[HIGH COURT OF AUSTRALIA.]

H. V. McKAY MASSEY HARRIS PROPRIETARY LIMITED . . . . } PLAINTIFF;

AND

THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1944.

MELBOURNE, *Oct.* 16.

SYDNEY, *Dec.* 11.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Constitutional Law—Defence—National security—Regulations—Validity—Control of industry—Persons employed in establishment engaged wholly or partly in production for defence purposes—Additional holiday pay—National Security (Supplementary) Regulations (S.R. 1943 *Nos.* 290, 307 ; 1944 *No.* 92), *reg.* 118 (3B), (3C).

Sub-regs. 3B and 3C of reg. 118 of the *National Security (Supplementary) Regulations* provided for additional payment in respect of two holidays to persons employed in establishments engaged in production for war or defence purposes or in the repair or overhaul of munitions of war, even if those persons were not themselves actually engaged in such production, repair or overhaul.

Held, by *Latham* C.J., *Rich*, *McTiernan* and *Williams* JJ. (*Starke* J. dissenting), that sub-regs. 3B and 3C are within the defence power of the Commonwealth Parliament.

Australian Woollen Mills Ltd. v. *The Commonwealth*, *ante*, p. 476, followed.

DEMURRER.

H. V. McKay Massey Harris Pty. Ltd. brought against the Commonwealth and the Federal Agricultural Implement and Stovemakers Porcelain Enamellers and Ironworkers Association of Australia an action in the High Court in which the statement of claim was substantially as follows :—

1. The plaintiff is a company duly incorporated in the State of Victoria and carries on business at Sunshine, Victoria, and elsewhere as (*inter alia*) a manufacturer of agricultural implements.

2. The plaintiff carries on an establishment, factory or workshop at Sunshine aforesaid which at all material times was engaged partly in production for war or defence purposes or in the repair or overhaul

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of munitions of war within the meaning of reg. 118 of the *National Security* (*Supplementary*) *Regulations*.

3. At all material times certain members of the defendant union were employed at the said establishment, factory or workshop by the plaintiff who were not employees as defined in sub-reg. 4 of reg. 118 of the *National Security* (*Supplementary*) *Regulations* and were not employed in administrative and executive capacities or engaged on professional work.

4. The said establishment, factory or workshop was, while the members of the defendant union referred to in par. 3 hereof were employed as aforesaid, engaged partly in production for war or defence purposes or in the repair or overhaul of munitions of war.

5. Sub-regs. 1, 2, 3 and 3A of reg. 118 of the *National Security* (*Supplementary*) *Regulations* would, while the members of the defendant union referred to in par. 3 hereof were employed as aforesaid, have applied in relation to them if they had been employees as defined in sub-reg. 4 of reg. 118.

6. The defendants claim that pursuant to the provisions of reg. 118, as amended by Statutory Rules 1944 No. 92, the plaintiff was liable in the first pay period in respect of the said establishment, factory or workshop after the date on which the said Statutory Rules 1944 No. 92 came into operation to make to each of the employees referred to in par. 3 hereof the payment which would be required by reg. 118 to be made to them if while they were so employed they had been employees as so defined in relation to whom the said sub-regs. 1, 2, 3 and 3A applied.

7. The plaintiff claims that sub-regs. 3B and 3C of reg. 118, as amended by Statutory Rules 1944 No. 92, are invalid and void and beyond the power of the Commonwealth of Australia and/or the Governor-General of the Commonwealth of Australia on the ground that it is not a lawful exercise of the power of the Commonwealth of Australia to make laws with respect to the naval and military defence of the Commonwealth and the several States within the meaning of s. 51 (vi.) of the *Commonwealth of Australia Constitution Act* and/or is not authorized by the provisions of the *National Security Act* 1939-1943.

8. The plaintiff claims that by reason of the matters alleged in par. 7 hereof it is not liable to make the said payments to any of the employees referred to in par. 3 hereof.

And the plaintiff claims—

(*a*) A declaration that sub-regs. 3B and 3C of reg. 118 of the *National Security* (*Supplementary*) *Regulations* are invalid and void.

(*b*) A declaration that the plaintiff is not liable to make to any of the employees referred to in par. 3 the payment referred to in the said sub-reg. 3B.

The Commonwealth of Australia demurred to the statement of claim "upon the ground that sub-regs. 3B and 3C of Regulation 118 of the *National Security* (*Supplementary*) *Regulations* are respectively authorized by power validly conferred upon the Governor-General by the *National Security Act* 1939-1943 such Act including such parts thereof as authorise the said Regulations being a valid and effective exercise of the legislative powers of the Commonwealth."

The relevant regulations sufficiently appear in the judgments hereunder.

It was agreed that counsel for the plaintiff should begin.

Fullagar K.C. (with him *Spicer*), for the plaintiff. The challenged sub-regulations are invalid for the reasons given in *Victoria* v. *The Commonwealth* (*Public Service Case*) (1). The regulations have no connection with defence ; their object really is to make a present to employees because they or some of them lost something through Christmas Day 1943 having fallen on a Saturday (and similarly as to New Year's Day 1944) ; they go further than merely to make up wages to which employees would have been entitled if Christmas Day had fallen on a week day. The effect of the regulations in the case of a factory engaged in production partly for war purposes and partly for civilian requirements is that the whole of the staff is brought in, including clerks, typists and indoor workers generally, whether or not there is any connection with defence ; clerks, for instance, are not engaged in an executive capacity and are not within the exception provided in that regard. The effect of the regulations would, no doubt, be pleasing to the employees who benefited, and to that extent the regulations might tend to "contentment in industry", but there is no sufficient nexus with defence.

Barry K.C. (with him *A. M. Fraser*), for the Commonwealth. It follows from *Pidoto* v. *Victoria* (2), that the prevention of industrial disputes is within the defence power and that any proper means to achieve that purpose may be resorted to ; and that the provision of additional payments is a method of preventing industrial unrest and is also within the defence power. It is proper for this Court to take

(1) (1942) 66 C.L.R. 488 : See, *per Latham* C.J., at p. 509 ; *per McTiernan* J., at pp. 524, 525 ; *per Williams* J., at p. 533.

(2) (1943) 68 C.L.R. 87 : See, *per Latham* C.J., at p. 102 ; *per Williams* J., at p. 128.

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notice of proceedings in the Commonwealth Court of Conciliation and Arbitration which arose out of the original reg. 118, and of the judgment of that Court in those proceedings. It is then clear that the original reg. 118 gave rise to industrial dissatisfaction and that the purpose of the amendments introducing the sub-regulations now challenged was to remove that dissatisfaction. The purpose was the preservation of industrial peace in war-production establishments. There is, therefore, a sufficient connection with defence notwithstanding that employees not actually engaged in war production as well as those who are so engaged may benefit.

Fullagar K.C., in reply. So far, when National Security regulations relating to industry have been challenged, the Court has looked to the content of the regulations in question in each case. There has not been any decision that the Commonwealth has for war purposes a general power to legislate in respect of industrial unrest: such a decision would conflict with the existing authorities.

Cur. adv. vult.

Dec. 11.

The following written judgments were delivered :—

LATHAM C.J. Demurrer to a statement of claim which claims a declaration that sub-regs. 3B and 3C of reg. 118 of the *National Security* (*Supplementary*) *Regulations* are invalid. These regulations are contained in Statutory Rules 1943 No. 290 as amended by Statutory Rules 1943 No. 307 and Statutory Rules 1944 No. 92. The regulations deal with the subject of additional payment to employees in respect of Christmas Day 1943 and New Year's Day 1944. These days were Saturdays. State statutes and many industrial awards make special provisions for these and other holidays. The regulations in their final form apply to any person who was employed at any establishment, factory, mine, dockyard or workshop, which was, while he was so employed, engaged, wholly or partly, in production for war or defence purposes, or in the repair or overhaul of munitions of war, and who was still so employed. Thus the regulations provide for extra payment to be made to persons employed as stated, even if they were not themselves actually engaged in production for war or defence purposes or in the repair or overhaul of munitions of war, if only they were employed in a factory, &c., in which such work was being done. It is contended that such provisions cannot be supported under the defence power, and the defendants do not seek to justify them under any other legislative power of the Commonwealth Parliament.

If, under the defence power, the Commonwealth Parliament has the power of fixing or providing for the fixation of remuneration for any industrial employment, then these regulations are within power. In the case of *Australian Woollen Mills Ltd.* v. *The Commonwealth* (1) I have expressed my opinion that the Commonwealth does possess this power, and, accordingly, it is not necessary for me to go into any further detail in the present case. Opinions may differ as to the wisdom of a particular provision enacted under this power, but such opinions are not relevant to the question of the validity of the legislation.

In my opinion the demurrer should be allowed and there should be judgment for the defendants in the action.

RICH J. The question raised by the demurrer in this case is whether sub-regs. 3B and 3C of reg. 118 of the *National Security (Supplementary) Regulations* are respectively authorized by power validly conferred upon the Executive by the *National Security Act* 1939-1943 to exercise the defence power of the Commonwealth. The decisions of the Court have gone much further than we are invited to go in this case in upholding exercises of the power conferred by the *National Security Act* 1939-1943. I think *Australian Woollen Mills Ltd.* v. *The Commonwealth* (1) is an example. In the present case the employment with which the regulations are concerned must take place in establishments in which defence work is being done. It is true that the employees who benefit under the regulations are not necessarily themselves engaged in work of a strictly defence character. But they are working in the same undertaking or factory, and I do not think that the Court can say that it is an untenable view that uniformity of treatment of employees working side by side is expedient to promote industrial harmony. These regulations appear to be framed to give effect to that view, and the promotion of industrial harmony in defence work is, I think, an object fairly within defence power.

In my opinion the demurrer should be allowed and judgment entered for the defendants.

STARKE J. The statement of claim in this action claims a declaration that sub-regs. 3B and 3C of reg. 118 of the *National Security (Supplementary) Regulations* are invalid and of no effect and certain ancillary relief. The defendants have demurred to the statement of claim.

(1) *Ante*, p. 476.

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Starke J.

These regulations provide in substance :—

Notwithstanding anything contained in any law, where—

(*a*) a person (who if he had been an employee as defined by the regulations) was employed at or in any establishment, factory or workshop which was, while he was so employed, engaged, wholly or partly, in production for war or defence purposes and is still so employed his employer shall, in the first pay period after the date on which sub-reg. 3B comes into force make to him the payment which would be required by the regulation if, while he was so employed, he had been an employee within the meaning of certain preceding sub-regulations.

The benefits so conferred depend, not upon the employee being engaged in war work, but upon the factory or workshop being so engaged while he was employed.

The preceding sub-reg. 1 provides that notwithstanding anything contained in any law to the contrary, where an employee (as defined by the regulation) is entitled under any law to a holiday without deduction or loss of pay on Christmas Day or New Year's Day or both, his employer shall, for Christmas Day 1943 or New Year's Day 1944 or each of those days, as the case may be, pay to him in respect of the pay period which includes the day for which payment is so to be made, whether or not the employee is required to work on that day—

(*a*) where the employee does not ordinarily work on a Saturday —additional pay equivalent to the amount ordinarily payable to him for one full day's work ; or

(*b*) where the employee ordinarily works on a Saturday— additional pay equivalent to the difference between the amount ordinarily payable to him for one full day's work and the amount so payable for work on a Saturday ; or

(*c*) where the employee, being an employee working under a shift system, regularly works on certain Saturdays only in a cycle of weeks—additional pay as therein prescribed.

And sub-reg. 2 provides that in any case where the employee is required to work on Christmas Day 1943 or New Year's Day 1944 or both, the payment shall be in addition to the additional payment or other compensation to which he is entitled under any other law in respect of work performed by him on either or both of those days, as the case may be.

Christmas Day 1943 and New Year's Day 1944 fell upon Saturdays.

Generally speaking, employees under weekly engagements were entitled to holidays on Christmas Day and New Year's Day without

deduction of pay. But, when Christmas Day and New Year's Day fell, as in 1943 and 1944, upon a Saturday, employees lost the benefit of those holidays. Employees were either entitled to a holiday on Saturday without deduction of pay, or, if they worked on Saturday, then they were entitled to special holiday rates such as double time. The regulation does not interfere with these rights, but it prescribes a payment on the part of employers additional to what the employee would otherwise be entitled. Similar provision is made as to employees working under a shift system regularly working on certain Saturdays only in a cycle of weeks. And this new right is conferred (1) not because the employees are engaged on war work, but only because they work in a factory or workshop wholly or partly engaged in war work ; (2) not because the employees have lost any pay to which they were entitled, for the regulation prescribes additional pay ; (3) not because the employees have been deprived of any holidays by reason of war regulations or conditions but merely because Christmas Day 1943 and New Year's Day 1944 happened to fall upon Saturday in those particular years.

This Court has given many remarkable decisions on the defence power, but to assert that its decisions demonstrate that such a regulation as is now attacked has a real and substantial connection with defence and is a law with respect to the naval and military defence of the Commonwealth suggests that these decisions require reconsideration and a more rational approach to the interpretation of the Constitution.

The demurrer should be disallowed.

McTIERNAN J. In my opinion the demurrer should be allowed. This result follows inevitably from the decision in *Australian Woollen Mills Ltd.* v. *The Commonwealth* (1).

WILLIAMS J. This demurrer raises the question whether sub-regs. 3B and 3C added to reg. 118 of the *National Security (Supplementary) Regulations* by Statutory Rules 1944 No. 92 are a valid exercise by the Executive of the power conferred upon it by the *National Security Act* 1939-1943 to exercise the defence power conferred upon the Commonwealth Parliament by the Constitution, s. 51 (vi.).

It is sufficient to say that, in my opinion, the validity of the sub-regulations should be upheld if there is a sufficient nexus between the control of wages and employment in industry and the defence of the Commonwealth in war time. In *Australian Woollen Mills*

(1) *Ante* p. 476.

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Ltd. v. *The Commonwealth* (1) I have expressed the opinion that this is a sufficient nexus, so that, without again covering the same ground, I would, for the reasons there stated, *mutatis mutandis*, allow the demurrer.

Demurrer allowed. Judgment for defendants with costs.

Solicitors for the plaintiff, *Moule, Hamilton & Derham.*

Solicitor for the Commonwealth, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.

(1) *Ante* p. 476.