[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND OTHERS;

EX PARTE FEDERATED GAS EMPLOYEES INDUSTRIAL UNION.

H. C. OF A. 1950-1951.

MELBOURNE, 1950. *Oct.* 18-20, 23, 24. 1951. *March* 5.

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

Industrial Arbitration (Cth.)—Award—Enforcement—Powers of Commonwealth Court of Conciliation and Arbitration—Industrial dispute—Overtime—Award made by consent prohibiting union of employees from being "directly or indirectly . . . a party to or concerned in any ban" on overtime—Order of compliance—Commonwealth Conciliation and Arbitration Act 1904-1949 (*No.* 13 *of* 1904—*No.* 86 *of* 1949), *s.* 29 (*b*).

An award under the *Commonwealth Conciliation and Arbitration Act* 1904-1949, made with the consent of a union of employees in an industrial dispute to which it was a party, contained a clause to the effect that (a) an employer might require any employee to work reasonable overtime and that such employee, should work overtime in accordance with such requirement; (b) "No organization party to this award shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the working of overtime in accordance with the requirements of" the clause. Subsequently a rule to show cause issued out of the Commonwealth Court of Conciliation and Arbitration requiring the union to show cause why an order should not be made under s. 29 (*b*) of the Act that the union should comply with sub-clause (*b*) of the clause of the award by ceasing to be directly or indirectly a party to or concerned in certain bans, limitations and restrictions on the working of overtime in accordance with the requirements of the clause. It was contended that s. 29 (*b*) did not authorize such an order; it would order future compliance with the award, and, on the proper construction of s. 29 (*b*), the only power it conferred was the power to order the remedying of a past default in complying with an award.

Held that the Commonwealth Court of Conciliation and Arbitration had power under s. 29 (*b*) of the Act to make an order in accordance with the terms of the rule to show cause.

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ORDER NISI for Prohibition.

On 3rd April 1950 the Chief Conciliation Commissioner under the *Commonwealth Conciliation and Arbitration Act* 1904-1949 (hereinafter called the Act) made an award in an industrial dispute to which the Australian Gas Light Co., the North Shore Gas Co. Ltd. and the Federated Gas Employees' Industrial Union (hereinafter called the prosecutor), an organization registered under the Act, were parties. The prosecutor consented to the award, which contained a clause, numbered 17, containing three sub-clauses, *a*, *b* and *c*, in the same form as the pars. i, ii and iii, of clauses 11 (*hh*) and 13 (*k*) in the award of 8th September 1947 set out in the report of the last-preceding case, *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (1).

On 31st July 1950 a rule to show cause issued out of the Commonwealth Court of Conciliation and Arbitration, on the application of the above-named companies, requiring the prosecutor to show cause why an order should not be made by the court under s. 29 (*b*) of the Act that the prosecutor "should comply with sub-clause (*b*) of clause 17 of the . . . award by ceasing to be directly or indirectly a party to or concerned in certain bans, limitations and restrictions upon the working of overtime in accordance with the requirements of the said sub-clause" (the phrase "the said sub-clause" apparently being an erroneous reference to clause 17).

A further rule to show cause of the same date required the prosecutor to show cause why it should not be enjoined pursuant to s. 29 (*c*) of the Act "from committing or continuing a contravention of the . . . Act namely the breach by it of sub-clause (*b*) of clause 17 . . . of the . . . award by being directly or indirectly a party to or concerned in certain bans, limitations or restrictions upon the working of overtime in accordance with the requirements of the said clause".

The court announced that an order to be subsequently settled by the court would be made against the prosecutor under s. 29 (*b*) and that an order "as sought" would also be made under s. 29 (*c*), but the orders had not as yet been drawn up.

The prosecutor obtained in the High Court an order nisi—directed to the Commonwealth Court of Conciliation and Arbitration, the judges thereof and the above-named companies—for a writ to prohibit further proceeding on the rules to show cause on the ground that the Commonwealth Court of Conciliation and Arbitration had and has no jurisdiction to make the orders or either of them mentioned in the rules to show cause for that the

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orders and each of them would not be and were not within the jurisdiction conferred on the court by s. 29 (*b*) and (*c*) of the Act or otherwise.

This case was argued together with the last-preceding case; the report of the argument of counsel herein is accordingly incorporated in the report of that case.

P. D. Phillips K.C. and *D. Corson*, for the prosecutor.

G. E. Barwick K.C. and *R. Ashburner*, for the respondent companies.

R. M. Eggleston K.C. and *R. J. Leckie*, for the respondents the Commonwealth Court of Conciliation and Arbitration and the judges thereof to admit service of process and to submit to whatever order the High Court might make; also, for the Attorney-General of the Commonwealth (intervening by leave).

Cur. adv. vult.

March 5.

The following written judgments were delivered :—

LATHAM C.J. It is now necessary to consider the other case (that in which the Federated Gas Employees' Industrial Union is the prosecutor), which was heard together with the case of the Amalgamated Engineering Union (1). In the case of the gas employees the position is that the award contained the same clauses as to overtime as in the Engineering Union case. The Gas Employees' Federation, however, consented to the award and no question arises as to whether or not the matters with which the overtime clauses deal were within the ambit of the dispute between the parties or were otherwise provisions which the court had power to include in an award. It was alleged by the employers that there was similar concerted action by members of the union to defeat the overtime provisions. Two gas companies, parties to the award, applied to the Arbitration Court and obtained orders nisi to show cause why an order under s. 29 (*b*) of the Act for compliance by the union with the award and also an order under s. 29 (*c*) enjoining the union from committing or continuing the contravention of the Act should not be made. The union obtained an order nisi for a writ of prohibition in this Court to prohibit any further proceedings upon the orders nisi in the Arbitration Court upon the ground that the Arbitration Court has no jurisdiction to make the orders sought in the rules to show cause. No order

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has been made by the Arbitration Court and the argument for the union has therefore necessarily proceeded upon the basis that the Arbitration Court has no power to make any order for compliance with a negative provision of an award or enjoining a contravention of an award as being a contravention of the Act. For reasons which I have stated I am of opinion that these objections should not prevail. The order nisi in this case should be discharged.

DIXON J. This is an order nisi for a writ of prohibition prohibiting further proceedings on two orders nisi which had been pronounced absolute made by the Arbitration Court, one for an order for compliance with an award and the other for an order for an injunction made in purported pursuance of pars. (*b*) and (*c*) respectively of s. 29 of the *Commonwealth Conciliation and Arbitration Act* 1904-1949. Both orders were made in respect of clause 17 of an award in an industrial dispute in the gas industry made by the Chief Conciliation Commissioner on 3rd April 1950.

Clause 17 consists of three paragraphs in the same form as the paragraphs of the sub-clauses considered in *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (1), a case argued with this case.

The orders absolute of the Arbitration Court have not been drawn up, but their effect may be ascertained from the material parts of the orders to show cause made absolute. One order requires the now prosecutor to show cause why an order should not be made by the Arbitration Court under s. 29 (*b*) of the Act that the prosecutor should comply with the sub-clause (*b*) (the second paragraph that is to say) of clause 17 of the award by ceasing to be directly or indirectly concerned in certain bans, limitations or restrictions upon the working of overtime in accordance with the requirements of clause 17 (erroneously called in the order nisi the " said sub-clause ").

The other order nisi calls on the prosecutor to show cause why it should not be enjoined pursuant to s. 29 (*c*) of the Act from committing or continuing a contravention of the said Act, namely the breach by it of sub-clause (*b*) of clause 17 of the award by being directly or indirectly a party to or concerned in certain bans, limitations or restrictions upon the working of overtime in accordance with the requirements of clause 17. The application for a writ of prohibition in respect of this second order, that for an injunction as under s. 29 (*c*), is governed by the reasons I have given in *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union, Australian Section* (1), and may be conveniently

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disposed of at once. Because, in my opinion, s. 29 (*c*) relates only to infringements of the provisions of the Act as distinguished from the infringement of the provisions of an award the order made in purported pursuance of s. 29 (*c*) is bad and a writ of prohibition in respect of that order should issue.

The other order is, however, in my opinion, good and no writ of prohibition should issue in respect of it. The attack upon it was based solely on an interpretation placed on s. 29 (*b*) which would confine its operation to empowering the Arbitration Court to order the remedying of a past default in complying with an award. The provision, it was argued, does not extend to authorizing an order for future compliance, not even to ordering, as this order may be thought to do, a cessation from a presently continuing breach of an award.

The restrictive interpretation for which it was so contended was founded upon considerations arising from the condition of the Act when s. 29 (*b*) was first introduced into the legislation, confirmed, so it was said, by the subsequent legislative treatment of the material provisions. Section 29 (*b*) was inserted in the Act of 1904-1911, though in a somewhat fuller and perhaps better form, as s. 38 (*da*) by Act No. 18 of 1914. At that time the Act of 1904-1911 contained in s. 48 the following provision :—" The Court may, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach under pain of fine or imprisonment, and no person to whom such order applies shall, after written notice of the order, be guilty of any contravention of the award by act or omission. In this section the term 'award' includes 'order'. Penalty: One hundred pounds or Three months' imprisonment."

It is contended that s. 38 (*da*), which No. 18 of 1914 inserted, could not have been intended to cover the same ground as the mandamus to compel compliance with the award under s. 48. Therefore, it was said, as s. 48 must be considered to look to future performance, s. 38 (*da*) must be confined to remedying past breaches or non-observances of awards.

The Act has had a long history and is by no means in its then form and I am not sure that it is permissible to interpret the provision standing, as it now stands, in a different context by reference to its former context. But, even if it be so, the restrictive construction contended for is not justified. Section 48 dealt with awards only and provided a procedure designed to create a punishable offence if there was a further contravention. It also fixed

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the maximum punishment. Section 38 (*da*) related both to orders and awards and authorized the making of an order for compliance which, as I take it, would be enforceable under the then ss. 44, 45, 46 and 47. The purposes of the respective provisions differed and I think that there is no sufficient support for the theory that the two provisions might not overlap in their application to infringements of awards.

In any case I find it very difficult to formulate with any precision the restricted meaning which it is sought to place upon the present s. 29 (*b*), and I do not think the language of s. 29 (*b*) is susceptible of such a limitation. After it had been decided that the Arbitration Court as then constituted could not be the repository of any judicial power, s. 6 of Act No. 39 of 1918 substituted in s. 48 certain inferior State courts for the Arbitration Court but left s. 38 (*da*) untouched. Two years later, by s. 21 of Act No. 31 of 1920, the High Court or a Justice of the High Court was added to these tribunals and the scope of s. 48 was somewhat enlarged. In 1926, when the Arbitration Court was reconstituted in a manner making it constitutionally competent to receive judicial power, the Arbitration Court was added to the tribunals in s. 48 by s. 10 of Act No. 22 of 1926. At length, by s. 41 of Act No. 43 of 1930, s. 48 was repealed.

All this appears to me to establish no more than that until 1930 the legislature placed a value on the powers given by s. 48. It was relied upon, however, as confirmatory of the interpretation contended for. But I cannot see how it really aids the argument.

In my opinion the order under s. 29 (*b*) is within that provision and no writ of prohibition should be issued in respect of that order. I think that the order nisi should be made absolute for a writ of prohibition prohibiting further proceedings upon the order, pronounced by the Commonwealth Court of Conciliation and Arbitration on 9th October 1950, making absolute a rule made on 31st July 1950 to show cause why an order under s. 29 (*c*) should not be made against the prosecutor.

McTIERNAN J. In this case proceedings were instituted under s. 29 (*b*) and s. 29 (*c*) of the Act.

It would follow from the reasons which I gave in the former case (1) for holding that the order therein made under s. 29 (*c*) was invalid that it is not within the jurisdiction of the Arbitration Court to make the order sought under that provision. In the

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case of s. 29 (*b*) the order which the Court of Conciliation and Arbitration was asked to make was an order in the terms of the award: but, so far as I can see, no order was made under s. 29 (*b*) which is open to the objection which proved fatal in the case of the Amalgamated Engineering Union. In the present case I think the order nisi should be made absolute so far as it applies to the proceedings under s. 29 (*c*).

WEBB J. I think the order nisi for prohibition should be made absolute.

KITTO J. The order nisi in this case is for a writ of prohibition prohibiting the respondents from further proceeding with or upon two rules to show cause made by a Judge of the Arbitration Court, whereby the prosecutor was called upon to show cause why certain orders should not be made against the prosecutor under s. 29 (*b*) and s. 29 (*c*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1949.

Before the order nisi was granted, the Arbitration Court had heard the matter and had announced that orders to be subsequently settled by the court would be made. No order has been drawn up or settled.

Upon the rule to show cause which refers to s. 29 (*b*), the Arbitration Court has decided to order that the prosecutor shall comply with sub-clause (*b*) of clause 17 of Part I of the Gas Industry Federal Award by ceasing to be directly or indirectly a party to or concerned in certain bans, limitations or restrictions upon the working of overtime in accordance with the requirements of that sub-clause. The Court has not decided to include in the order a provision such as that which, in the *Metal Trades Case* (1), I regarded as unauthorized by s. 29 (*b*), namely a provision requiring the union to procure the working of overtime by its members without any ban. In my opinion the order is authorized by s. 29 (*b*).

Upon the rule to show cause based upon s. 29 (*c*), the Arbitration Court has decided to enjoin the prosecutor from committing or continuing what the rule described as "a contravention of the said Act." This description is followed immediately by the words "namely by the breach by it of sub-clause (*b*) of clause 17 of section 1 of the above award (i.e. the Gas Industry Federal Award) by being directly or indirectly a party to or concerned in certain bans, limitations or restrictions upon the working of overtime in

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accordance with the requirements of the said clause". For reasons similar to those I have stated in relation to the order purporting to be made under s. 29 (*c*) in the *Metal Trades Case* (1), I am of opinion that the Arbitration Court has no power under s. 29 (*c*), but has power under s. 29 (*b*) to make this order.

In my opinion the order nisi should be discharged.

Order nisi discharged in relation to order made under the Commonwealth Conciliation and Arbitration Act 1904-1949, s. 29 (*b*). *Order absolute in relation to order made under s.* 29 (*c*). *No order as to costs.*

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

Solicitors for the respondent companies, *Perkins, Stevenson & Linton*, Sydney.

Solicitor for the other respondents and the intervener, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

E. F. H.

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