[HIGH COURT OF AUSTRALIA.]

IN re an APPLICATION BY THE PUBLIC SERVICE ASSOCIATION OF NEW SOUTH WALES;

AND

IN re the INDUSTRIAL UNION OF EMPLOYEES (COMMISSIONED POLICE OFFICERS) AWARD.

APPLICATION FOR REMOVAL FROM THE INDUSTRIAL COMMISSION OF NEW SOUTH WALES.

H. C. OF A. 1947.

SYDNEY, *Sept.* 10, 15.

Williams J.

High Court—Proceedings before State Industrial Commission (N.S.W.)—Whether before a "court"—Award—Variation—Applicability of Commonwealth regulations—"Cause"—Distinct and divisible question—"Part of cause"—Removal into High Court—Attorney-General for Commonwealth or for a State—Not a party to the proceedings—Right to apply for removal of cause or part thereof—Judiciary Act 1903-1946 (*No.* 6 *of* 1903—*No.* 10 *of* 1946), ss. 2, 40—*Industrial Arbitration Act* 1940-1946 (*N.S.W.*) (*No.* 2 *of* 1940—*No.* 6 *of* 1947), *ss.* 14 (8) (*a*), (*b*), 20 (1) (*f*), 87—*National Security* (*Economic Organization*) *Regulations* (*S.R.* 1942 *No.* 76—1947 *No.* 43), *regs.* 16, 18 (3).

The Industrial Commission of the State of New South Wales, set up by the *Industrial Arbitration Act* 1940-1947 (N.S.W.), is a "court" within the meaning of s. 40 of the *Judiciary Act* 1903-1946.

Under s. 40 of the *Judiciary Act* the Attorney-General for the Commonwealth or a State may apply for removal into the High Court of a "cause or part of a cause" whether or not he is a party to the proceedings in which the cause arises and, if the cause really and substantially arises under the Constitution or involves its interpretation, the Court must grant the removal as of right notwithstanding that the matter is apparently concluded by authority. Any distinct and divisible question may be "part" of such a cause within the meaning of s. 40.

APPLICATION under s. 40 of the *Judiciary Act* 1903-1946.

After the conclusion of the evidence on an application made under the *Industrial Arbitration Act* 1940-1947 (N.S.W.) by the Public Service Association of New South Wales to the Industrial Commission of that State for an award in respect of commissioned members of the police force of the State, and before making his

award therein, the President of the Industrial Commission submitted a statement to the Chief Judge of the Commonwealth Court of Conciliation and Arbitration in accordance with the *National Security* (*Economic Organization*) *Regulations*. On 8th May 1947, the Senior Judge of the Commonwealth Court of Conciliation and Arbitration, pursuant to reg. 18 (3) of the *Economic Organization Regulations*, authorized the Industrial Commission to proceed to determine the matter and to alter rates of remuneration to the extent necessary to remove any anomaly which might be proved to the satisfaction of the Industrial Commission to exist, whereupon, on 29th May 1947, an award was made by the President.

The Attorney-General for New South Wales appealed against the making of the award to the Full Bench of the Industrial Commission. During the hearing of the appeal counsel for the Association submitted, *inter alia*, (1) that the President was justified by the authority given under reg. 18 (3) of the *Economic Organization Regulations* to make the award, and (2) that reg. 16 of the *Economic Organization Regulations* prohibiting an industrial authority from altering rates of wages did not bind the State of New South Wales in respect of officers of its police force, and that in so far as they purported to do so they were invalid. Leave having been given to the Attorney-General for the Commonwealth to intervene in respect of the second-mentioned submission, it was contended on his behalf that the *National Security* (*Economic Organization*) *Regulations*, made under the *National Security Act* 1939-1946 and as continued under the *Defence* (*Transitional Powers*) *Act* 1946, were valid and binding on the State and the authorities of the State, including legal tribunals created by State law.

At the conclusion of the argument the Full Bench of the Industrial Commission reserved judgment and intimated that it would later deliver judgment on all points raised on the hearing of the appeal.

An application was made to *Williams* J. on behalf of the Attorney-General for the Commonwealth for an order under s. 40 of the *Judiciary Act* 1903-1946 to remove the appeal into the High Court.

Weston K.C., *Macfarlan* and *Benjafield*, for the applicant, the Attorney-General for the Commonwealth.

Barwick K.C. and *Conybeare*, for the Public Service Association of New South Wales.

Cook, for the Attorney-General for the State of New South Wales.

Cur. adv. vult.

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Sept. 15.

WILLIAMS J. delivered the following written judgment :—

This is a motion on behalf of the Attorney-General for the Commonwealth for an order under s. 40 of the *Judiciary Act* to remove a cause or part of a cause from the Industrial Commission of New South Wales into this Court. The cause in question is an application pending before the Commission between the Public Service Association of New South Wales as applicant, and the Attorney-General for the State of New South Wales as respondent, for an award for Commissioned Officers of the Police Force of New South Wales. The application was heard by the President of the Commission who made an award fixing rates of pay for superintendents and inspectors to take effect from 6th December 1946, and remain in force for three years. Before making the award the President obtained authority from the Senior Judge of the Commonwealth Court of Conciliation and Arbitration under reg. 18 (3) of the *National Security* (*Economic Organization*) *Regulations* to proceed to determine the matter and alter rates of remuneration to the extent necessary to remove any anomaly which might be proved to his satisfaction to exist having regard to existing standards so as to maintain a proper degree of relativity and a balanced scale of remuneration. From that award the Attorney-General for the State of New South Wales appealed to the Full Bench of the Commission. The appeal has been heard, and the Full Bench has reserved its decision.

One question that arose at the hearing before the Full Bench was whether the President was justified by the authority given under reg. 18 (3) of the *Economic Organization Regulations* to make the award, and it was contended for the Public Service Association that—(1) the President was so authorized ; and (2) authority was not necessary because the *Economic Organization Regulations* would not apply to an application to the Commission to alter the rate of remuneration of members of the Police Force of New South Wales.

On the second contention the Attorney-General for the Commonwealth was granted leave to intervene, the question was argued, and the Full Bench intimated that it would take the question into consideration in reaching its decision. It is in respect of this question that the Attorney-General has applied to have the cause or part of the cause removed into this Court. Counsel for the Attorney-General for the State of New South Wales submitted to such order as the Court should see fit to make. But a number of submissions were made by Mr. *Barwick* for the Public Service Association of New South Wales in opposition to the motion. They were that :—(1) there is no cause or part of a cause arising under

the Constitution or involving its interpretation; (2) there was no cause pending in a court within the meaning of s. 40; (3) the Attorney-General for the Commonwealth is only entitled to apply under the section in a cause in which he or the Commonwealth is a party.

(1) It was submitted that no cause or part of a cause arises under the Constitution or involves its interpretation because this Court has already decided the question which the Attorney-General applied to have removed into this Court. It is clear that the preservation of order and the prevention of crime by means of police is part of the essential executive governmental functions of the State of New South Wales (*Coomber* v. *Berks Justices* (1)). It also seems to me to be clear that this Court has decided that the terms and conditions of employment including rates of remuneration of public servants and other persons employed by a State in the performance of these functions are not subject to the defence power of the Commonwealth, and therefore not subject to the industrial provisions of the *Economic Organization Regulations* (*Victoria* v. *The Commonwealth* (2); *Pidoto* v. *Victoria* (3); *Victoria* v. *Foster* (4); *Melbourne Corporation* v. *The Commonwealth* (5)) (and particularly the third of these cases). But however close and authoritative the previous decisions, if the cause, as it does here, really and substantially arises under the Constitution or involves its interpretation, the Court has no option but to grant the application.

(2) Section 14 of the *Industrial Arbitration Act* 1940-1947 (N.S.W.) provides for the constitution of the Industrial Commission of New South Wales which—"shall be a superior court of record and its seal shall be judicially noticed . . . and each member shall . . . hold office during good behaviour, shall have the same rank, title, status, and precedence and the same salary, pension, and other rights as a puisne judge of the Supreme Court, and shall be removable from office in the same manner only as a judge of the Supreme Court." The Commission has both arbitral and strictly judicial original and appellate functions, and is clearly a court. In *Ex parte Walsh and Johnson*; *Re Yates* (6) it was held that the definition of "cause" given by Lord *Selborne* in *Green* v. *Lord Penzance* (7) applied to the word "cause" in s. 40. Lord *Selborne* pointed out that "cause" is not a technical word and includes any proceedings competently brought before and litigated

(1) (1883) 9 App. Cas 61, at p. 67.
(2) (1942) 66 C.L.R. 488.
(3) (1943) 68 C.L.R. 87.
(4) (1944) 68 C.L.R. 485.
(5) (1947) 74 C.L.R. 31.
(6) (1925) 37 C.L.R. 36.
(7) (1881) 6 App. Cas. 657, at p. 671.

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in a court. Section 40 contemplates that the cause is one which may terminate in a final judgment. Judgment is defined by s. 2 of the *Judiciary Act* to include any judgment, decree, order, or sentence. It is therefore not confined to its technical meaning of judgment in an action. The definition is not exclusive, and the word must be given a wide meaning to make it coincide with the wide meaning of "cause." Section 14 (8) (*a*) of the *Industrial Arbitration Act* provides that at sittings of the Commission three members shall be present, but that the Commission may in any particular matter delegate any of its powers or functions to any one member. Section 14 (8) (*b*) provides that from any order, award, ruling, or decision made by such member an appeal shall lie to the Commission. Section 87 provides that subject to the right of appeal an award shall be binding for the period not exceeding three years specified therein and after such period until varied or rescinded. Section 20 (1) (*f*) provides that awards may be rescinded or varied but this does nor preclude awards from being final. They are made final by the Act and until rescinded or varied decide the rights of the parties (cf. *Pepper* v. *McNiece* (1)). Proceedings brought and litigated before the Commission are in my opinion causes in a court within the meaning of s. 40.

(3) In *Ex parte Walsh and Johnson* (2) *Isaacs* J. said—"The dominant idea" (that is of ss. 40 and 40A of the *Judiciary Act*) "is to make s. 74 of the Constitution a real and effective provision to secure that all Australian constitutional questions of *inter se* nature shall be determined in this Court in any event, and to enable a party or Commonwealth or States to have any other constitutional question arising in a cause determined by this Court. The method is by limiting the jurisdictional powers of State Courts in constitutional questions in the way described." The Attorney-General for the Commonwealth or a State must therefore as *Starke* J. pointed out in the same case (3), have the right to apply to have a cause or part of a cause removed into this Court as of course whether he is a party to the proceedings or not; otherwise the purpose of the section would be frustrated.

For these reasons I am of opinion that the Attorney-General of the Commonwealth is entitled to an order under s. 40. I am also of opinion that the question whether the industrial provisions of the *Economic Organization Regulations* bind the Commission in fixing the remuneration of members of the Police Force is part of the cause within the meaning of the section. This seems to me to

(1) (1941) 64 C.L.R. 642.
(2) (1925) 37 C.L.R., at p. 74.
(3) (1925) 37 C.L.R., at p. 130.

follow from the passage in the judgment of *Isaacs* J. in *Ex parte Walsh and Johnson* (1) already cited. It is obvious that it will be convenient to remove only this part of the cause into this Court. I therefore make the following orders :—

(*i*) Order that part of the cause between the Public Service Association of New South Wales and the Attorney-General for the State of New South Wales now pending in the Industrial Commission of New South Wales No. 383 of 1946 be removed into this Court, the part to be so removed being the question whether the industrial provisions of the *Economic Organization Regulations* are binding upon the Commission in an application for an award for Commissioned Officers of the Police Force of New South Wales;

(*ii*) Order under s. 18 of the *Judiciary Act* that the part of the cause so removed be argued before the Full Court at the next sittings in Sydney commencing on 11th November 1947;

(*iii*) These orders to be without prejudice to the right of the Commission to dispose of the cause if it can do so without deciding the part removed into this Court;

(*iv*) Liberty to either Attorney-General or the Public Service Association to apply to the Full Court for an earlier hearing; and

(*v*) That the costs of this motion be reserved.

Orders accordingly.

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

Solicitor for the Public Service Association of New South Wales, *Crichton-Smith, Taylor & Scott.*

Solicitor for the Attorney-General for the State of New South Wales, *F. P. McRae*, Crown Solicitor for the State of New South Wales.

J. B.

(1) (1925) 37 C.L.R., at p. 74.