[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; Ex Parte AMALGAMATED ENGINEERING UNION.

H. C. of A. 1949.

Sydney, *Nov.* 21.

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

Mandamus—Commonwealth Court of Conciliation and Arbitration—Determination of basic wage—Factor of child endowment—Controversial issue at Federal elections then ensuing—Adjournment of hearing—Discretion of the Arbitration Court—Review by the High Court—The Constitution (63 & 64 *Vict. c.* 12), *s.* 75 (v.)—*Commonwealth Conciliation and Arbitration Act* 1904-1948 (*No.* 13 *of* 1904—*No.* 65 *of* 1948), *ss.* 4, 32, 36, 38 (1).

During the course of a lengthy hearing of industrial disputes involving the fixation of the basic wage persons not connected with the disputes but concerned with the general Federal election then pending made repeated references to the relation of child endowment to the basic wage, a matter which would have to be determined in the hearing of the disputes. The Commonwealth Court of Conciliation and Arbitration thereupon announced that it had decided that it was its duty to proceed no further with the hearing of the disputes " while the issue remains the subject of election propaganda " and adjourned the further hearing to a date to be fixed. Upon an application for a writ of mandamus directing the Commonwealth Court of Conciliation and Arbitration to hear and determine the disputes according to law,

Held, by *Latham* C.J., *Dixon*, *McTiernan* and *Williams* JJ. (*Webb* J. dissenting), that the order made by the Commonwealth Court of Conciliation and Arbitration for the adjournment of the hearing of the disputes was within the discretion of that court, and that the application should be refused.

Mandamus.

An application was made *ex parte* on behalf of the Amalgamated Engineering Union, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1948, for

an order nisi for a writ of mandamus directed to the Commonwealth Court of Conciliation and Arbitration and the judges of that Court commanding the court to hear according to law the parties to certain disputes in pursuance of the duty of the court to hear and determine those disputes according to law and in pursuance of that duty should also hear and determine according to law any application which might be made by any of the said parties for a resumption or an adjournment of the hearing of those disputes.

The arbitration agent of the union deposed in an affidavit: that on 14th January 1949, on behalf of the union, he notified the Registrar of the Commonwealth Court of Conciliation and Arbitration in accordance with the provisions of the Act that the union was aware of the existence of an industrial dispute, namely, a refusal by employers of claims, including, *inter alia*, a claim that the basic wage to be paid to employees should be £10 per week with an additional amount of 10s. per week in four named places, made by the union upon employers of members of the union contained in a log of wages and working conditions of all persons employed by those employers in the States of New South Wales Victoria, South Australia and Tasmania, the dispute thus involving the matter of the alteration of the basic wage or the principles upon which it was computed referred to in s. 25 of the Act. The parties first appeared before the Full Court of the Commonwealth Court of Conciliation and Arbitration to be heard on 22nd February 1949, and thereafter, in consequence of various orders and directions of that Full Court, the actual hearing of the parties to the dispute commenced on 18th May 1949 and, subject to adjournments, the hearing continued until 14th November 1949; that simultaneously with that hearing the Full Court had proceeded to the hearing of the parties to numerous other disputes between employers and employees involving claims by the employees for an increase in the basic wage to be paid by employers to employees; that all the disputes had been consolidated and carried on as one hearing by direction of the court; that on 14th November 1949, at the commencement of the sitting of the court the Chief Judge made the following statement:—"At the basis of the problem of settling the disputes before the court concerning the basic wage for adult male and female workers are, as has been made manifest during the proceedings, questions relative to the amount and fair and proper distribution of the national income and to the capacity of the economy to support such distribution. Since these matters have been raised for consideration in another field, since, in other words, they lie at the basis of an issue raised at the coming elections to

H. C. OF A. 1949.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE AMALGAMATED ENGINEERING UNION.

the Federal Parliament by the references made to the possible supplementation of the basic wage by changes in the amount and incidence of child endowment, the court (which must not be taken to express any criticism of those references) has decided that it is its duty to proceed no further in the present case while the issue remains the subject of election propaganda. The case will therefore be adjourned to a date to be fixed."; that the court then adjourned and neither the deponent nor any other person was heard or given an opportunity to address the court prior to or in relation to that adjournment.

The secretary of the Australasian Council of Trade Unions deposed that an application made in chambers during the afternoon of 14th November 1949 for the fixing of an early date for the hearing of a motion by the industrial organizations of employees concerned for an immediate resumption of the hearing of the disputes, was unanimously refused by the three judges who heard the application.

P. D. Phillips K.C. (with him *R. L. Gilbert*), for the applicant. The jurisdiction of the Arbitration Court to adjourn its proceedings is not disputed, but in exercising its discretion to adjourn its proceedings the court must proceed upon appropriate grounds which fall within the realm of judicial discretion. The discretion to adjourn must be exercised in accordance with the well-understood principles which regulate a judicial discretion. The ground upon which the Arbitration Court has purported to act in this case does not fall within the realm of judicial discretion (*R.* v. *Evans* (1)). This Court has jurisdiction to order that a writ of mandamus issue to compel the Arbitration Court to exercise its judicial function (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres* (*Aust.*) *Ltd.* (2)). There is nothing in s. 75 (v.) of the Constitution which limits the granting of a writ of mandamus to any particular ground or reason. When determining a matter mentioned in s. 25 of the *Commonwealth Conciliation and Arbitration Act* 1904-1948, as here the basic wage, the Arbitration Court does not sit in its judicial capacity but merely as an arbitrator. A wrong exercise of judicial discretion was considered in *R.* v. *Adamson* (3); *Sharp* v. *Wakefield* (4) and *R.* v. *Brighton Corporation*; *Ex parte Tilling* (*Thomas*) *Ltd.* (5). Where a tribunal adjourns proceedings, even though acting in good faith, for reasons which have no relation to the interests of the parties before it, whose dispute

(1) (1890) 62 L.T. 570.
(2) (1949) 78 C.L.R. 389.
(3) (1875) 1 Q.B.D. 201, at p. 205.
(4) (1891) A.C. 173, at p. 179.
(5) (1916) 114 L.T. 800.

or litigation it is considering, then that will be a purported exercise of the discretion so improper as to amount to no real exercise at all. If consideration be given to matters not relevant to the parties in dispute or the just determination of the issue, then that is a wrong exercise of the discretion. It is not denied that the Arbitration Court is an arbitral tribunal performing a function which is perhaps wider than merely determining any *lis inter partes*. A tribunal which has to administer a law could never properly stop in the course of its administration because the law might be changed whatever the stage of potential or contingent alteration has been reached. If the statement made by the Arbitration Court means as a matter of law, in the light of its statutory powers and duties, it has so interpreted the statute which created it as to impose a duty upon itself it is clearly wrong. It strikes at the very basis of a tribunal of the nature of the Arbitration Court and the administration of justice if it allows itself to be concerned with the passing of ephemeral acts of an electoral test. A mistaken conception of the current of party politics at the time could never be appropriate matter for an independent tribunal, however much charged with the public interests (*Irish Union of Distributive Workers and Clerks* v. *Rathmines Urban District Council* (1)). Because the Arbitration Court has important public functions, and because the interests of the public make those functions, in one sense, relatively undefined, it is all the more important that clearly irrelevant considerations should be excluded by the supervisory jurisdiction of this Court. So much uncertainty so constantly intervenes between a promulgation of a party doctrine during an election and an actual change in the law that the consideration of party doctrine promulgated during an election must, in the eyes of the Court, be irrelevant.

LATHAM C.J. This is an application for a writ of mandamus directed to the Commonwealth Court of Conciliation and Arbitration and the judges of that Court directing that the court should hear according to law the parties to certain disputes in pursuance of the duty of the court to hear and determine the same according to law and should also hear and determine according to law any application which may be made by any of the parties to those disputes for a resumption of the hearing of the disputes.

The affidavits submitted to the court show that the Arbitration Court has been engaged for several months in hearing an application for the increase of the basic wage. That application involves a consideration of what may be described as a family wage and of

(1) (1928) I.R. 260, at p. 291.

H. C. OF A. 1949.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE AMALGAMATED ENGINEERING UNION.

Latham C.J.

child endowment. In the general Federal election which is at present proceeding, the voting in which will take place on 10th December next, reference has been made to the relation of child endowment to the basic wage. That is a matter which would have to be determined by the court in the hearing of the disputes mentioned. The court made an announcement in these terms—"At the basis of the problem of settling the disputes before the court concerning the Basic Wage for adult male and female workers are, as has been made manifest during the proceedings, questions relative to the amount and fair and proper distribution of the National Income and to the capacity of the economy to support such a distribution." Reference is then made to the fact that these matters have been raised as an issue in the political field and it is stated that the court has decided that it is its duty to proceed no further in the present case "while the issue remains the subject of election propaganda." I read those words as meaning that the adjournment which the court directed on this occasion was an adjournment only until after the election, and not an indefinite adjournment, as has been suggested.

Section 75 (v.) of the Constitution of the Commonwealth authorizes this Court to issue writs of mandamus to officers of the Commonwealth and that section is applicable notwithstanding the provisions of s. 32 of the Arbitration Act in a case where the tribunal in question is declining to exercise the jurisdiction which is given to it.

It is an obvious statement of fact that very often matters dealt with in the Arbitration Court are subjects of political controversy. If the Arbitration Court were to cease to perform its functions whenever a matter before it became a subject of political controversy the court would often not be in operation. If the adjournment of a case amounts to a refusal to exercise jurisdiction mandamus may go. In the present case it is contended that the court has exercised its discretion upon grounds which are not relevant to the subject matter in respect of which the discretion has been conferred and it is said that the fact that there is a controversy outside the court on a particular matter is no ground whatever for the exercise of the discretion which the court has as to the time when cases may be heard. The general principles relating to the grant of a writ of mandamus were expressed in the case of *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1):—"A writ of mandamus does not issue except to command the fulfilment of some duty of a public nature which remains unperformed. If the person under the duty professes to perform

(1) (1933) 50 C.L.R. 228, at pp. 242, 243.

it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law *de novo*, at any rate if a sufficient demand or request to do so has been made upon him. In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void. But the prosecutor who undertakes to establish that a tribunal has so acted ought not to be permitted under colour of doing so to enter upon an examination of the correctness of the tribunal's decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or of the regularity or irregularity of the manner in which the tribunal has proceeded. The correctness or incorrectness of the conclusion reached by the tribunal is entirely beside the question whether a writ of mandamus lies." In this case the Arbitration Court is of opinion that it would be undesirable for the hearing of these disputes to proceed at a time when substantial matters involved in the disputes have become issues in a general Federal election. Under s. 38 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 the court has power to adjourn its sittings to any time and place. Under s. 36 it is provided (I read only the words referring to the court, leaving out those referring to conciliation commissioners) that the court shall in such manner as it thinks fit carefully and expeditiously hear every industrial dispute. The definition of " industrial disputes " includes in a sense within itself the definition of " industrial matters " and the definition of " industrial matters " in s. 4 of the Act contains these words—" ' Industrial matters ' . . . includes all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." All those are matters with which the Arbitration Court is concerned.

H. C. OF A. 1949.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE AMALGAMATED ENGINEERING UNION.

Latham C.J.

In my opinion the desirability of granting what I have already said is a temporary adjournment was a matter for the discretion of the court. There is obviously room for difference of opinion as to the wisdom of the exercise of such a discretion in such a case as this. That, however, is not a matter for this Court to determine. It is not for us to determine whether the discretion was wisely exercised, but only whether the Arbitration Court has exercised it within its jurisdiction in adjourning the further hearing of the matters for the period mentioned. In my opinion that is a discretion which has been committed by the Act to that court. If this Court in this case were to grant the application for a writ of mandamus we would really be reviewing or revising that exercise of discretion and not commanding the court to exercise a jurisdiction which it has refused to exercise.

In my opinion for these reasons the application should be refused.

DIXON J. I agree that there is no foundation for the issue of a writ of mandamus.

McTIERNAN J. I agree. It is within the discretion of the judges of the Arbitration Court to consider and decide the question whether the discussion in the constituencies of the relation of the basic wage to child endowment would affect the conduct and consideration of the basic-wage case. It is not necessary for this Court to decide whether the view which the Arbitration Court took of the matter was right or wrong. They made an order for the adjournment of the basic-wage case, which, in my opinion, is completely within their discretion. Their consideration of the question or their decision to make that order were not affected by an extraneous or irrelevant matter.

WILLIAMS J. I also agree. To put it shortly, it appears to me that it was clearly within the jurisdiction of the court to adjourn the hearing and that, having regard to the arbitral functions of the court and the nature of the case which they were hearing, the reason for the adjournment could not be said to be so extraneous as to amount to an excess of jurisdiction.

WEBB J. I regret that I cannot share the view of the majority of the Court. The ground upon which the adjournment was based does not reveal any duty of the court to adjourn, or warrant the exercise of any discretion to adjourn. I am unable to see how a controversy, even an Australia-wide one, during a Federal election

could in any way interfere with the proper discharge of the duty of the Federal Arbitration Court to determine the basic wage, more particularly when we remember that the ground of the adjournment is that the controversy that will take place will be about child endowment. I recognize the strength of the authorities referred to by the Chief Justice and other members of this Court against granting a mandamus unless there is a clear failure to perform a duty; but in this case I regret to say that I think that there is that clear failure. I would grant the application.

Application refused.

Solicitor for the applicant: *Maurice Blackburn & Co.*, Melbourne.

J. B.