[HIGH COURT OF AUSTRALIA.]

Re MacSWEEN; Ex parte FRASER.

H. C. OF A. 1956.

SYDNEY, *Dec.* 3.

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

Industrial Law (Cth.)—Commonwealth Industrial Court—Power to order compliance with rules of registered organisation—Decisions of High Court that earlier legislation in same terms conferred judicial power on the Court of Conciliation and Arbitration—Re-enactment of legislation and conferring of power on Commonwealth Industrial Court when established as judicial tribunal—Whether power judicial or administrative—Whether High Court should reconsider question in view of earlier decisions and action of Parliament—The Constitution (63 & 64 *Vict. c.* 12), *s.* 75 (*v*)—*Conciliation and Arbitration Act* 1904-1956, *s.* 141.*

In view of the fact that in enacting s. 141 of the *Conciliation and Arbitration Act* 1904-1956 the legislature has acted upon the decisions in *Jacka* v. *Lewis* (1944) 68 C.L.R. 455 and *Barrett* v. *Opitz* (1945) 70 C.L.R. 141, that section should be treated as vesting part of the judicial power of the Commonwealth in the Commonwealth Industrial Court and not as being an attempt to confer power of an administrative character on that tribunal. The Court accordingly refused an order nisi for a writ of prohibition upon grounds which would impugn those decisions.

APPLICATION for Order Nisi for Prohibition.

In November 1955 Donald Roffey MacSween was duly elected to the office of secretary of the Victorian branch of the Clothing and Allied Trades Union of Australia, an organisation of employees registered under the provisions of the *Conciliation and Arbitration Act* 1904-1956, the only other candidate for such office being one Frederick Wilmot Bradley. On 5th December 1955 Bradley laid certain charges against MacSween under the rules of the organisation,

* Section 141 of the *Conciliation and Arbitration Act* 1904-1956 provides:—"(1) The Court may, upon complaint by any member of an organization and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

(2.) Any person who fails to comply with such directions shall be guilty of an offence. Penalty: Fifty pounds."

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which charges were heard under the rules by the branch executive of the Victorian branch on 19th December 1955 when they were dismissed.

In April 1956 MacSween received notice from David Skene Fraser purporting to act as the general secretary-treasurer of the organisation of an appeal by Bradley from the decision of the branch executive of the Victorian branch to the federal council of the organisation and of charges against him laid by Bradley of a substantially similar nature to those dealt with by the Victorian branch executives for hearing before the federal council.

Fraser in his capacity as general secretary-treasurer was present at the meeting of the federal council when the charges against MacSween were heard and took an active part in the hearing thereof and in the decision thereon by which MacSween was found guilty of all charges and was suspended from office and membership of the organisation and from being employed by it for a period of four years. Fraser was not a delegate to the federal council of the organisation nor was he by virtue of his office a member of such council and his participation in the hearing before the federal council was unauthorised by any rule of the organisation.

On 20th September 1956 *Dunphy* J. on the application of MacSween and pursuant to s. 141 of the *Conciliation and Arbitration Act* 1904-1956 granted an order nisi calling upon Fraser to show cause before the Commonwealth Industrial Court why orders should not be made as follows :—that he, Fraser, be ordered and directed to perform and observe the rules of the Clothing and Allied Trades Union of Australia and in particular (i) to treat the decision of the federal council hereinbefore referred to as being null and void, and (ii) to observe such other orders as might be made by the court.

The matter came on for hearing before the Commonwealth Industrial Court (*Spicer* C.J., *Dunphy* and *Morgan* JJ.), which on 16th November 1956 declared the decision of the federal council to be null and void and that MacSween continued to be secretary of the Victorian branch of the organisation.

At the hearing before the court counsel for Fraser contended that s. 141 of the *Conciliation and Arbitration Act* was not a valid exercise of legislative power by Parliament in that it purported to confer power of a non-judicial nature, but the court in view of the decisions in *Jacka* v. *Lewis* (1); *Barrett* v. *Opitz* (2), and *Australian Workers' Union* v. *Bowen* [*No.* 2] (3), rejected the contention.

(1) (1944) 68 C.L.R. 455.
(2) (1945) 70 C.L.R. 141.
(3) (1948) 77 C.L.R. 601, at p. 619.

Following upon this decision Fraser applied *ex parte* to the High Court for an order nisi for a writ of prohibition directed to the Commonwealth Industrial Court to restrain further proceedings upon its order.

P. D. Phillips Q.C. (with him *N. M. Stephen*), for the applicant. The power in s. 141 is not properly judicial power but is of an administrative nature for the control of organisations. *Jacka* v. *Lewis* (1) decided that the power conferred by the fore-runner of s. 141 was judicial in character but we rely on what was said in *Barrett* v. *Opitz* (2) by *Dixon J.* (as he then was) (3). Now that there are two tribunals, the Industrial Court and the Arbitration Court, it is a matter of importance to have the matter fully investigated and finally determined.

[DIXON C.J. Does not the fact that the power in s. 141 has been conferred on a judicial tribunal tend rather against the views I expressed in the passages cited ?]

The fact that a judicial tribunal has been chosen as the recipient of the power may be an indication that it should be treated as judicial power, but the matter is one for full argument. It is of importance finally to determine the question now, the two tribunals having been so recently established. A departure from the earlier decisions will do no more than determine where the proper allocation of constitutional power should be. If it is to be finally decided that this is judicial power, there will undoubtedly be implied limitations upon the power if it resides in the Industrial Court. If, however, it is held to be administrative power, then the proceedings before the Arbitration Court would be of a different character, particularly as to the discretionary power to grant or refuse relief in accordance with the relevance of the order to the maintenance of industrial peace. Such a consideration would be proper enough for the Arbitration Court, but quite out of place for the Industrial Court as a judicial tribunal. The matter ought not to be determined from the viewpoint of legislative reliance upon the earlier decisions of this Court. Important guidance can be given by this Court to these two tribunals as to how this power should properly be exercised. The other basis upon which the writ is sought is that there is an error of law on the face of the record in the Industrial Court and it is a matter for determination whether the constitutional prohibition does not extend to such error as undoubtedly certiorari would have done. There are suggestions in recent English authorities that

(1) (1944) 68 C.L.R. 455.
(2) (1945) 70 C.L.R. 141.
(3) (1945) 70 C.L.R., at pp. 162-164, 165, 166, 169.

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prohibition can do the work of certiorari in instances such as this, and the matter is worthy of full investigation.

The oral judgment of the Court was delivered by DIXON C.J.:—

In view of the fact that in enacting s. 141 the legislature has acted upon the decisions of the Court in *Jacka* v. *Lewis* (1) and in *Barrett* v. *Opitz* (2), we think that s. 141 should be treated as vesting part of the judicial power of the Commonwealth and that we ought not to grant an order nisi on a ground which impugns those decisions.

We do not think that the other ground taken is one within the scope of a writ of prohibition.

Order accordingly.

Solicitors for the applicant, *Herbert, Geer & Rundle.*

R. A. H.

(1) (1944) 68 C.L.R. 455.

(2) (1945) 70 C.L.R. 141.