[HIGH COURT OF AUSTRALIA.]

PRINTING INDUSTRY EMPLOYEES UNION OF AUSTRALIA . . . . . } APPLICANT;

AND

VICTORIAN CHAMBER OF MANUFACTURES AND OTHERS . . . . . } RESPONDENTS.

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MELBOURNE, *March* 13, 14.

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

Industrial Arbitration—Commonwealth Court of Conciliation and Arbitration—Power of Chief Judge to direct practice and procedure—Claims before Full Court—Standard hours—Basic wage—Power to determine whether claims should be heard together—"Question of law arising in relation to . . . the proceeding"—Commonwealth Conciliation and Arbitration Act 1904-1946 (*No.* 13 *of* 1904—*No.* 30 *of* 1946), *ss.* 13A, 18A, 21AA, 38, 43.

In November 1946 the Full Court of the Commonwealth Court of Conciliation and Arbitration had before it claims for reduction of the standard hours of work and also claims for an increase in the basic wage in various industries. It announced its decision (subject to any further direction it might give) to hear the various claims concurrently. On 24th February 1947 the claims were listed accordingly, the court being constituted by the Acting Chief Judge and two other judges. One of the claimant unions applied to have the standard-hours claims heard separately, before the basic-wage claims. The Acting Chief Judge announced that it was for him alone to decide the matter in the exercise of the powers of the Chief Judge under s. 43 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1946 and that he would not depart from the prior direction of the Full Court for a concurrent hearing. The other two judges were of opinion that the Acting Chief Judge did not have this power, but one of them concurred with the Acting Chief Judge in making an order for the adjournment of the proceedings for several days. In the meantime the applicant union took out a summons under s. 21AA of the Act for the decision by the High Court of the question whether the application for separate hearings was a matter to be determined exclusively by the Acting Chief Judge without the concurrence of the other members of the Full Court or by all or a majority of the members of the Full Court.

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Held:—

(1) By the whole Court, that the question was, within the meaning of s. 21AA, a "question of law arising in relation to . . . the proceeding" before the Full Court of the Commonwealth Court of Conciliation and Arbitration.

(2) (*a*) By *Latham* C.J., *Rich*, *Dixon* and *McTiernan* JJ., that the application was not a matter which could be determined by the Acting Chief Judge under s. 43 (2) of the Act; (*b*) by *Williams* J., that, whatever the powers of the Acting Chief Judge might otherwise be under s. 43 (2), they were subject to ss. 38 and 18A (3) under which the Full Court had the power to determine the application which was before it. Accordingly, the application was a matter to be determined by all or a majority of the members of the Full Court.

SUMMONS under s. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1946.

For a considerable time prior to November 1946 the Full Court of the Commonwealth Court of Conciliation and Arbitration was engaged in hearing concurrently industrial disputes in various industries in which claims were made for a reduction of the standard hours of work. The court published an announcement, on 12th November 1946 in the first instance, and on 26th November in a revised form, which stated:—"The Full Court's current list will from to-day embrace the following groups of cases:—Standard hours.—The cases which were part heard on 31st October last. Basic wage.—(*a*) So many of the applications which were adjourned by the Full Court on 7th February 1941 as are for variation of awards still current," and basic-wage claims subsequently arising. "The court . . . will forthwith proceed to hear and determine the basic-wage question in conjunction with the standard-hours question. . . . The . . . matters now announced are subject to any further or different directions which the court may give from time to time."

From 25th November to 10th December the court heard, concurrently with the standard-hours claims, a claim for an interim increase in the basic wage and delivered judgment awarding an interim increase on 13th December 1946. On 24th February 1947 the court listed for simultaneous hearing the standard-hours claims and the basic-wage claims generally. The Printing Industry Employees Union of Australia (which was one of the claimants) and certain other parties requested the court to deal with the standard-hours claims separately from the basic-wage claims and to complete the hearing of the standard-hours claims before dealing further with any claims for an increase of the basic wage; this was opposed by some of the other parties.

On 5th March 1947 the Full Court (Acting Chief Judge *Drake-Brockman*, Judges *Foster* and *Sugerman*) assembled and published

statements in respect of this request or application (as it was called in the affidavit and summons mentioned hereunder). The Acting Chief Judge announced as the decision of the court, it being " agreed to by my brother *Sugerman* and myself," that the court adjourn until 17th March. He also stated, however, that it was his obligation and duty and his alone, exercising the powers of the Chief Judge under s. 43 of the *Commonwealth Conciliation and Arbitration Act*, to determine the procedure to be followed, and his decision was that the procedure already laid down by the court as to hearing the two sets of claims together should not be altered. He added that he was " prepared to listen to reasons . . . At present we have been given no reasons . . . as to why the basic-wage and hours questions should not be heard together as already directed by the court." Judge *Foster* was of opinion that the question of a concurrent hearing was one for the Full Court, not for the Acting Chief Judge under s. 43 of the Act, and Judge *Sugerman*, although concurring in the adjournment, was of the same opinion. Judge *Foster* was further of the opinion that the court should forthwith proceed with the separate hearing of the standard-hours claims.

The claimant Union above named took out a summons under s. 21AA of the Act, joining as respondents the Victorian Chamber of Manufactures, the States of Victoria, New South Wales, Western Australia, Tasmania, Queensland and South Australia and also the Commonwealth. The summons was supported by an affidavit of Alfred Tennyson Brodney, in par. 10 of which the request or application mentioned above was referred to.

The only question here material which was submitted for the decision of the High Court was inserted in the summons by amendment and was as follows :—

> " Was the application to the Full Court of the Commonwealth Conciliation and Arbitration Court made on the 24th day of February 1947 (referred to in paragraph 10 of the affidavit of Alfred Tennyson Brodney sworn . . . and filed herein) a matter to be determined exclusively by the acting Chief Judge without the concurrence express or implied of the other learned members of the Full Court or by all or a majority of the learned members of the Full Court ? "

The summons was referred by *Dixon* J. to the Full Court of the High Court.

Phillips K.C. (with him *Gowans* and *Eggleston*), for the applicant. The question asked by the summons is, within s. 21AA of the Act, a " question of law arising in relation to . . . the proceeding "

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before the Full Court. That the question has already arisen is clear; not only has it arisen, but in addition the Acting Chief Judge has already purported to decide it, notwithstanding that the other members of the Court were of opinion that he had not the power to decide it. The question, therefore, is properly before this Court. As to the substance of the matter, it is submitted that it was not for the Acting Chief Judge but was for the Full Court before which the claims were pending to determine the order of the hearing (whether by a unanimous or a majority decision). On 24th February there was an application before the Full Court for a reversal of its previous decision, and that was a matter for determination by the Full Court. The Full Court has an inherent power to regulate its own proceedings, but, in any event, the matter is covered by s. 38 (*a*) and (*u*) of the Act, and by rule 46 of the rules of court made under the Act, which deals expressly with the order of the hearing of claims. As s. 43 (2) of the Act is expressed to be subject to the Act and the rules, there was no room in the present case for the exercise by the Acting Chief Judge of any power under that sub-section. Moreover, the power of the Chief Judge under the sub-section to give directions as to "the practice and procedure of the court" is a power to give directions in the nature of rules of court for observance in the future and not a power to give an *ad-hoc* direction in a specific proceeding.

Coppel K.C. (with him *S. C. G. Wright*), for the Victorian Chamber of Manufactures. The question asked by the summons is not a question which has already arisen within the meaning of s. 21AA. It may never arise at all. The only order made by the court on 24th February was the order for an adjournment. The previous order of the Full Court for a concurrent hearing still stands. Both the Acting Chief Judge and Judge *Sugerman* have indicated that they are willing to reconsider the matter if reasons are advanced. It is possible that on the adjourned hearing the court will decide to reverse the prior decision of the Full Court; if so, the present question will not arise. On the other hand, it will arise at the adjourned hearing if the Acting Chief Judge adheres to the view he has already indicated, but that is a matter for the future. On the substance of the matter, if this Court thinks the question is now open, it is not contended that the matter is one to be determined by the Acting Chief Judge under s. 43 (2).

Ashkanasy K.C. (with him *Basil Buller Murphy*), for the States of Victoria, New South Wales, Western Australia and Tasmania, adopted the argument of the applicant.

The States of Queensland and South Australia did not appear.

T. W. Smith, for the Commonwealth. It is submitted that the question has already arisen and that this Court should determine it.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. The Full Court of the Commonwealth Court of Conciliation and Arbitration had, in November 1946, been engaged for some months in hearing claims with respect to standard hours in a large number of industries. These claims had been referred to the Full Court because a single judge had no jurisdiction to deal with them : *Commonwealth Conciliation and Arbitration Act* 1904-1946, s. 18A (4). In February 1941 a number of claims for increases in the basic wage had been adjourned *sine die*. Other claims have since been made for such increases. On 12th and 26th November 1946 the Full Court sitting in the standard-hours cases made a decision that the court would " forthwith proceed to hear and determine the basic-wage question in conjunction with the standard-hours question." The court also directed that the matters then announced were " subject to any further or different directions which the court may give from time to time." The court proceeded with the concurrent hearing of matters relating to standard hours and a claim for an interim increase in the basic wage and delivered judgment on the latter matter on 13th December 1946. On 24th February 1947 there were listed for hearing before the Full Court various standard-hours claims and the basic-wage claims to which reference has been made, together with further claims subsequently made in respect of the basic wage.

His Honour Acting Chief Judge *Drake-Brockman* was of opinion that it was the function and the duty of the Acting Chief Judge to determine under s. 43 of the Act whether the cases relating to standard hours ought or ought not to continue to be heard concurrently with the cases relating to the basic wage. He therefore gave a decision independently of his colleagues that the prior decision of the court as to hearing the cases jointly should not be altered. This decision was explicitly given on the basis that the matter was one for the determination of the Chief Judge, and not for decision by the Full Court. Their Honours Judge *Foster* and Judge *Sugerman* did not agree in this interpretation of s. 43 and were of opinion that the question whether a concurrent hearing should be continued was a matter for the Full Court which was sitting to hear the cases. The

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Acting Chief Judge and Judge *Sugerman* concurred in adjourning any further hearing to 17th March. Judge *Foster* was of opinion that the court should proceed at once with a separate hearing of the standard-hours cases.

A summons under s. 21AA of the Act has been taken out and referred to the Full Court. The summons submits the following question for decision :—

> " Was the application to the Full Court of the Commonwealth Conciliation and Arbitration Court made on the 24th day of February 1947 (referred to in Paragraph 10 of the affidavit of Alfred Tennyson Brodney sworn on the 7th day of March 1947 and filed herein) a matter to be determined exclusively by the acting Chief Judge without the concurrence express or implied of the other learned members of the Full Court or by all or a majority of the learned members of the Full Court."

The application referred to in the question was an application for separate hearings of the standard-hours and basic-wage cases. Another question contained in the summons is not very clear in its terms and none of the parties now ask that it should be answered.

The first question which arises is whether the question submitted is a question which, within the meaning of s. 21AA, is a question of law arising in relation to the dispute or to the proceeding, i.e. to a proceeding which is before the court. In my opinion the question does so arise. It is necessary before any hearing of the disputes can proceed to determine whether the Acting Chief Judge or the court which is hearing the cases has the power to determine whether or not there shall be a joint hearing of the cases. The question raised is not one which relates to the actual exercise of a power in the present cases. The question is a question as to where the authority to exercise a power resides. As it is necessary to determine this question before determining the disputes between the parties which are the subject of proceedings in the court, the question arises in relation to those disputes and proceedings : *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1).

I proceed, therefore, to consider the question submitted by the summons. Section 43 of the Act, so far as relevant, is in the following terms :—

" (1) The Judges of the Court or a majority of them may make rules not inconsistent with this Act or the Regulations—

(*a*) for regulating the practice and procedure of the Court ; and

(*b*) for prescribing the duties of the Industrial Registrar, the the Deputy Industrial Registrars, and any other officers of the Court.

(1) (1925) 36 C.L.R. 442.

(2) Subject to this Act and to the rules, the practice and procedure of the Court and the duties of the Industrial Registrar, the Deputy Industrial Registrars, and other officers of the Court shall be as directed by the Chief Judge."

The words " practice and procedure of the court " in s. 43 (1) (*a*) should be given the same meaning as the same words in s. 43 (2). It is plain that in s. 43 (1) the words refer to general rules or regulations to be applied in and by the court when the court is discharging its functions. Similarly, in s. 43 (2) the words refer to general directions which are to be applied in and by the court in the discharge of its functions in dealing with matters or classes of matters which come before it.

The words do not relate to the application of such rules or directions in a particular case ; for example, the judges could not, under the power conferred by s. 43 (1), make a rule requiring that the various applications as to standard hours and the basic wage now before the court should be heard together. A direction of this character would be a decision in particular matters and would not constitute the making of a rule regulating practice and procedure. The position is the same under s. 43 (2). Under that provision the Chief Judge cannot give a direction which is a decision as to the procedure to be followed in a particular case which is before the Full Court, though as a member of a Full Court hearing the case he can take part in giving such a decision.

Neither the Chief Judge nor the court can compel any party to make an application which that party does not wish to make. It may be that the court will be of opinion that an order sought in respect of a particular claim should not be made unless the court is able to deal at the same time with other matters which, from either a legal or an economic or a specifically industrial point of view, are, in the opinion of the court, connected with the claim or will be affected by the decision on the claim. If the court were of such an opinion it could adjourn the hearing of the claim until the other matters had received consideration in proceedings duly before the court, or, if the action or inaction of the parties prevented the consideration of these other matters, the court could dismiss the claim. But the determination of questions such as these is a matter for the court which hears a claim and does not belong to the subject of directions as to practice and procedure so as to fall within the matters in relation to which the Chief Judge has special powers under s. 43 (2). A decision upon such matters is not a rule for regulating the practice and procedure of the court within the meaning of s. 43 (1) or a direction as to the practice and procedure of the court within the meaning of s. 43 (2).

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This view of s. 43 (2) is different from that taken by the Chief Judge but I must not be understood as indicating any dissent from what the learned Chief Judge has said as to the duty of the court to preserve its independence and to refuse to accept any direction from any external source in the performance of its duties. Counsel for the applicants, it is proper to say, have disclaimed any intention or attempt to use such improper means of influencing the decision of the court.

The power conferred on the Chief Judge by s. 43 (2) is expressed to be "subject to this Act and to the rules." The Act and rules made under the Act in my opinion make provision for the position which has arisen. Section 38 confers many powers upon the court, including (*a*) a power to hear and determine disputes, and (*u*) generally to give all such directions and do all such things as it deems necessary and expedient in the premises. Under this power the court which is engaged in hearing and determining a dispute has power to determine whether cases shall be heard together or separately. Further, rule 46 of the rules made under the Act provides as follows: "All references or claims shall be heard and dealt with in the order in which they are filed unless the court or a judge otherwise directs." This provision plainly confers power upon the court which is hearing a reference or a claim to determine the order in which references and claims shall be heard.

Accordingly, in my opinion, the question submitted should be answered by declaring that the application to which the question refers was a matter to be determined by all or a majority of the members of the Full Court.

Rich J. As I do not agree with the opinion of the Acting Chief Judge of the Arbitration Court on the crucial question in this matter I shall state my opinion in my own way. Dr. *Coppel* in his argument raises what is really a preliminary objection to the jurisdiction of this Court to deal with the question submitted to us. In a very persuasive but plausible speech he contended that a question of law had not yet arisen in the proceedings before the Arbitration Court. He adopted the role of a minor prophet and suggested that before Monday next—the date when the case would be resumed in the Arbitration Court—the spirit of concord might have descended on the Arbitrators and harmony would have been restored by a change of opinion on the part of the three judges. I do not claim to be a prophet nor to be able to reconcile Dr. *Coppel's* purely metaphysical contrarieties concerning the word "arising." As to these enigmas I prefer to take a more concrete or factual position: *Davos sum non*

Oedipus. It appears to me that where two rival claimants to—let us say—a room raise their claims upon the threshold as to who is entitled to occupy the room, though neither has crossed the threshold and entered the room, a question has arisen. The case concerns rival claims to a power and it appears to me to be beside the point that the rival claimants may not have entered upon the full exercise of the power, if that be so. With regard to the crucial question I am of the opinion that the decision of the questions raised in this controversy is not a matter within s. 43 (1) as being a rule regulating the practice and procedure of the court or a direction as to the practice and procedure of the court within s. 43 (2). The decision concerns a specific direction about the hearing of the matters before the Arbitration Court made in the course of the hearing. It is just as much so as a direction as to the order of taking evidence, the rejection or admission of evidence, the time and order of the addresses of counsel, what questions are immediately to be decided and those to be postponed and so on. Such matters are for the court dealing with the claims and not for the Chief Judge pursuant to the power conferred on him under s. 43 (2).

I therefore answer in the negative the first part of the question added by the order made by my brother *Dixon* on 11th March 1947 and the second part of the question in the affirmative.

DIXON J. In my opinion s. 38 of the *Commonwealth Conciliation and Arbitration Act* confers upon the court as such powers which are sufficient in extent to enable it to decide whether or not the whole or any part of a dispute or other proceeding shall be heard with the whole or part of another dispute or proceeding or of other disputes or proceedings. Sub-section (2) of s. 43 is expressed to be subject to the Act and for that reason it cannot confide to the Chief Judge any power conferred by s. 38 on the court. If for no other reason, s. 43 (2) therefore cannot be interpreted as placing it within the province of the Chief Judge, as distinguished from the court, to direct that two or more proceedings before the court shall or shall not be heard together. But, in any case, the purpose of the material part of s. 43 (2) is not to transfer to the Chief Judge the function ordinarily exercised by a court of giving interlocutory directions, rulings and determinations concerning the hearing of a given case or cases or as to procedural questions or matters arising therein, but of supplementing deficiencies or inadequacies in the practice and procedure of the court as ascertained from statute, from the rules of the court and from the *cursus curiae*. Where it is found that no mode of procedure is provided appropriate

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to a case or description of a case, the Chief Judge may supply the want by directing the manner in which the party or parties may proceed.

I am, therefore, of opinion that it is not for the Chief Judge but for the court to say whether the disputes or claims as to the basic wage are to be heard with the disputes or claims as to standard hours. I think that for the purpose of s. 21AA this question of law arose in relation to the proceedings of the Court of Conciliation and Arbitration when the Chief Judge ruled that the power and responsibility of deciding whether or not such disputes or claims should be heard together resided in him alone and when the other two members of the court expressed their dissent from that ruling. The question was thus raised who had the power and I cannot see why this question any the less arose because one or two of the three Judges who differed as to where the power resided had not yet finally declared how they would exercise it, if the power resided with the court and not with the Chief Judge. Quite logically they first gave their respective decisions upon the question of power before deciding what ought to be done under the power. I think that then, at all events, the question arose whether, on the one hand, it was a function of the court or, on the other hand, s. 43 (2) placed the responsibility upon and confided the authority to the Chief Judge, as his Honour considered. The applicants were therefore entitled to proceed by summons under s. 21AA.

For these reasons I agree that the second question in the summons should be answered that the application should have been determined by a majority of the Judges of the Court of Conciliation and Arbitration.

McTIERNAN J. I agree with the order proposed and with the reasons of his Honour the Chief Justice.

WILLIAMS J. In my opinion a question of law has arisen in relation to the proceedings within the meaning of s. 21AA of the Act. I agree, of course, that the question must be an actual and not a hypothetical question. But there is an application before the Arbitration Court to hear the hours and basic-wages claims separately and in that application the Acting Chief Judge has decided, contrary to the views of the other two judges, that the determination whether the application should be granted or not is a matter for him and not for the court as a whole.

No doubt the application has been adjourned until a future date and when it comes on for further hearing one or both of the other

judges may take the same view as the Acting Chief Judge, but both they and the parties are now entitled to know whether the power to grant or refuse the application resides in the Acting Chief Judge or the whole court.

The Acting Chief Judge claims that the power resides in him by virtue of ss. 13A and 43 (2) of the Act. I find it unnecessary to express an opinion upon the extent of these powers. They are made subject to the Act. They are therefore subject to ss. 38 and 18A (3); and these sections confer ample power upon the Full Court, or if there is a division of opinion upon a majority of that court, to decide whether the application should be granted or not.

In my opinion question (2) should be answered that it is a matter to be determined by all or a majority of the court.

Question answered as follows: The application was a matter to be determined by all or a majority of the members of the Full Court.

Solicitors for the applicant, *Maurice Blackburn & Co.*

Solicitors for the Victorian Chamber of Manufactures, *Moule, Hamilton & Derham.*

Solicitor for Victoria, New South Wales, Western Australia and Tasmania, *F. G. Menzies*, Crown Solicitor for Victoria.

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

E. F. H.