages than the rate determined by such Board. By an award made by the Commonwealth Court of Conciliation and Arbitration in a dispute to which the Federated Carters and Drivers Industrial Union of Australia, of which Barrett was a member, and a number of employers, including the defendant, were parties, the minimum weekly wages prescribed for an adult driver of one horse was £4 9s. 6d. in Melbourne. The dispute in respect of which the award was made was based on a claim made by the Union which included a demand that the drivers of one horse should be paid a weekly wage of £7 7s. 6d. The award came into operation on 31st March 1925 and was in operation at the material time. By a determination of the Carters and Drivers Board, made on 30th November 1925 and published in the *Government Gazette* on 14th December 1925 and which came into operation on 15th December 1925, the minimum weekly rate of wages prescribed for adult drivers of one horse in the Metropolitan District was £4 12s. 6d. It was admitted that for the week in question the defendant Company paid to Barrett, a driver of one horse, the sum of £4 9s. 6d. only. The defence raised was that the determination of the Wages Board was inconsistent with the award and was therefore invalid, reliance being placed on the decision of the High Court in *Clyde Engineering Co.* v. *Cowburn* (1). The Magistrate convicted the defendant and imposed a fine of £3.

From that decision the defendant now appealed to the High Court by way of order to review.

(1) (1926) 37 C.L.R. 466.

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Ham, for the appellant. The only defence raised turned on the question whether the determination by the Wages Board of the minimum rate of wages overruled the award of the Commonwealth Court of Conciliation and Arbitration fixing a lower minimum rate of wages, and the determination of that question involved an exercise by the Magistrate of Federal jurisdiction conferred by sec. 39 of the *Judiciary Act*. The High Court has jurisdiction, under sec. 73 of the Constitution, to hear appeals from all Courts exercising Federal jurisdiction. The matter before the Court of Petty Sessions was not merely one as to the correct application of Federal law to the facts of the particular case, but the question was what, having regard to the Constitution, was the proper legal effect of a determination of a Wages Board fixing a higher minimum rate of wages than was prescribed by an award of the Commonwealth Court of Conciliation and Arbitration. That involved the question of the meaning of sec. 109 of the Constitution. [Counsel referred to *Booth* v. *Shelmerdine Bros. Pty. Ltd.* (1); *Commonwealth* v. *Kreglinger & Fernau Ltd.* (2); *In re Drew* (3).] As to the question of the validity of the determination of the Wages Board so far as it prescribed a higher minimum rate of wages than that prescribed by the award, that is settled by *Clyde Engineering Co.* v. *Cowburn* (4).

Fullagar, for the respondent. The determination of the Wages Board is not a law of the State, and the award of the Commonwealth Court of Conciliation and Arbitration is not a law of the Commonwealth. Each is a fact upon which the relevant law of the State or of the Commonwealth operates. In the case of the determination sec. 226 of the *Factories and Shops Act* 1915 operates upon it, and in the case of the award sec. 44 of the *Commonwealth Conciliation and Arbitration Act* operates upon it. To establish an inconsistency within sec. 109 of the Constitution, it must be shown that there is an inconsistency between sec. 226 of the *Factories and Shops Act* and some section of the *Commonwealth Conciliation and Arbitration Act*, and none can be shown. If the determinations of the Wages Board are laws of the State and of the Commonwealth respectively,

(1) (1924) V.L.R. 276; 46 A.L.T. 8.
(2) (1926) 37 C.L.R. 393.
(3) (1919) V.L.R. 600; 41 A.L.T. 65.
(4) (1926) 37 C.L.R. 466.

there is no inconsistency. The test laid down in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1) may be safely applied in this case. There are two commands, each of which can be obeyed without disobeying the other. In *Clyde Engineering Co.* v. *Cowburn* (2) the State law directly impinged upon the freedom of the Commonwealth Court of Conciliation and Arbitration to determine what it was directed by the *Commonwealth Conciliation and Arbitration Act* to determine. The prescription of a minimum rate of wages by an award can be given no further effect than is contained in the words of the prescription; it gives no right to an employer.

Ham, in reply.

Cur. adv. vult.

Oct. 18.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, RICH AND STARKE JJ. The decision of this Court in *Troy* v. *Wrigglesworth* (3) establishes the competency of this appeal; and all that it is necessary to say on the rest of the case is that it is completely covered by the principles laid down in the *Clyde Engineering Co.'s Case* (2).

In the present case it is attempted to support a minimum wage fixed by the Wages Board as against a lower minimum wage fixed by a prior award of the Commonwealth Court of Conciliation and Arbitration in a dispute in which the question as to the amount at which that wage should stand was in issue between the parties. It is plain that the Wages Board determinations made pursuant to the Victorian law cannot be sustained in opposition to the earlier Federal award made pursuant to the Federal law.

The appeal should be allowed and the conviction quashed.

ISAACS J. This case is in all material respects indistinguishable from the *Forty-four Hours Case* (2).

The reasons I gave in that case I apply to this, with the result that the Victorian legislation necessary to support the conviction

(1) (1910) 10 C.L.R. 266.
(2) (1926) 37 C.L.R. 466.
(3) (1919) 26 C.L.R. 305.

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is inconsistent with the Federal legislation supporting and enforcing the award, and is, therefore, by force of sec. 109 of the Commonwealth Constitution, to that extent invalid.

The decision of the Court of Petty Sessions with respect to the operation of that section in the circumstances was consequently erroneous, and this appeal should be allowed.

HIGGINS J. By an award of the Commonwealth Court which came into operation on 31st March 1925 the minimum weekly wage prescribed for adult drivers of one horse was £4 9s. 6d., in Melbourne. The award was made in a dispute extending beyond the limits of any one State. The period specified in the award for its operation was one month; but under the Act the award continues in force until a new award has been made (sec. 28). The award is binding on such employers only as are parties to the award; and the appellant Company was an employer party to the award. By a determination of the Victorian Wages Board for carters and drivers, gazetted on 14th December 1925, the minimum weekly wage prescribed for Victorian employers was, as to Melbourne, £4 12s. 6d. The appellant company paid one Barrett, a driver of one horse, only £4 9s. 6d. for the week ending 23rd January 1926.

On an information and summons under the *Factories and Shops Act* 1915 of Victoria (sec. 222), the Police Magistrate imposed on the company a fine of £3 with costs—notwithstanding the recent decision of this Court in *Clyde Engineering Co.* v. *Cowburn* (1). As I understand the reasons of the Police Magistrate, he thought he ought to obey two previous decisions of the High Court, leaving it to this Court to set aside the conviction if wrong.

If I were free to act on my personal opinion, I confess that I should uphold the conviction. My reasons are given in my judgment in the *Clyde Engineering Case* (1). The State Parliament having the general power to deal with labour conditions, the determination of the State Wages Boards should be obeyed and enforced, except so far as the command of the Wages Board is inconsistent with the command of the Commonwealth Court, and invalid under sec. 109 of the Constitution (or sec. 30 of the *Commonwealth Conciliation and*

(1) (1926) 37 C.L.R. 466.

Arbitration Act). There is, to my mind, no inconsistency where the Commonwealth award, as in this case, has merely fixed a *minimum* rate, leaving it open to the parties to agree for a higher rate, and leaving it open to the Wages Board to prescribe a higher rate. Whatever wage the employer and employee can agree to, the Wages Board can prescribe.

But I am not free to give effect to my personal opinion. I am bound by the decision of the majority of the Full Bench in the *Clyde Engineering Case* (1); and the majority have taken the view, for varying reasons, that a State authority cannot prescribe better terms for an employee whose union is subject to a Commonwealth Court award than the Commonwealth Court has prescribed. In my opinion, under these circumstances the appeal must be allowed.

As to the procedure adopted in this case, I am of opinion that this Court is the proper Court to hear this appeal. The decision of the case in the Police Court involved a matter arising under the Constitution as well as involving its interpretation (in particular, the meaning of sec. 109); the Police Court was given by sec. 39 of the *Judiciary Act* jurisdiction over such a matter; and under sec. 73 of the Constitution this Court is given jurisdiction to hear appeals from all orders of Courts exercising Federal jurisdiction.

Appeal allowed and conviction quashed.

Solicitors for the appellant, *Derham, Robertson & Derham.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

B. L.

(1) (1926) 37 C.L.R. 466.