Expl *R* v *Blackburn; Ex p Transport Workers Union* (1953) 88 CLR 125

[HIGH COURT OF AUSTRALIA.]

THE FEDERATED MILLERS AND MILL EMPLOYEES' ASSOCIATION OF AUSTRALASIA . . . . . APPLICANT;

AND

BUTCHER AND OTHERS . . . . RESPONDENTS.

H. C. OF A. 1932.

SYDNEY, *May* 11, 12.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration (Cth.)—Industrial dispute—Ambit of dispute—Employees' log of demands not conceded by employers—Dispute submitted to Court by plaint—Subsequent thereto two logs of demands served by employers on employees—"Subject to adjustments and necessary variations"—Difference in rates of wages and number of working hours per week—Demands not conceded by employees—Employers' logs referred into Court—Three applications heard together—One award—Whether separate disputes—Award varied by order of Court—Wages reduced by ten per cent—Resultant wages below rates shown in employers' logs as adjusted—Validity of order—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *secs.* 16A, 19 (*d*), 24.

On 16th April 1926 an employees' organization served upon employers in the industry a log of demands for wages and conditions specifying the rates of wages sought for the various classes of work and demanding a working week of forty-four hours. The demands not having been conceded within the time stipulated, the organization treated the failure to do so as raising a dispute and on 27th May 1926 filed a plaint in the Commonwealth Court of Conciliation and Arbitration claiming the wages and conditions set out in the log, service of the plaint upon the employers being effected a few days afterwards. On 25th and 26th June 1926 respectively, two logs of demands were served upon the organization by two separate associations of employers. Both logs were similar in terms and were expressed to be "subject to the adjustments and necessary variations." Each log specified (*inter alia*) minimum rates of wages in the same amounts for the various classes of work, and each log stipulated for a working week of forty-eight hours. After an abortive conference both of such logs were, under sec. 19 (*d*) of the *Commonwealth Conciliation and*

Arbitration Act, referred into Court on 5th August 1926. The three applications were heard together, and on 26th November 1928 an award was made prescribing (*inter alia*) a working week of forty-four hours, minimum rates of wages being either slightly less than, equal to or slightly more than the minimum rates of wages proposed in the employers' logs, but in every case considerably less than the minimum rate of wages proposed by the organization. The award contained the usual "adjustment clause" providing for the alteration of the rates of wages automatically in accordance with variations in the cost of living as established from time to time by the Commonwealth Statistician. On 30th March 1931 the Full Court of the Court of Conciliation and Arbitration ordered that the award be varied by reducing all wages by ten per cent. Upon the hearing of a summons taken out by it under sec. 21AA of the Act, the organization contended that the Commonwealth Conciliation and Arbitration Court's order was invalid because it operated to reduce the rates of wages prescribed by the award below the rates specified by the employers in the logs submitted by them and subsequently coming within the cognizance of the Court.

Held, that the order was within the ambit of the dispute and was, therefore, valid:

By *Gavan Duffy* C.J., *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., on the ground that the employers' logs did not contain or imply any statement of their readiness to pay in any circumstances the wages shown therein;

By *Gavan Duffy* C.J., *Rich* and *Dixon* JJ., on the ground also that when the Court of Conciliation and Arbitration takes cognizance of an industrial dispute defined in extent and subject matter no subsequent action by the parties operates to limit the jurisdiction of the Court;

By *Starke* J., on the ground that the logs served by the employees' organization and the employers respectively and not acceded to by the persons or bodies upon whom they were served raised separate and independent disputes or controversies, and not one dispute.

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 referred to the Full Court of the High Court.

On or about 16th April 1926 the Federated Millers and Mill Employees' Association of Australasia served upon employers in the industry a log of demands for wages and conditions specifying (*inter alia*) the rates of wages sought for the various classes of work in the industry and demanding a working week of forty-four hours. Failure on the part of the employers to concede the demands, or any of them, within the time allowed, namely fourteen days from 16th April, was treated by the Association as equivalent to a refusal, or as sufficient otherwise to raise a dispute, and on 27th

H. C. OF A. 1932.

FEDERATED MILLERS AND MILL EMPLOYEES' ASSOCIATION OF AUSTRALASIA v. BUTCHER.

May 1926 it filed a plaint in the Commonwealth Court of Conciliation and Arbitration claiming the wages and conditions set out in the log. Service of the plaint upon the employers was effected on or about 8th June 1926. On 25th and 26th of that month respectively, two logs of demands were served upon the Association by two separate associations of employers, representing employers carrying on business in four States of the Commonwealth. Both of the logs were similar in terms, and were expressed to be "a list of wages and conditions proposed and authorized" by the employers "as the basis of an award," and the proposed award was to be "subject to the adjustments and necessary variations." Each log specified (*inter alia*) minimum rates of wages in the same amounts for the various classes of work in the industry and each log stipulated for a working week of forty-eight hours. A conference between the parties was held in respect of the two logs under sec. 16A of the *Commonwealth Conciliation and Arbitration Act*, but, as agreement was not reached in regard to the several demands therein, failure to do so was treated as raising two more industrial disputes, which were thereupon, on 5th August 1926, referred into the Court of Conciliation and Arbitration under sec. 19 (*d*) of the Act. The three disputes of which the Court thus had cognizance were heard together, and on 26th November 1928 an award was made which prescribed (*inter alia*) a working week of forty-four hours and minimum rates of pay which were either slightly less than, equal to or slightly more than the minimum rates of wages proposed in the employers' logs for the various classes of work, but which were in every case considerably less than the minimum rates of wages proposed in the log prepared by the Association. The award contained the usual "adjustment clause," which provided for the alteration of the rates of wages automatically in accordance with variations in the cost of living as established quarterly by the Commonwealth Statistician, except as to a fixed sum forming part of the rates and not based upon the calculation for the cost of living.

On 30th March 1931, following upon the hearing of a summons issued at the instance of some of the respondent employers, the Full Court of the Conciliation and Arbitration Court ordered that the award be varied "by reducing all wages rates prescribed by the

said award and payable thereunder from time to time by ten per centum."

On 1st February 1932 the Federated Millers and Mill Employees' Association took out a summons under sec. 21AA of the Act for the determination of the following questions:

(1) Whether the order of 30th March 1931 purporting to vary the award made on 26th November 1928 in the matter of the above-mentioned disputes was validly made so far as concerns the said Association and the members thereof and the persons, firms and corporations who were respectively claimants and respondents in the said disputes in so far as it purports to reduce the wage rates prescribed by the award below the minimum rates of wages specified by the employers in the disputes within the cognizance of the Court;

(2) Whether the Full Court of the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make the said order of 30th March 1931; and

(3) Whether the said order of 30th March 1931 was within the area or scope of the industrial disputes within the cognizance of the Commonwealth Court of Conciliation and Arbitration.

The summons was referred by *Evatt* J. to the Full Court.

Other material facts appear in the judgments hereunder.

O'Mara, for the applicant. The order of 30th March 1931 is invalid as it operates to reduce the various rates of wages to a level below the minimum rates of wages offered by the employers, and, therefore, is outside the ambit of the dispute between the parties (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1)). The proposal as to the award being subject to adjustments and necessary variations refers only to adjustments rendered necessary from time to time by alterations or variations in the cost of living, and does not refer to such variations as the Court might see fit to make; that fact distinguishes this case from *Australian Workers' Union* v. *Graziers' Association of New South Wales* (2). The fact

(1) (1931) 45 C.L.R. 409.

(2) (1932) 47 C.L.R. 22.

H. C. OF A. 1932.

FEDERATED MILLERS AND MILL EMPLOYEES' ASSOCIATION OF AUSTRALASIA v. BUTCHER.

that the minimum rates of wages offered by the employers were based upon a forty-eight hour week as against a forty-four hour week offered by the employees, and as contained in the award, does not justify the making of the order in question. Although there were perhaps three applications before the Court, the Court heard them together and made one award; in the circumstances it should be regarded as being only one dispute (see *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1) and *Australian Workers' Union* v. *Graziers' Association of New South Wales* (2)).

[EVATT J. referred to sec. 24 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 and *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (3).]

A dispute may be merged into other disputes: its area may be extended or contracted.

[DIXON J. There is another question: whether the jurisdiction of the Court depends upon the existence of the dispute at the time it takes cognizance or at the time it makes the award.]

The relevant time is the time the Court makes the award.

[DIXON J. referred to *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (3).]

Stanley Lewis, for the respondents. The Commonwealth Court of Conciliation and Arbitration had jurisdiction over the whole dispute submitted to it by plaint. Such jurisdiction was never lost, and even if the Court acted wrongly the *Commonwealth Conciliation and Arbitration Act* prevents any wrongful order of the Court from being attacked.

[STARKE J. The employees' log enabled the Court to go down to zero; therefore the ten per cent reduction was within the ambit (see *Federated Engine-Drivers' and Firemen's Association of Australasia* v. Al *Amalgamated* (4).]

In the actual proceedings not only was the dispute of which the Court had cognizance properly before the Court but on the hearing of that dispute one of the matters, that is, rate of wages, in respect

(1) (1931) 45 C.L.R. 409.
(2) (1932) 47 C.L.R. 22.
(3) (1920) 28 C.L.R. 1.
(4) (1924) 35 C.L.R. 349.

of which the dispute was brought before the Court, was thrown into issue.

[STARKE J. referred to *Holyman's Case* (1).]

That case has been partly overruled by *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (2). The parties cannot deprive the Court of the jurisdiction which it had at the inception of the proceedings. The effect of the service of the logs by the employers is that the employers agreed to pay the rates of wages as set out in such logs upon the terms and conditions stated therein, and it must be implied from such service that the only disputed matters are the matters between the amounts shown in the employers' logs and the amounts shown in the log submitted by the employees' organization. The whole question is framed on the basis that there were three disputes instead of one only. The dispute is taken as the dispute at the time the Court takes cognizance of it and, whatever the parties do subsequently, the Court never loses its jurisdiction. The Court had cognizance and it had jurisdiction, and nothing the Court does in relation to such a dispute is open to attack; therefore, the order is good. The Court at all times retains control of a dispute of which it has cognizance, as shown by sec. 24 of the Act; even agreement by the parties is only one factor in the matter. Once the Court has jurisdiction, the parties cannot add to or take away from that jurisdiction, and the ambit of the dispute, which is fixed when the Court acquires jurisdiction, is always the same. The order is severable. Even if it is invalid so far as it operates to reduce wages below the minimum rates conceded by the employers, it is valid in respect of those items which are not reduced below such minimum rates. The order is wholly good. The words "subject to the adjustments and necessary variations" in the employers' logs show that the rates proposed were variable and bring the matter within the decision in *Australian Workers' Union* v. *Graziers' Association of New South Wales* (3). Such words are apt words to describe what the Court itself does, not what the parties do; "necessary variations" meaning "necessary in the public interest" and what is necessary being a matter within the discretion of the Court.

(1) (1914) 18 C.L.R. 273. (2) (1925) 35 C.L.R. 528.
(3) (1932) 47 C.L.R. 22.

H. C. OF A. 1932.

FEDERATED MILLERS AND MILL EMPLOYEES' ASSOCIATION OF AUSTRALASIA v. BUTCHER.

O'Mara, in reply. The jurisdiction of the Court can be affected by the conduct of the parties subsequent to the Court having cognizance of the dispute. The matter which the Court had to deal with was a dispute as to wages within the limits imposed by the logs presented by the employees' organization on the one hand and by the employers on the other hand. In the presentation and conduct of the case the parties combined the claims and treated them as one dispute. Just as the parties can terminate their disputes by, e.g., settlement, so can they limit the jurisdiction.

Cur. adv. vult.

May 12. The following written judgments were delivered :—

GAVAN DUFFY C.J., RICH AND DIXON JJ. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 seeking a decision upon the validity of an order of the Commonwealth Court of Conciliation and Arbitration by which a variation was made reducing the minimum wage prescribed by an award. The order is attacked on behalf of the employees' organization upon the ground that it operates to reduce the amounts of the prescribed wages below the amounts in dispute between the parties to the industrial disputes settled by the original award. This award was expressed to be made in the matter of three industrial disputes of which the Arbitration Court had taken cognizance. The employees' organization on or about 16th April 1926 served upon the employers a log of demands for wages and conditions. It specified the rates of wages sought for various classes of work in the industry, and it demanded a working week of forty-four hours. None of these demands was conceded by the employers within the time fixed by the organization for a reply, namely, fourteen days from 16th April 1926, or at all. The organization treated the employers' failure to accede to the demands as equivalent to a refusal or as sufficient otherwise to raise a dispute, and on 27th May 1926 filed a plaint in the Court of Conciliation and Arbitration claiming the wages and conditions set out in the log. The first of the three disputes of which the Arbitration Court took cognizance is that submitted by this plaint. It is not contended that a dispute had not arisen

before the filing of the plaint as a result of the employers' failure to concede the demands of the organization. If matters had stopped there, it could not be disputed, in view of the decisions of this Court, that the ambit of the industrial dispute as to wages had no downward limit. The Court of Conciliation and Arbitration might, in the settlement of such a dispute by its award or any variation of its award, prescribe minimum wages of any amount not in excess of the sums fixed by the log of demands served by the organization. But on 25th and 26th June 1926 respectively, two logs of demands were served upon the employees' organization on behalf of employers One of these logs was prepared by one association of employers, and the other by another association. Each specified minimum rates of wages and each sought a working week of forty-eight hours. Failure to concede these demands was treated as raising two more industrial disputes. They were referred into the Court of Conciliation and Arbitration under sec. 19 (*d*) of the Act, and they are the two other supposed disputes in respect of which the original award was made. It may be doubted whether separate disputes actually arose out of these logs. They appear to relate to the same subject matter as the original dispute, and might be considered as formal statements of what the employers desired from the Court. Indeed, the heading under which the demands are set out is " List of wages and conditions proposed and authorized as the basis of an award by the respondents." The contention of the employees' organization now is that these logs operated to restrict the ambit of the existing dispute, and, in respect of wages, to confine it to the difference between the amounts stated in the log of the employees' organization and the amount stated in the employers' log. The original award made as in settlement of the three disputes prescribed rates within these limits. But the order of variation complained of reduced the rates so prescribed by ten per cent. The award contained the usual provision for the alteration of rates of pay automatically in accordance with variations in the cost of living, except as to a fixed sum forming part of the rates and not based upon the calculation for the cost of living. It is said on behalf of the employees' organization that, when the reduction of ten per cent is applied to these provisions, the rates of wage which result are lower than those proposed by the

H. C. OF A. 1932.

FEDERATED MILLERS AND MILL EMPLOYEES' ASSOCIATION OF AUSTRALASIA v. BUTCHER.

Gavan Duffy C.J. Rich J. Dixon J.

employers' logs as adjusted to the prevailing cost of living. This consequence is denied on the part of the employers, but it may be assumed for the purposes of our decision. There are two answers to the contention that the ambit of the original dispute was restricted by reason of the subsequent service of the employers' logs.

The first answer is that when the Court of Conciliation and Arbitration takes cognizance of an industrial dispute defined in extent and subject matter no subsequent expressions by the parties of their readiness to concede parts of demands and no communication of terms and conditions to which they are willing to submit can operate to limit the jurisdiction of the Court. Sec. 24 of the Act proceeds upon the view that an industrial dispute of which the Court has cognizance being a matter of public concern, is to be settled by or under the supervision of the Court either by means of an award or an agreement certified by a Judge or a Conciliation Commissioner. The employers' logs are no more than communications of the employers' desires in respect of the regulation of the industrial relations between the parties. The subjects included in the rival proposals may not be identical, but they cover the same field. There is nothing in the nature of a withdrawal by one party from the industrial dispute or a retractation of his demands or refusals. Indeed, within eight days before the service of their log the employers had filed answers to the plaint disputing each and every claim therein. The jurisdiction of the Court to settle the dispute thus pending before it was not diminished by the subsequent disclosure of the amounts which the employers were in fact prepared to pay as wages.

The second answer to the contention on behalf of the employees' organization is that the employers' logs did not contain or imply any statement of their readiness to pay in any circumstances the specified wages. The demand for a working week of forty-eight hours was an inseparable part of their proposal. It is not proper to treat a demand for hours as equivalent to a money sum expressed in wages. Hours of work involve working conditions which may and often do affect other matters as well as wages. The proposal for specified amounts of minimum wages and for a forty-eight hour week are interdependent. Accordingly the statement of the amount of wages which they were prepared to pay cannot be treated as a

concession *pro tanto* by the employers of demands based upon a forty-four hour week.

For these reasons the ambit of the dispute was not limited and the order of variation was validly made.

The second question in the summons should be answered as follows: The Full Court of the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make the order of 30th March 1931.

It is unnecessary to answer the remaining questions contained in the summons.

STARKE J. This was a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930. All the questions raised by the summons should be answered in the affirmative. And I so decide because, in my opinion, the logs or claims served by the employers and employees respectively, and not acceded to by the persons or bodies upon whom they were served, raised separate and independent disputes or controversies and not one dispute. The order made by the Arbitration Court reducing wages by ten per cent is then within the ambit of the dispute raised by the employees' claim (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. Al *Amalgamated* (1)). The *Insurance Staffs' Case* (2) is distinguishable on the facts; but I should have thought, since that case, that the extent of an industrial dispute is ascertained not by reference to curial proceedings, but rather by reference to extrinsic facts.

EVATT AND MCTIERNAN JJ. In order to sustain the attack made by the applicants upon the order of the Arbitration Court directing a ten per cent reduction of wages, it must first be shown that the employers' logs dated June 25th and June 26th, 1926, respectively, are to be taken as a final expression of willingness to pay the wages therein specified.

But although the logs were accompanied by letters requesting the employees' organization to agree to the terms and conditions "contained" in the logs, the logs described their own contents as

(1) (1924) 35 C.L.R. 349.

(2) (1931) 45 C.L.R. 409.

H. C. OF A. 1932.

FEDERATED MILLERS AND MILL EMPLOYEES' ASSOCIATION OF AUSTRALASIA v. BUTCHER.

Evatt J. McTiernan J.

a "list of wages and conditions proposed and authorized as the *basis* of an award." Moreover, the last provision, dealing with the date of the operation of the proposed award, treated the award to be made in relation to the logs as being "subject to the adjustments and necessary variations." This is certainly a reference to the adjustment clause (No. 5 of the logs), but the use of the word "variations" also points to Court action which may alter the wages suggested for reasons other than changes in the cost of living. If so, the specified rates cannot be regarded as fully definitive of the employers' attitude in relation to the wages payable from time to time in the industry.

For this reason we are of opinion that the case is covered in principle by the recent decision of this Court in the *Graziers' Case* (1), and that the Arbitration Court had jurisdiction to make the order challenged.

We express no opinion upon the question whether the jurisdiction of the Arbitration Court can be affected by action of the parties to a dispute after the Court has duly acquired cognizance thereof and the dispute answers the description contained in the Constitution and the statute. That the parties to a dispute can in fact by appropriate action restrict its area or ambit, is clear enough. But whether the Court is, as a consequence of such actual restriction of the ambit of a dispute, prevented from making an order which it could lawfully have made at an earlier moment of time, is a different question. The answer to it is not contained in the decisions, and it is not necessary to decide the point in this case.

Question 2 *answered in the affirmative. In view of answer to question* 2 *it is not necessary to answer questions* 1 *and* 3. *No order as to costs.*

Solicitor for the applicant, *A. Landa.*

Solicitors for the respondents, *Moule, Hamilton & Derham,* Melbourne, by *Dawson, Waldron, Edwards & Nicholls.*

J. B.

(1) (1932) 47 C.L.R. 22.