[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

KELLY;

Ex parte THE COMMONWEALTH PUBLIC SERVICE CLERICAL ASSOCIATION AND ANOTHER.

H. C. of A. 1955.

Sydney, *March* 29; *April* 15.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Industrial Law (Cth.)—Public Service Association—General secretary—Non-practising barrister—Application to Chief Judge of Court of Conciliation and Arbitration—Right of audience—"Counsel or solicitor"—Duty to hear—Refusal—Mandamus—Conciliation and Arbitration Act 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952)—*Public Service Arbitration Act* 1920-1952 (*No.* 28 *of* 1920—*No.* 36 *of* 1952), *ss.* 15C, 19.

Section 19 of the *Public Service Arbitration Act* 1920-1952, which provides that no person or organization shall in any proceeding under this Act be represented by counsel or solicitor, disqualifies counsel or solicitor from appearing in any such proceeding only in his professional capacity on behalf of a client. Accordingly where a non-practising barrister employed exclusively by an industrial organisation as its general secretary sought to appear on its behalf as such general secretary the section had no application.

On an application to the Chief Judge of the Commonwealth Court of Conciliation and Arbitration for leave to appeal against a determination of the Public Service Arbitrator all parties who appeared or were represented before the Public Service Arbitrator are entitled to be heard. Accordingly where the Chief Judge, being bound to decide the application in accordance with law and not in accordance with an erroneous interpretation of s. 19, refused to hear an organization by its general secretary, a non-practising barrister.

Held, mandamus would lie.

Mandamus.

In this matter the prosecutors were granted by *Fullagar* J. an order nisi for a writ of mandamus directed to the Chief Judge of the Court of Conciliation and Arbitration commanding him upon the hearing of an application in which the Commonwealth Public Service Board was applicant and the Australian Third Division

Telegraphists and Postal Clerks' Union and others were respondents for leave to appeal pursuant to s. 15c of the *Public Service Arbitration Act* 1920-1952 against a determination of the Public Service Arbitrator made on 17th February 1955 to hear the prosecutor the Commonwealth Public Service Clerical Association by its general secretary the prosecutor George William Francis Smith upon the grounds that the prosecutor association was entitled to be heard as a party interested in the application for leave to appeal and that the prosecutor Smith did not seek to represent the association in the capacity of counsel or solicitor.

The rules of the Commonwealth Public Service Clerical Association provided by r. 51 that the general secretary of the association should be its registered officer for the purposes of the *Conciliation and Arbitration Act* 1904-1952 and of the *Public Service Arbitration Act* 1920-1952 and should be empowered to act on behalf of the association.

Further facts appear in the judgment of the Court hereunder.

R. M. Eggleston Q.C. (with him *D. Corson*), for the prosecutors. The real question is whether "counsel" in s. 19 of the *Public Service Arbitration Act* 1920-1952 means counsel practising as such or whether it means a person having the legal qualifications to so practise. It is submitted that "represented by counsel or solicitor" in s. 19 means represented by a person practising as counsel or as a solicitor and who appears in the capacity of counsel or solicitor. "Counsel" is a more limited expression than "barrister". [He referred to the meaning of "counsel" as it appears in *The Shorter Oxford English Dictionary*, 3rd ed. (1944), *Wharton's Law Lexicon*, 14th ed. (1938), *Osborn: The Concise Law Dictionary*, 4th ed. (1954), *Webster's New International Dictionary*, 2nd ed. (1934).] "Counsel" is not a term apt to describe all persons admitted to the Bar whether practising or not, but is one who engages in the profession of giving legal advice to clients. Alternatively, "represented by counsel or solicitor" means represented by a person properly described as counsel, i.e. by acting as such, whether or not he in fact practises. The association is required by regulation to provide by its registered rules for a person to present claims under the *Arbitration Act* and the prosecutor Smith is such person. Section 19 which excludes counsel or solicitor looks not to accidental but to essential characteristics and a person is not excluded unless he is in fact acting in the capacity of counsel or solicitor when appearing to represent the organization. The Chief Judge has refused to hear the properly appointed representative and mandamus should go

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notwithstanding that the refusal to hear arose from a wrong construction of s. 19. [He referred to *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ellis* (1).] Section 32 of the *Conciliation and Arbitration Act* does not here apply. The *Public Service Arbitration Act* sets up a purely administrative body which has no strictly judicial function. The Public Service Arbitrator has no authority to determine conclusively against anyone the construction of the statute under which he operates. The effect of the amendment to the *Public Service Arbitration Act* made in 1952 is to bring the Arbitration Court as an existing institution into the sphere in which the Public Service Arbitrator operates and the court is empowered to make similar orders to those made by the arbitrator but has no further or wider power. [He referred to ss. 15A, 15B, 15C of the *Public Service Arbitration Act*.] It is not part of the arbitrator's function to determine the construction of s. 19 conclusively and therefore it is not the function of the Chief Judge. [He referred to *R.* v. *Board of Appeal*; *Ex parte Kay* (2) and to *Reg.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (3).] The Court is not asked in the least to depart from what was said in *Ellis' Case* (1) on the question of mandamus. The Court is asked to express its opinion on the construction of s. 19 and to refrain from issuing mandamus. The prosecutors submit that they are entitled to mandamus but seek no more than the Court's approval of that view, that being sufficient for their purposes.

K. A. Ferguson Q.C. (with him *R. Else-Mitchell*), for the respondent Chief Judge. Beyond referring the Court to *Ellis' Case* (1) the respondent has nothing to say on the question of mandamus. The intention of the legislature in s. 19 is to exclude from appearance persons qualified as barristers or solicitors. "Counsel" is synonymous with barrister. The prohibition is against the appearance of counsel or solicitor and no question of whether such person is paid or not for such appearance arises. It is not a question of payment. The fact that the prosecutor Smith is on the non-practising list does not matter. He is by virtue of his admission entitled to practise and that concludes the matter. [He referred to the *Legal Practitioners Act* 1898-1936 (N.S.W.), s. 10.] Section 19 ought not to be read as referring only to practising barristers when non-practising barristers may practise at any time. It is submitted that the question is one not of capacity but of qualification. The legislature intended to exclude qualified persons. The prohibition against

(1) (1954) 90 C.L.R. 55.
(2) (1916) 22 C.L.R. 183, at pp. 184, 185, 186, 187.
(3) (1891) 1 Q.B. 378, at pp. 382, 383.

representation by counsel or solicitor is absolute and an inquiry as to the capacity in which a person qualified as a barrister or solicitor appears is not to be made. [He referred to *Waterside Workers Federation* v. *Commonwealth Steamship Owners' Association* (1).] It is submitted that the question is one of qualification and that once it is established that a person is a barrister or solicitor he is thereby disqualified from appearing.

R. M. Eggleston Q.C., in reply.

Cur. adv. vult.

April 15.

THE COURT delivered the following written judgment:—

Pursuant to s. 15c of the *Public Service Arbitration Act* 1920-1952 the Public Service Board made an application to the Chief Judge of the Court of Conciliation and Arbitration for leave to appeal against a determination made by the Public Service Arbitrator. The application was made upon notice to the Commonwealth Public Service Clerical Association. That body is registered under the *Conciliation and Arbitration Act* 1904-1952 in pursuance of s. 5 of the *Public Service Arbitration Act* 1920-1952. The association sought to appear upon the hearing of the application by its general secretary, an officer exclusively employed by the association. The general secretary, Mr. G. W. F. Smith, was called to the Bar of New South Wales in 1937 but has never practised. He entered the Public Service of New South Wales where he was employed until in 1947 he became general secretary of the association. Section 19 of the *Public Service Arbitration Act* 1920-1952 is in these terms, viz.—"No person or organization shall in any proceeding under this Act be represented by counsel or solicitor". An application under s. 15c to the Chief Judge is a "proceeding under" the *Public Service Arbitration Act* 1920-1952. The Chief Judge refused to permit the association to appear before him by Mr. Smith as its general secretary on the ground that, since he is a member of the Bar of New South Wales, to do so would be inconsistent with s. 19. The association and Mr. Smith as prosecutors obtained an order nisi for a mandamus directed to the Chief Judge commanding him to hear the association by its general secretary, Smith.

We are now called upon to say whether the order nisi should be made absolute, and that involves two questions; first, whether the case is within s. 19 and second, if it is not, whether the remedy of mandamus lies.

The first of these questions depends entirely on the terms of the section. Those terms are appropriate to describe the appearance

(1) (1914) 8 C.A.R. 53, at pp. 60, 61.

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before a tribunal of counsel or solicitor in his professional capacity on behalf of a client. There is no reason to suppose that it was meant to extend beyond that nor to give the language the provision uses any wider application. Clearly if a natural person who is a party to a proceeding under the Act is a barrister or a solicitor, s. 19 has nothing to say against his being heard. A corporation must proceed by the agency of natural persons and an organization not represented by counsel cannot appear before a tribunal except by some servant or agent. When it appears by its proper officer he acts as its servant, and even if he is a barrister or a solicitor he does not represent the organization in virtue of that status. The organization is not his client and his duties as well as his authorities are of a different description.

Section 19 does not vary materially from s. 12 of the *Arbitration (Public Service) Act* 1911, the language of which was taken from the last words of s. 27 of the *Commonwealth Conciliation and Arbitration Act* 1904. That section began by conferring a positive right upon an organization to be represented by a member or officer and upon any other party to be represented by an employee. Then followed the prohibition. In *Waterside Workers Federation* v. *Commonwealth Steamship Owners' Association* (1), *Higgins* J. as President of the Arbitration Court construed the words of prohibition as not excluding from the operation of the earlier or positive part of the section an officer or employee because he was qualified as a barrister or solicitor. That means that the words of prohibition referred only to representation by counsel or solicitor in his professional capacity. At the same time his Honour made it clear that the relation of the person who is a barrister or solicitor to the party whom he represented before the court as officer or employee must be in truth and reality that of an officer or employee and that a colourable employment or appointment would not do.

Although s. 19 confers no positive right to representation by an officer, employee or other agent and is confined to prohibiting representation by counsel or solicitor there is no reason for giving the words any wider meaning or application. The consequence is that the learned Chief Judge acted upon a mistaken interpretation of s. 19 in refusing to allow Mr. Smith to represent the association.

The question whether mandamus is a remedy available to correct the error is not an easy one. It depends on the scope and operation of the *Public Service Arbitration Act* 1920-1952. How far do the considerations apply to it which led this Court to decide in *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ellis* (2), that under s. 46 of the *Conciliation and Arbitration Act*

(1) (1914) 8 C.A.R. 53.

(2) (1954) 90 C.L.R. 55.

1904-1952 the question who according to a proper application of the provision to the true facts might represent the party was left to the Arbitration Court to decide once for all? Until the enactment by Act No. 36 of 1952 of ss. 15A, 15B and 15C of the *Public Service Arbitration Act* "proceedings under" that Act meant proceedings before the Public Service Arbitrator, who is not constituted a court but is a *quasi* judicial administrative tribunal. How he is to proceed appears directly and by inference from ss. 12, 13, 14 and 15 of the Act. Section 12 (5) makes it clear enough that besides the organization claiming, the Board and a Minister, when the Board or a Minister object, are to be represented, if only in conference. But the Act appears to confer no rights to be heard upon other parties. It gives no right of audience to any particular description of representative. Section 19 stands therefore as a general prohibition, not as a denial or qualification of some right. In these circumstances a mandamus would not lie to the arbitrator because he had mistakenly applied s. 19 unless it could be shown that the case was one in which he was under a duty to hear the party and by the particular officer whom he had excluded or at least under a duty to consider according to law whether he would or should do so.

There is a provision protecting the Public Service Arbitrator's awards against attack by prohibition and other remedies: s. 20. But there is no attempt to establish the arbitrator as a court nor is there any other evidence of an intention to commit to him the determination of the meaning and application of s. 19, which after all is simply prohibitory or restrictive. Section 15C (1), (2) and (3) confer upon the Chief Judge a specific power or function under the Act. Because the power or function involves a "proceeding", s. 19 applies. It is not a proceeding before the Arbitration Court, but before the Chief Judge designated by the Act by reference to his office. Section 46 of the *Conciliation and Arbitration Act* 1904-1952 is therefore entirely inapplicable, whether or not it may apply, subject to s. 19, in a substantive appeal under s. 15C (4) of the *Public Service Arbitration Act*. It would seem, therefore, that the Chief Judge himself occupies in reference to s. 19 no different position from the arbitrator.

The considerations which, according to our decision in *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ellis* (1), govern the administration of s. 46 of the *Conciliation and Arbitration Act* 1904-1952 are therefore in the main inapplicable. It is clear that if there be a duty on the part of the Chief

(1) (1954) 90 C.L.R. 55.

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Judge to hear the association he must hear the general secretary on the association's behalf: *R.* v. *Board of Appeal*; *Ex parte Kay* (1). But s. 19, as has already been pointed out, is simply prohibitory, and the source of the duty must be sought elsewhere. Section 15c (1), (2) and (3), for all that appears in the statute, might be administered upon an *ex parte* application. But by S.R. No. 55 of 1952, regs. 67c and 67H were inserted in the *Conciliation and Arbitration Regulations*. They require that a copy of the application shall be served upon the parties who appeared or were represented before the Public Service Arbitrator, and that the registrar shall give notice of the time and place fixed by the Chief Judge for the hearing of the application to the persons upon whom a copy of the application has been served. The implication would seem to be that on the hearing of the application such persons are to be considered as parties and are entitled to be heard accordingly. If this is the effect of the regulations there is an end of the matter, for the prosecutor association was represented before the arbitrator in the proceedings out of which the pending application to the Chief Judge arose. But even if the Chief Judge had power to hear the application *ex parte*, it was at least his duty, when the association appeared before him by its general secretary and sought to oppose the application as an organization adversely affected by it, to decide in accordance with law, and not in accordance with an erroneous interpretation of s. 19, whether or not he would hear the proposed opposition. The transcript of the proceedings which took place before him shows that he allowed other organizations to appear by officers to oppose the application, and no doubt he would have allowed Mr. Smith to appear for the prosecutor association but for the view which he entertained as to the meaning of s. 19.

From what has been said it follows that it is a case in which mandamus does lie. But no doubt it is unnecessary to make the order absolute, for the learned Chief Judge will doubtless give effect to the views we have expressed. We will therefore make no order at present.

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

Solicitor for the respondent Chief Judge of the Court of Conciliation and Arbitration, *D. D. Bell*, Crown Solicitor for the Commonwealth.

R. A. H.

(1) (1916) 22 C.L.R. 183.