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LR 613

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

MAHONY . . . . . RESPONDENT;

EX PARTE JOHNSON . . . . . PROSECUTOR.

*Transport Workers—Waterside worker—Licence—Issue of licence—Renewal of licence—Refusal to renew or issue new licence—Mandamus—Transport Workers Act 1928-1929 (No. 37 of 1928—No. 3 of 1929), secs. 6, 7, 9.* H. C. OF A. 1931.

On an application for a writ of mandamus to compel the licensing officer under the *Transport Workers Act 1928-1929* to issue a licence to the applicant, MELBOURNE, Sept. 25; Nov. 12.

*Held*, by Rich and Dixon JJ. : There is no discretion in the licensing officer under the *Transport Workers Act 1928-1929* to refuse to renew a licence to a waterside worker under that Act, and an applicant is entitled under sec. 9 (2) of the Act to a renewal of his licence, even if the licensing officer may have a wide discretion in granting a primary licence ; Rich, Starke, Dixon, Evatt and McTiernan JJ.

By Starke J. : There is no difference between the discretionary power of the licensing officer to issue a licence and his power to renew a licence, and the rule nisi should be absolute to the licensing officer to consider and determine the prosecutor's application for a licence according to law ;

By Evatt and McTiernan JJ. : The licensing officer has no discretion to refuse either the grant or the renewal of a licence.

*Held* by the Court, accordingly, that the order nisi for a mandamus should be made absolute.

ORDER NISI for mandamus.

Henry Francis Mahony was appointed as licensing officer for the ports of Townsville and Lucinda in Queensland under the provisions of the *Transport Workers Act 1928-1929*, and Martin Haren was appointed as issuing officer at Halifax, near Lucinda, in the State



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of Queensland. Cholmondeley Newham Godschall Johnson had been employed as a waterside worker at the port of Lucinda since the year 1928, and had been duly licensed as a waterside worker at Lucinda under the *Transport Workers Act*, and was a financial member of the Permanent and Casual Wharf Labourers' Union of Australia, a union duly registered under the provisions of the *Commonwealth Conciliation and Arbitration Act*. The licence which Johnson held was due to expire on 30th June 1931, and on or about 27th June 1931 Johnson applied to the licensing officer, Mahony, through the issuing officer, Martin Haren, for a renewal of such licence. Haren informed Johnson that he could not grant a renewal of the licence unless he (the latter) was a returned soldier or a returned sailor as prescribed by reg. 2 of the *Waterside Employment Regulations* or a member of the Waterside Workers' Federation of Australia. Johnson again applied for a renewal on 29th June 1931, which was again refused on the same ground. Johnson was not a member of the Waterside Workers' Federation of Australia.

A complaint laid by Mahony against Johnson was heard by the Police Magistrate at Ingham on 7th August 1931, alleging that on 3rd July 1931 Johnson engaged as a waterside worker for work on the s.s. *Aldinga*, he not being a holder of a licence issued to him which was in force. The complaint was dismissed on the ground that Johnson engaged for work on the ship on or before 30th June 1931 and at a time when he was duly licensed under the said Act. At the hearing of the complaint Mahony gave evidence as follows:—"I am the licensing officer under the *Transport Workers Act* 1928-1929 for the ports of Townsville and Lucinda. It rests with me when I receive an application for a licence or a renewal of a licence under the Act whether I issue the licence or not. The issuing office is entirely under me and they carry out my instructions. I would have no regard for the efficiency of the man applying for a licence. I consider I have a complete discretion. In this particular case my instructions were to have regard to the policy of the Government. I did what I thought would accord with the policy of the Government. I satisfied myself what the policy of the Government was. The instructions I received were to take into consideration the policy of the Government. I had no direct



instructions to refuse licences. I did not have instructions to issue licences only to Waterside Workers' Federation members. I took the policy to be that the Government desired only members of the Waterside Workers' Federation and certain returned soldiers to be employed. I gathered it from the statutory rules and instructions I had from Melbourne telling me how to act—"machinery instructions" I would call them. At the time I refused the renewal of licences to the men regulations were in force giving priority to members of the Waterside Workers' Federation. The regulations giving preference to Waterside Workers' Federation members went on 29th July. The policy of the Government has not changed. My discretion has not changed. I instructed Mr. Haren of Halifax to refuse applications for renewal by men who were not members of the Waterside Workers' Federation. That is the sole reason why licences were not issued by those officers to these men." At the time of Johnson's applications, Statutory Rules 1931, Nos. 76 and 77, were in force, but their operation ceased on 29th July 1931.

On 8th August 1931 Johnson applied for the grant of a licence as a waterside worker at the port of Lucinda. The application was refused. In refusing it Haren stated:—"Acting under advice received from the licensing officer for the port of Lucinda this morning, I am advised new regulations have been gazetted under date 7th August 1931 granting priority to members of the Waterside Workers' Federation. The position, therefore, is now the same as when renewal of licences was refused prior to the thirtieth of June last. Further, as notice of appeal has been given in regard to cases decided at Ingham, the licensing officer decides the matter is *sub judice*. In the opinion of the licensing officer there is ample Federation labour available at Lucinda to work that port." It further appeared that the only access by land to the port of Lucinda is by a private tramline owned by the Colonial Sugar Refining Co. Ltd., and that the wharf is the property of the Company; that there is facility for unloading only one vessel at a time; that the principal export is raw sugar, and apart from sugar vessels only one small vessel serves the port per week, the sole industry being the shipping and discharge of goods; that the population, apart from waterside workers, is negligible, and there were available thirty members of

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the Waterside Workers' Federation licensed under the Act, and many more available at a few hours' notice, and four returned soldiers and sailors—labour sufficient to work any vessels at any time; and that the licensing officer paid no regard to the efficiency of the applicants, but exercised his discretion, having regard to the statutory rules giving preference, in the belief that it was in the best interests of the port and as a means of avoiding trouble with rival factions of labour.

Johnson obtained an order nisi directed to Mahony to show cause why a writ of mandamus should not be issued directing him to issue to Johnson a waterside worker's licence for the port of Lucinda under the *Transport Workers Act* 1928-1929. The case was treated as though the issuing of a licence and the renewal were governed by the same considerations.

The order nisi, which was made returnable before the Full Court of the High Court, now came on for argument.

*Robert Menzies* K.C. (with him *H. S. Nicholas*), for the prosecutor Johnson. There is no discretion with regard to granting or withholding a licence. When the prescribed conditions are complied with, it is obligatory to grant the licence. The absence of any right of appeal is in contrast with the provision of such a right in case of cancellation. That shows that the officer is not exercising a discretion in granting the licence (*Metropolitan Coal Company of Sydney v. Australian Coal and Shale Employees' Federation* (1); *Zachariassen v. Commonwealth* (2)). If any discretion is given it must be in relation to unfitness by character or physique for the class of work for which the applicant is to be licensed. The whole statutory provision must be considered in interpreting words of this character in order to determine whether or not any discretion is given (*Julius v. Lord Bishop of Oxford* (3); *Caldow v. Pixell* (4)). The licence is granted for one year and the regulations may be changed in the meantime. The limits of discretion in regard to cancelling licences are declared, but none are prescribed in regard to the issue of licences. A writ of mandamus should issue for the granting of

(1) (1917) 24 C.L.R. 85.  
 (2) (1917) 24 C.L.R. 166.

(3) (1880) 5 App. Cas. 214, at pp. 222, 225.  
 (4) (1877) 2 C.P.D. 562.



the licence, or at least to compel consideration of the application according to law.

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*Gorman* K.C. (with him *Herring*), for the licensing officer, the respondent, Mahony. The licensing officer is given a discretion as to whether or not a licence should issue. The word "may" is used in a permissive sense only. The alternative is that the officer must issue a licence to every applicant. There is nothing to indicate that the officer acted upon any inadmissible grounds, and the exercise of the power is not controllable by any Court of law. In the event of this Court granting an injunction, nothing will be gained, for no work will be available for the applicant or for anyone outside the preferred classes, and the proceedings will therefore be futile, and a mandamus should not issue (*Julius v. Lord Bishop of Oxford* (1) ). Assuming that the licensing officer has a discretion, it cannot be said that he exercised no discretion at all (*R. v. Wandsworth District Board of Works* (2) ).

*Cur. adv. vult.*

The following written judgments were delivered :—

Nov. 12.

**RICH AND DIXON JJ.** The prosecutor held a licence as a waterside worker which, unless renewed, would expire on 30th June 1931. On 27th June he applied for a renewal of his licence. His application was refused because he was not a member of the Waterside Workers' Federation of Australia and was not a returned soldier or sailor. On 29th June he repeated his application for a renewal, and it was again refused for the same reasons. On 8th August he applied for a licence, and this application was refused also. The questions for decision are whether a licensing officer possesses a discretion to refuse an application duly made for the renewal of a waterside workers' licence, and, if so, whether the grounds upon which that discretion is lawfully exercisable include those considerations which induced the refusal to renew the licence of an applicant who was not a member of the Waterside Workers' Federation and not a returned soldier or sailor.

(1) (1880) 5 App. Cas. 214.

(2) (1858) 6 W.R. 576.



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We think that upon the true construction of sub-sec. 2 of sec. 9 of the *Transport Workers Act* 1928-1929 it confers upon a waterside worker who holds a licence that is in force a right to its renewal if he makes an application in accordance with the prescribed form and accompanied by the prescribed fee within thirty days before the expiry of the term of his licence. The words of the sub-section are: "A licence may be renewed upon application made at any time within thirty days before the expiry of the term of the licence." We think the words "a licence may be renewed" should be construed as if the words understood after "renewed" were "by a waterside worker" and not "by a licensing officer." In other words, if the verb were thrown from the passive into the active voice the sentence would be expressed "a waterside worker may renew his licence," &c., and not "a licensing officer may renew a waterside worker's licence," &c. We think the context and subject matter supply many reasons for adopting this construction. The statute forbids the employment of unlicensed persons as waterside workers in the loading or discharge of inter-State or oversea cargo, and provides for the licensing of waterside workers. Any person desiring to obtain a licence as a waterside worker at a port to which Part III. of the Act applies may make application to the licensing officer at that port in accordance with the prescribed form (sec. 6 (1)). Sec. 7 provides that where an application is made under this provision to a licensing officer "he may issue to the applicant a licence in accordance with the prescribed form bearing a number and the name of the port in respect of which it is issued," and that any licence so issued "shall contain the name of the person to whom it is issued and shall be signed in ink by that person and by the officer by whom it is issued." This section operates to authorize the officer to grant an original or primary licence. Whether from the whole statute an intention is to be collected that he should exercise this authority by granting an application duly made or should possess a discretion, and, if so, subject to any and what limitations, are disputed questions; but we are content to assume, for the purposes of our decision, that the licensing officer has a discretion and a wide one in granting a primary licence. When he does grant a primary licence he must observe the directions given by the section in order that the document may



be afterwards identified as well as the person to whom it is issued. Sec. 9 (1) then provides that the licence "shall, subject to this Part, remain in force until the thirtieth day of June next following the date of the issue of the licence." The words "subject to this Part" contain a reference to sec. 12 (1), and perhaps also to sub-sec. 2 of sec. 9. Sec. 12 makes elaborate provision for the cancellation of the licence of a waterside worker who commits any of certain misdeeds which the section enumerates and describes, or is convicted of specified offences. The licensing officer "may cancel a licence issued . . . to a waterside worker in any case as to which he is satisfied that the worker after a licence has been issued to him" did so offend or had been so convicted. The licensing officer must then fix a limited period "during which the person shall be ineligible to receive a licence." The waterside worker may appeal from the cancellation to a Court of summary jurisdiction, which, if it confirms the cancellation, "may vary the period during which the appellant is ineligible to receive a fresh licence." In the case of each authority the period must be not less than six nor more than twelve months. These provisions show that, when a primary licence is granted, the licensee may rely upon its continuance until 30th June then next, unless through his own fault a power of cancellation arises, and that in such an event he is protected against an erroneous or misguided exercise of that power by a right of appeal to a Court of law. We think that it would be surprising if, notwithstanding the security thus given, the licensee at the end of the term, which could not exceed twelve months, and annually thereafter, must depend for the right to continue his occupation upon the discretion only of the licensing officer. On the other hand, a renewal of his licence would not prevent its cancellation if afterwards it was found that before its renewal the licensee had rendered it liable to cancellation. This is so because he would have offended "after a licence has been issued to him." The provision for renewal is found in the second and third sub-sections of sec. 9, which deals with the duration of the licence. Sub-sec. 4 in terms distinguishes between the issue and the renewal of a licence. No provision directs that a renewal shall be in a particular form, bear a number, or name the port, or that it shall contain the name of the licensee, or be signed by him,

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or by the licensing officer or at all. It therefore appears that renewal is not considered as the grant of another licence but as the prolongation of the period of the original or primary licence. In providing for this prolongation or extension, sub-sec. 2 prescribes a condition precedent which, in our opinion, goes far to determine the true meaning of the provision. This condition is that the application shall be made within thirty days of the expiry of the term of the licence. To qualify a right of renewal given to the holder of a licence with such a limitation of time is a natural and reasonable course. But, if the purpose of the sub-section was to vest a discretionary power of renewal in the official who is authorized to grant at any time a new licence, the limitation of time would be pointless and illusory. "To renew" is used freely to mean "to obtain an extension of a period" as well as "to extend a period." See *New English Dictionary*, s.v. "renew," par. 8. The rest of the sentence in which the word occurs appears to us definitely to point to the former meaning. We are alive to the use of the word "upon" in the phrase "upon application," which may be felt by some to be suggestive rather of an application to, than by, the person who "renews" the licence. But in construing the language of a statute little or no reliance can be placed upon such delicate shades in the use of expressions, and any such feeling is completely dispelled when the sense of the condition which immediately follows the expression is understood.

In our judgment every substantial consideration is against construing "renew" to mean "give an extension" and interpreting the sub-section as a grant to the licensing officer of a discretionary power of refusal. Moreover, where a statutory provision is fairly open to two meanings an interpretation should be rejected which would allow the subject to be restrained from the exercise of his vocation.

For these reasons we think that the respondent did not possess a discretion to refuse a renewal of the prosecutor's licence, and a mandamus should go directing the respondent to grant his application for a renewal.

This judgment proceeds upon the assumption which the parties both adopted that upon the true interpretation of sec. 9 licences



granted originally under the provisions of Statutory Rules 1928, Nos. 98, 111 and 130, if renewed for a period after 1st July 1929, are governed by the statute. We are disposed to think that this assumption is correct. But we think that if the Regulations continue to govern the matter the result would be the same.

The order nisi is for a mandamus directing the licensing officer to issue to the prosecutor a waterside workers' licence. It was taken in that form, not for the purpose of distinguishing between the issue of an original licence and the issue of a licence by way of renewal, but because the existence or materiality of such a distinction was not recognized. During the argument, although much stress was laid upon many of the considerations which we think support the view that a right of renewal is given by the statute, they were relied upon as establishing or tending to establish that no discretion was given to refuse a licence, whether original or by way of renewal, and little or no attempt was made to distinguish between the grant and the renewal of a licence.

We think that such a distinction may exist ; and as the real question is whether the licences of waterside workers should have been renewed, and we are of opinion that renewal could not be refused, we think it unnecessary and undesirable merely because of the form of the order nisi to enter upon an examination of the question, which does not appear to us to arise upon the facts of the case, whether the original grant as distinguished from a renewal of a licence is discretionary, and, if so, how that discretion may lawfully be exercised.

We think the form of the order absolute should be moulded so that the mandamus will direct the renewal of the prosecutor's licence.

STARKE J. In form, this is a rule nisi calling upon the licensing officer for the ports of Townsville and Lucinda appointed under the *Transport Workers Act* 1928-1929, to show cause why a writ of mandamus should not be issued, directing him to grant to the prosecutor, Johnson, a waterside worker's licence for the port of Lucinda, pursuant to the said Acts. But in truth, it is an endeavour on the part of the prosecutor to establish his right to earn a livelihood

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in the calling of a waterside worker. According to the material before this Court, he bears a good character, is amenable to discipline, and is efficient in his work. But under the *Transport Workers Act* 1928-1929 no person shall engage as a waterside worker at certain ports unless he is the holder of a licence issued to him under the Act; and by secs. 6 and 7, any person desiring to obtain a licence as a waterside worker may make application to the licensing officer, who may issue to the applicant a licence, bearing a number, and the name of the port in respect of which it is issued. In 1931 the prosecutor was the holder of a licence expiring on 30th June of that year, which he applied to renew, but his applications were refused. In August 1931 he applied to the licensing officer for the grant of a licence as a waterside worker at the port of Lucinda, but this application was also refused. It is in respect of this latter refusal that the rule nisi was obtained, and not in respect of the refusal to renew the prosecutor's licence.

Two views were presented of the proper interpretation to be put upon these loosely drawn Acts; one, that the duty of the licensing officer was purely ministerial, or, in other words, that it was his duty to issue a licence to any person who so applied; the other, that an uncontrolled and absolute discretion was reposed in the licensing officer to grant such licences as he thought fit. The former view must, in my opinion, be rejected. Sec. 7 of the 1929 Act declares that the licensing officer "may issue . . . a licence": in themselves these words import discretion. But other sections of the Acts put the matter beyond doubt: they make provision for the employment of transport workers, and the regulation of the engagement, services and discharge of such workers; and one method of regulation is by licensing persons who can engage in transport work. The latter view must likewise be rejected. The Courts do not attribute an intention in the Legislature to interfere with the rights and liberties of the citizens of this country to work when, where and for whom they please unless that intention is expressed in clear and unmistakable language. The Acts make it penal to work without a licence, and therefore they contemplate a duty in the licensing officer to grant licences. It is, no doubt, a discretionary duty; but to say that it is an arbitrary power, not to be exercised



“on any definite principle, but haphazard, on the theory, presumably, that such matters are better kept outside the control of the Courts, and left to the uncontrolled discretion of the Executive and its servants,” is far too extravagant an intention to attribute to the Legislature. But the difficulty in interpreting this loosely drawn legislation is to find some principle upon which the discretion of the licensing officer should be exercised. The question is not whether the licensing officer has been right or wrong in the exercise of his discretion, but whether he has exercised it within the ambit of his power. If he has declined to consider matters that he ought to consider, or has taken into consideration matters that he ought not to consider, then he has not exercised his discretion within the ambit of his power, and mandamus will go to compel him to exercise it according to law (*Sharp v. Wakefield* (1); *R. v. Bowman* (2); *R. v. Cotham* (3); *R. v. Metropolitan Police Commissioner*; *Ex parte Holloway* (4)). The licensing officer in the present case refused to issue a licence because Regulations under the Transport Workers Acts gave preference to members of the Waterside Workers’ Federation of Australia, and ample Waterside Workers’ Federation labour was available at Lucinda to work the port. One would have thought that the granting or refusing of licences to work depended upon the personal fitness and ability of applicants, and not upon the supply of labour available at a port. And the provisions of sec. 12 dealing with the cancellation of licences lend strong support to this view: the power to cancel is wholly based upon the misconduct of the licensee. To say that the licensing officer may refuse a licence because he thinks sufficient labour is available to work a port without the services of an applicant for a licence who is of good fame and character and competent and willing to do and capable of doing such work as he can obtain, is an interference with the rights and liberties of the subject that would require express justification in the Transport Workers Acts, and I can find no such justification.

The right of the prosecutor to a renewal of his licence is not, as I have already intimated, the subject of the rule nisi for a mandamus, and was not argued at the Bar. In my opinion, the Court should

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(1) (1891) A.C. 173.

(2) (1898) 1 Q.B. 663.

(3) (1898) 1 Q.B. 802.

(4) (1911) 2 K.B. 1131.



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not, of its own motion, raise and decide a matter that the parties did not litigate. But as the decision of some of my brethren is based upon the point, all that I feel called upon to say is that I see no difference between the discretionary power of the licensing officer to issue a licence, and his power to renew a licence. In both cases application must be made, and renewal is simply the grant of a new licence for a further period. But the refusal to grant or to renew must, I think, be based upon some misconduct or unfitness of the applicant, and not upon any such grounds as the licensing officer acted upon in the present case.

*Huddart Parker Ltd. v. Commonwealth* (1), *Dignan v. Australian Steamships Pty. Ltd.* (2) and *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (3) all uphold the constitutional validity of the Transport Workers Acts, and they bind the members of this Court—though for my own part I am not convinced of their correctness. But for these decisions, it is perhaps right to add, this rule nisi for mandamus would have been wholly unnecessary. It is not necessary to do more than to refer to the opinion I gave in the *Huddart Parker Case* (4).

The order should be absolute to the licensing officer to consider and determine the prosecutor's application for a licence according to law, and without regard to the circumstances which he has assigned for refusing the licence.

EVATT J. This is an application for a writ of mandamus directing the licensing officer of certain Queensland ports to issue to the applicant a licence as a waterside worker under the *Transport Workers Act* 1928-1929, to be available at the port of Lucinda, Queensland.

Until recently the applicant was a holder of a licence as a waterside worker at such port, but when, in August last, after the expiry of the licence, he applied for a renewal or a fresh licence, the respondent refused his application.

The first claim made on his behalf is that any person who so desires has a right to become licensed as a waterside worker. The

(1) (1931) 44 C.L.R. 492.

(2) (1931) 45 C.L.R. 188.

(3) *Ante*, 73.

(4) (1931) 44 C.L.R. 492.



second is that, once a person is granted a licence, he is entitled to a renewal thereof. And the third is that, assuming the licensing officer to be vested with a discretionary authority to refuse an application, the exercise of the discretion in the present case has been affected and vitiated by extraneous and irrelevant considerations.

The statutory authority for the grant of an original licence is sec. 7 (1), which provides that a licensing officer "may" issue a licence to the applicant. The authority for the renewal of such licence is sec. 9 (2), which states that a licence "may" be renewed upon application made within a certain time before the term of the licence expires.

In my opinion sec. 9 (2) assumes that the appropriate licensing officer is the person who will perform the act of renewal, and the sub-section should not be read as though the holder of a licence is himself vested with the right of renewing it. Sec. 9 (4) provides that a licence "issued or renewed" is to remain in force until June 30th of the next following year. The licence is originally "issued" by a licensing officer; so too it is "renewed" by him.

Sec. 18 (a), moreover, treats the holder of a licence as one who, in the ordinary course of events, "applies for the issue to him of a licence . . . by way of renewal . . ." This provision regards the renewal of a licence rather as a new licence issued than as a mere extension of the old licence. In the present case it is of no importance to determine which is the correct view. But the machinery of licensing provided by Part III. of the Act and the Regulations made under sec. 24 have been devised in order to give the licensing officials full control over the issue of the necessary documents, and this also tends to show that sec. 9 (2) should be read as though the words were "A licence may be renewed *by a licensing officer.*"

Before dealing with the main contention of the applicant, I shall refer to the suggestion that in any event a mandamus should go to the respondent because, even if he had a discretion to refuse an application either for an original licence or its renewal, his discretion was not properly exercised. It appears from the evidence that the following matters were considered by the respondent when he refused the application:—

- (i.) That there were, readily available at the port of Lucinda, thirty members of the Waterside Workers' Federation of

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Australia and four returned soldiers, all of whom were licensed under the Act, and that the services of these men were sufficient to work all vessels visiting the port ;

- (ii.) That there was a danger of trouble on the waterfront if licences were issued to the applicant or other members of the rival trade union ;
- (iii.) That certain statutory rules having the force of law were being issued from time to time by the Executive Government of the Commonwealth, and these provided for preference of employment to members of the Waterside Workers' Federation and to returned soldiers ;
- (iv.) That the policy of the Executive Government in this matter, as evidenced by the issuance of the statutory rules, was to prefer the class of labour described in (iii.).

In his affidavit the respondent said: "I had no regard to the respective efficiency as waterside workers of any of the applicants for licences or renewals of licences but exercised my discretion having regard to the existing statutory rules, giving preference as aforesaid in the belief that in so doing it was in the best interests of the port with a view to avoiding trouble on the waterfront with rival factions of labour and in the full belief that I had (and I still believe I have) absolute discretionary powers in issuing licences under the said Acts." But this must fairly be taken as meaning, not that the respondent assumed that the present applicant was not fit or efficient to perform work on the waterfront, but that he assumed that the applicant was efficient and refused his application merely for the reasons set out.

If a licensing officer has a discretion in the matter of issuing or renewing licences, it is difficult to confine within narrow limits the matters relevant for his consideration. This Court has already affirmed the competence, under the Act, of the Executive to make regulations providing that, among licensed persons, preference shall be given to those belonging to one organization of workers. The applicant belonged to an opposing trade union. Opposed factions of workers may not co-operate very efficiently in wharf-labouring work. Moreover, the work offering may be limited in quantity, and if the officer has to exercise a discretion, I think that he may



have regard to the maximum number of workers reasonably required for the working of the port. The statute contemplates the appointment of licensing officers for the various ports of the Commonwealth, and this points to the necessity of such officers being in touch with the trade of the port and the amount of labour readily available.

In order to show that the respondent's discretion was influenced by irrelevant matters, much has been made of the fact that the respondent has stated, in his very candid affidavit, that he paid regard to the Commonwealth Executive policy, although receiving no dictation from Government.

If it is assumed that the licensing officer has a discretion to refuse licences, I think that he is not debarred from considering the existence of such a policy. He would be regarded not as a judicial but as an administrative officer vested with a discretionary power. He would have to act honestly, but he might well pay some regard to the preference scheme favoured by the Government. He would be expected to pay special attention to the requirements of the port which, in a sense, is committed to his charge. Above all, the discretion to be exercised would be his discretion, and he could not allow the Executive or any other person to exercise it for him. Upon the same assumption of a discretion, there is no reason why he should not be allowed to seek the opinions of persons well experienced in the methods of providing and organizing labour. It cannot be assumed that the well experienced and the well qualified are absent from the responsible Executive of the day. The weight the licensing officer might see fit to attach to any or all of such opinions would be a matter entirely for him.

In this case there is no logical halting-place between two positions: one, the existence of a discretion in every licensing officer to refuse licences upon one or other of the grounds upon which the respondent acted; the other, the absence of any such discretion at all. That was the position adopted by Mr. *Menzies* in his lucid argument.

This conclusion once reached, the question at once arises whether the licensing officer has any discretion to refuse an application either for an original licence or its renewal.

I have already stated that the word "may" is used in sec. 7 (1) and sec. 9 (2). It follows that no obligation or duty to issue either

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a licence or its renewal is cast by either sub-section upon the licensing officer. He is empowered to act, and that is all.

None the less, it may appear from the rest of the Act that Parliament intended that applicants should have a right to call for the exercise of the power. "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so" (per Earl Cairns L.C. in *Julius v. Lord Bishop of Oxford* (1)). Let us apply these tests to the present statute.

"The thing empowered to be done" by the licence is merely the right, without breach of Commonwealth law, to work as a waterside worker at the ports to which Part III. of the Act may be applied by the Minister. The licence gives the holder no right to obtain any employment. But without a licence, he cannot lawfully be employed for the purpose of waterside operations in inter-State and foreign trade.

"The object for which" licences are required is to enable that portion of trade and commerce over which the Commonwealth has legislative jurisdiction to be carried on smoothly, without interruption or disturbance. The Commonwealth Parliament has no general authority over trade and commerce unless it is "with other countries, and among the States." The individual wharf-labourer, though a necessary means for the free flow of trade, is not himself directly engaged in such trade, and he may not know or care whence or whither the goods he is unloading or loading have come or are going. Within the hour, nay within the minute, he may change from an instrument of inter-State trade to one of intra-State trade because the vessel he is helping to load or unload may be trading both inter-State and intra-State.

This is not without importance because the absence of a licence may effectively prevent the labourer from obtaining work in connection with a part of trade and transport which the Commonwealth



Parliament is not competent to control or regulate. Under such circumstances it is more difficult, in the absence of clear words, to suppose that the Parliament intended to remit a man's livelihood to the discretion of subordinate Government officials.

What are "the conditions under which it is to be done?" Merely an application to the licensing officer of the port in accordance with a prescribed form, and the payment of a prescribed fee. A licence when issued is to be in a certain form; and, in the event of misbehaviour on the part of the holder within the five categories described in sec. 12, the licensing officer may cancel the licence.

But if a licence is cancelled, the holder may appeal to a Court of summary jurisdiction against such cancellation. After cancellation the licensee may for a period not exceeding twelve months "be ineligible to receive a licence." Sec. 12 exhibits a clear intention that the period of disqualification which a licensed waterside worker may have to undergo in the event of his misbehaviour, shall be strictly limited.

What is "the title of the person or persons for whose benefit the power is to be exercised"? This aspect of the question raises the only difficulty in the way of the applicant's full success. In *Attorney-General for Canada v. Attorney-General for British Colombia* (1) the Privy Council and the Supreme Court of Canada determined that certain fishing licences, the power to grant which was conferred upon the head of a department, could not be refused to qualified applicants. The statute did not, however, declare eligibility except impliedly, by excluding those who were not British subjects resident in the Province, nor returned soldiers nor Canadian companies. The difficulty here is that eligibility is not expressly defined by the Act nor is there any exclusion even (say) of aliens or alien enemies.

But the ineligibility which arises after cancellation and the time limit to which it is subject, tend to show that the licensing officer has no other discretion to refuse a licence or its renewal.

Moreover, sec. 6 (1) says that "Any person desiring to obtain a licence as a waterside worker . . . may make application to the licensing officer. . . ." The employment of the word "may" is very important, because it is obvious that all who "desire

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(1) (1928) S.C.R. (Can.) 457; (1928) 4 D.L.R. 190; (1930) A.C. 111;



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to obtain a licence" *must* make application before they can get one. The truth seems to be that the persons who may be granted licences are indicated not by the class comprised of "any person," but by that comprised of "any person desiring to obtain a licence as a waterside worker." In sec. 6 (1), therefore, "may" has to be interpreted as imposing a duty to apply upon all who wish to obtain licences. And I have come to the conclusion that, co-existing with such a duty, there is also a right to obtain that for which they are applying. Putting the matter in a slightly different way, the statute should be regarded as making it mandatory upon all persons who wish to work as waterside workers to apply for and obtain licences. And the power of the licensing officer to issue or renew licences is to be treated as correlative to such mandate.

The broad scheme of Part III. of the statute is to enable a licensing scheme to be brought into operation at selected ports of the Commonwealth, for the purpose of exercising a limited supervision over all waterside workers engaged on overseas or inter-State vessels. Licences have to be obtained by all such workers. When issued, they facilitate checking and inspection. Licences are merely a means to an end. The statute intends that, where the licensing system is adopted, all workers will at once become and continue to be licensed or registered. Once this is done, control is possible. If instances of misbehaviour do occur, a licence may be cancelled and ineligibility for a period limited by Parliament itself may result. Even that is subject to important qualifications, and an independent tribunal may revise and reverse the decision of the departmental officer. It is difficult to suppose that Parliament, which so hedged round the authority of the licensing officer in cases of proved or admitted misbehaviour by a licensee, gave the same officer the right to refuse the grant of a licence altogether. A more difficult position might have arisen had the power of issue or renewal been vested in a Minister of the Crown, who would have to assume responsibility to Parliament for his actions. The fact that the statutory power was intended to be exercised by a mere local executive official, strongly supports the view that Parliament intended that the licences and their renewals should be issued by him as a matter of course.

Applying to the *Transport Workers Act* the tests suggested by Earl Cairns, the logical result is that licensing officers are invested



with the power of issuing and renewing licences. But the power is directly related to and qualified by the duty cast by the statute upon all persons who desire to obtain licences. Such persons are bound to apply to the licensing officers, and the statute contemplates that the result of their application will be the issue of a licence or its renewal.

A mandamus should therefore go.

McTIERNAN J. The prosecutor applied on 8th August 1931 to the respondent, in his capacity as a licensing officer, for a licence as a waterside worker under the *Transport Workers Act*, but the respondent refused to issue a licence to him. In these proceedings the prosecutor is asking for a mandamus to compel the respondent to issue to him a licence, in accordance with that application. The respondent assumed to refuse the prosecutor's application for a licence on a number of grounds, which are described in the affidavits. Upon a consideration of the statute as a whole, I think that Parliament intended that the licensing officer should be bound to issue a licence as a waterside worker to any person desiring to obtain such a licence who duly makes an application to the licensing officer in the manner provided by sec. 6. In other words, I think that the licensing officer was empowered by sec. 7 to issue a licence, where an application is made under sec. 6, in order that "any person desiring to obtain a licence" should be able to obtain it (*Julius v. Lord Bishop of Oxford* (1); *R. v. Metropolitan Police Commissioner*; *Ex parte Holloway* (2), overruling *R. v. Metropolitan Police Commissioner*; *Ex parte Pearce* (3). See also *Ex parte Nyberg*; *In re Nicholson* (4); *Byrne v. Armstrong* (5)). Therefore, I think that the order nisi should be made absolute.

I wish to express my concurrence in the joint opinion of my brothers *Rich* and *Dixon* that the holder of a licence as a waterside worker is entitled as of right to the renewal of such licence upon making an application for that purpose, in the manner and within the period mentioned in sec. 9. The section does not expressly say that such an application should be made to the licensing officer,

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(1) (1880) 5 App. Cas. 214.

(3) (1910) 80 L.J. K.B. 223.

(2) (1911) 2 K.B. 1131.

(4) (1882) 8 V.L.R. (L.) 292; 4 A.L.T. 83.

(5) (1899) 25 V.L.R. 126; 21 A.L.T. 78.



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but it appears by the form prescribed to be used for an application for renewal of a licence—and it is also, I think, a matter of necessary intendment—that the application for such a renewal should be made to the licensing officer. By the prescribed form it also appears that the licence is “renewed by endorsement.”

Two views, each quite antithetical to that which I have adopted as to the duty of the licensing officer upon receipt of an application duly made to him for a licence, but divergent from one another, were advanced during the course of the argument. They were (1) that the licensing officer is entitled to reject an application for the issue of a licence in certain cases ; (2) that the licensing officer has an absolute and uncontrolled discretion to issue or to refuse to issue a licence to any person who has duly applied for it. It may be remarked at once, concerning the first of these two submissions, that the Legislature has not expressly defined any ground upon which a licensing officer may reject an application for a licence, except the provision in sec. 12 that a person whose licence has been cancelled shall be ineligible to receive a licence for the period determined under that section ; nor has it visibly expressed in the context of the Act any principle upon which the licensing officer should act in refusing an application for a licence. If the Legislature intended that the licensing officer should have this qualified authority, one is left to divine the grounds upon which it may be exercised, and the bounds which have been set to the power of this official. Such matters would have been most important parts of the Legislature’s intention, and there would have been most cogent reasons for making them part of the statute. No attempt was made to give a complete account of the grounds or of the principle which, in this view, it must be assumed the Legislature had in mind. It was said, however, by way of an instance, that it must have intended that the licensing officer could reject an application from a person of bad character. But no criterion, by which a licensing officer may adjudge an applicant to be unfit to receive a licence, can be inferred from the Act, unless it is said that he may reject an application for a licence upon any one or more of the grounds stated in sec. 12, upon which he may cancel a licence. But sec. 12 is expressly limited to cancellation of licences. Furthermore, the holder of a licence which has



been cancelled under that section, is given a right of appeal. It appears to me that if the Act allows the licensing officer to reject an application because of the character of the applicant, it has left him free to adopt his own criteria for judging the fitness of any applicant; and, presumably as matters incidental to this power, there is committed to him the duty of determining, for example, what, if any, credence and weight should be given to unfavourable reports as to the character of any applicant which he has called for, or which he may have received but not invited, or whether a conviction is a bar to an application, or whether, upon a consideration of the date of the conviction, the nature or circumstances of the offence, the conviction should not be a bar. It may be noted that the form which has been prescribed for an application for a licence does not require the applicant to furnish any evidence as to character. There is nothing in the statute which, in my opinion, would justify me in concluding that the Legislature intended to cast such responsibilities upon a "licensing officer," especially when it has expressly given him somewhat similar authority, with the safeguard of an appeal, only in the matter of the cancellation of a licence.

Another ground upon which it was said that the licensing officer could reject an application, if his authority is limited to the rejection of applications in certain cases only, is that an adequate number of persons have already been licensed. It should be borne in mind that the official to whom it is sought to attribute even this qualified authority to reject applications for licences is appointed under sec. 5, which is in these terms: "5. Subject to the directions of the Minister, the Permanent Head of the Department of State administered by the Minister may, as he thinks fit for the purposes of this Act, appoint licensing officers in respect of ports in the Commonwealth to which this Part applies." A close consideration of the Act does not lead me to the conclusion that Parliament intended—it has not expressly stated any such intention—that the licensing officer could, when he saw fit to do so, fix the number of licences which he should issue at the port in respect of which he was appointed. It was not contended in this case that a mandamus should not go to compel the licensing officer to issue a licence on the ground that he is a subordinate officer—as he appears to be in this

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case—subject to the direction of the Permanent Head of the Department who appointed him. The case was argued on the basis that the licensing officer was “master in his own household.” As the question of his status was not raised in argument, I assume that basis to be correct, without indicating any opinion on it or on the question as to the result which would follow if that basis were unsound.

So far as regards the second view above mentioned, namely, that the licensing officer had an absolute and uncontrolled discretion to issue or refuse licences, that view is, in my opinion, contrary to the intention of the Legislature as exhibited by the Act. The Act requires that all persons who are engaged for work as waterside workers where the Act applies, should be licensed. By sec. 14 any person commits an offence who engages another person as a waterside worker who is not the holder of a licence, and by sec. 13 any person who is not the holder of a licence who engages in the occupation commits an offence. The Act compels all persons, who are engaged as waterside workers at the ports to which the Act applies, to hold licences in order that they may be subject to, and compelled to comply with, the code of conduct and discipline which this statute enacts (sec. 12). Provision is made for the appointment of licensing officers, and they are given power to issue licences upon application. Thus the control, which arises over a waterside worker after he has obtained a licence, may be effectively exercised. Furthermore, the Act contains no provisions from which, in my opinion, it can be inferred that a licensing officer has authority to refuse licences, irrespective even of the merits of the applicants, if such were material, so as to limit the number of persons who may be lawfully employed as waterside workers. He is not empowered to “decasualize” the occupation. The Act has set up standards which may be imposed on persons after they have been licensed, but it has prescribed no qualifications for a person desiring to obtain a licence, in the absence of which the licensing officer may reject the application. Moreover, it has not stated any conditions which must be satisfied to enable any person desiring to obtain a licence, for which he has duly applied, to receive it. Upon a consideration of the whole Act, I have come to the conclusion that the words in sec. 7, “he may issue,” though



prima facie "potential" only, and not significant *per se* of an obligation, were intended to confer a power of issuing licences, without which the object of the Act could not be accomplished. In my opinion, so far as regards the issuing of licences, the licensing officer is a medium merely for the receipt of applications for licences and the issue of licences.

The view of the Act which I have stated is not met by saying that any person, including a woman or child, may apply for and obtain a licence. The Legislature has not seen fit to provide against events which are not within the bounds of reasonable probability (*Julius v. Lord Bishop of Oxford* (1)). Furthermore, the prescription of a fee upon an application for a licence was no doubt intended to serve the purposes of providing for the cost of administration and providing a check against absurd applications.

The construction of the Act which I have adopted is, in my opinion, supported by sec. 12. By that section it is provided that a licensing officer may cancel a licence if he has satisfied himself as to the matters mentioned in the section. A waterside worker whose licence has been cancelled under this section may appeal against such cancellation. It should be specially observed that a maximum period is strictly limited, during which the person whose licence has been cancelled shall be "ineligible to receive a licence." It would, in my opinion, be quite extraordinary, if the Act has given a licensing officer a free hand to refuse a licence and thereby deprive of his livelihood a person who was engaged as a waterside worker when the Act was passed, or who held a licence which lapsed but was not renewed through mistake, sickness or for sufficient cause, while his right to cancel a licence, which is expressed to have a tenure of twelve months only, unless renewed, is strictly controlled and his decision in that case subject to appeal. Moreover, the order of the licensing officer cancelling a licence, and the order of the tribunal determining the appeal from him, must limit the period during which the appellant is "ineligible to receive" a licence. That is the only case in which the Legislature has declared, in effect, that the licensing officer must not issue a licence. In *Julius v. Lord Bishop of Oxford* (2), one element which the Court considered

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(1) (1880) 5 App. Cas., at p. 236.

(2) (1880) 5 App. Cas. 214.



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of importance in deciding whether the Bishop had a discretion was stated by Lord *Penzance* (1): "and that such a discretion should be reposed in the bishop, whose office is to guide, correct and control the clergy is exactly what might have been expected in an Act for the regulation of Church discipline." No claim could necessarily be made that the official, described in the Act as a licensing officer, and for whom no qualification or tenure is prescribed, has such a status given to him by the Act, that it naturally follows that he must be deemed to be authorized to adjudicate without appeal, as to the suitability of persons applying for licences, or, as in the present case, the needs of the port to which he is appointed. The fact is, however, that the Legislature recognized the necessity of providing for an appeal to a Court of summary jurisdiction from the acts done by the licensing officer, in pursuance of the authority which is given him to cancel a licence in circumstances, which are expressly described, that is to say, in "any case as to which he is satisfied that the worker after a licence has been issued to him" comes within the subsequent provisions of sec. 12. Therefore, upon a consideration of the whole Act and its object, I think that the respondent was bound to issue to the prosecutor a licence as a waterside worker, or to have renewed the licence which he held at the time he applied for its renewal, and that the order nisi should be made absolute.

*Order absolute for a mandamus directed to the respondent commanding him to renew the prosecutor's licence as a waterside worker.*  
*Order made absolute with costs.*

Solicitors for the prosecutor, Johnson, Malleson, Stewart, Stawell & Nankivell, agents for Minter, Simpson & Co., Sydney, agents for V. E. H. Swayne, Ingham, Queensland.

Solicitors for the respondent, Mahony, W. H. Sharwood, Crown Solicitor for the Commonwealth.

H. D. W.