[HIGH COURT OF AUSTRALIA.]

T. A. ROBINSON AND SONS PROPRIETARY LIMITED . . . . . } APPELLANT;
DEFENDANT,

AND

HAYLOR . . . . . RESPONDENT.
COMPLAINANT,

H. C. OF A. 1957.

SYDNEY, *Nov.* 12, 18.

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

Constitutional Law (Cth.)—Federal and State laws—Inconsistency—Award of conciliation commissioner—Power to deal with long service leave—Award silent thereon—State statute providing for long service leave—Validity—The Constitution (63 & 64 *Vict. c.* 12), *s.* 109—*Conciliation and Arbitration Act* 1904-1956 (*No.* 13 *of* 1904—*No.* 44 *of* 1956)—*Footwear Manufacturing Industry Award* 1951—*Long Service Leave Act* 1955 (*N.S.W.*).

There is no inconsistency within s. 109 of the Constitution between the *Footwear Manufacturing Industry Award* 1951, which operates pursuant to the *Conciliation and Arbitration Act* 1904-1956 (Cth.), and the *Long Service Leave Act* 1955 (N.S.W.) such as to displace the latter in its application to persons bound by such award.

The doctrine formulated in *Ex parte McLean* (1930) 43 C.L.R. 472 has never been applied to the conclusion or reasons of a federal industrial arbitrator leading to his award but only to the award itself or to an agreement having the force of an award, and the *Conciliation and Arbitration Act* 1904-1956 gives paramountcy to nothing save the provisions of the award or such an agreement as aforesaid.

APPEAL from the Chief Industrial Magistrate at Sydney, New South Wales.

On 7th March 1957 Walter Norman Haylor laid a complaint pursuant to the *Long Service Leave Act* 1955 (N.S.W.), ss. 12 and 14, against T. A. Robinson & Sons Pty. Ltd. (hereinafter called the company) alleging that the company did at Alexandria in the State of New South Wales employ him, a worker, from February 1930 to 1st February 1957 and that on the termination of his employment on 1st February 1957 it did not forthwith pay to him in addition

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to all other amounts due the full amount of the remuneration which became due to him under the provisions of the said Act.

Upon the hearing of the complaint before the Chief Industrial Magistrate at Sydney the company contended that both it and Haylor were bound by the provisions of the *Footwear Manufacturing Industry Award* 1951 made in settlement of an industrial dispute and that to apply the provisions of the *Long Service Leave Act* 1955 was inconsistent with such settlement, so that *pro tanto* those provisions were invalidated by virtue of s. 109 of the Constitution. This contention was rejected, and the company was ordered to pay to Haylor the sum of £294 1s. 2d., being the amount of his entitlement calculated in accordance with the provisions of the Act, together with an amount for costs.

From this decision the company by special leave appealed to the High Court.

R. Else-Mitchell Q.C. (with him *J. F. Dey*), for the appellant. The present case is different from *Collins* v. *Charles Marshall Pty. Ltd.* (1) in that here the conciliation commissioner had power to deal with long service leave. A claim was made in the log for such leave and the award made in settlement of the dispute rejected that claim. Such rejection produces inconsistency with a State law dealing with the same subject matter upon the basis that the award is an exhaustive statement of the relations of employer and employee as to matters arising in the industry including long service leave. The claim for long service leave having been rejected, the case is distinguishable from *W. A. Hamer Pty. Ltd.* v. *Flockhart* (2) where the Court refused special leave to appeal, the conciliation commissioner there having expressly reserved the question of long service leave. The award itself is not a law of the Commonwealth but a factum picked up and given binding effect by the *Conciliation and Arbitration Act* 1904-1956. It is in conformity with the decisions of the Court that the award is not the exclusive measure on the relations of employer and employee but is a manifestation of the terms and conditions upon which the industrial dispute between the parties has been settled. In manifesting such terms and conditions it operates to settle that dispute on the terms and conditions specified in the award. It follows from that that the field covered by the award is to be marked out by the ambit of the dispute within which the award-making authority had power to direct and did direct a settlement. The inquiry must always

(1) (1955) 92 C.L.R. 529; (1957) A.C. 274; (1957) 96 C.L.R. 1.

(2) (Unreported—2nd July 1957.)

be one as to the terms of the dispute and whether a determination on those matters was made. The award within the field of the dispute is the exclusive regulation of the industrial relations of the parties as to all matters comprehended within the dispute including long service leave. Support for the propositions put is to be found in *Clyde Engineering Co. Ltd.* v. *Cowburn* (1) and nothing in *Collins* v. *Charles Marshall Pty. Ltd.* (2) concludes the question against the appellant. [He referred to *Collins* v. *Charles Marshall Pty. Ltd.* (3).] The field intended to be covered by the award is to be determined by the ambit of the dispute and within the field thus determined the *Conciliation and Arbitration Act* takes up the award and creates the inconsistency with State law.

Gregory Gowans Q.C. (with him *J. C. Moore*), for the respondent. The issue of inconsistency is here to be determined by reference to the provisions actually set out in the award and not by reference to anything omitted from it by any antecedent decision of the award-making tribunal. One must find a Commonwealth law with which the State Act is inconsistent. This involves an examination of the *Conciliation and Arbitration Act* to see what it says on the subject. There are four stages in the course of a dispute or in the settlement of which the question of inconsistency may have to be considered, and the provisions of the Act apply variously to those four stages. At the first stage when a dispute has occurred but there have been no proceedings under the Commonwealth Act, there is no provision in the Commonwealth law which would collide with any State law prescribing rights and obligations in relation to industrial matters except s. 27. The State law at this stage can continue to operate or come into operation and there could be no inconsistency. At the second stage where the dispute is the subject of proceedings before the Commonwealth tribunal but before an award is made s. 27 is the only section which has anything to say on the question of State law. At this stage there is no Commonwealth law with which it could be said that a State law is inconsistent, and the latter remains good until the making of an award and is not affected by the decision of the conciliation commissioner. [He referred to *Reg.* v. *Blackburn*; *Ex parte Transport Workers' Union of Australia* (4).] The *dictum* of *Isaacs* J. in *Cowburn's Case* (5)

(1) (1926) 37 C.L.R. 466, at pp. 490, 491, 499.
(2) (1955) 92 C.L.R. 529; (1957) A.C. 274; (1957) 96 C.L.R. 1.
(3) (1955) 92 C.L.R., at pp. 550, 551, 553, 563, 564; (1957) A.C., at pp. 285, 286; (1957) 96 C.L.R., at pp. 7, 8.
(4) (1953) 88 C.L.R. 125.
(5) (1926) 37 C.L.R., at p. 491.

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cannot be taken literally. See also per *Rich* J. (1) where the comparison is drawn between post-award State law and pre-award State law. At the third stage when an award has been made and the dispute so determined, the *Conciliation and Arbitration Act* says that the award shall prevail and any State law inconsistent therewith cannot stand. [He referred to ss. 48, 50, 51, 59, 62.] It is the award with which State law is inconsistent not the decision of the conciliation commissioner. At the fourth stage where the award is kept in operation by s. 48 (2) of the *Conciliation and Arbitration Act*, the will of the arbitrator is spent and the intention of the legislature is to keep in force the industrial regulation as set out in the award, which alone can then give rise to any inconsistency. [He referred to *Reg.* v. *Hamilton Knight*; *Ex parte The Commonwealth Steamship Owners Association* (2); *Collins* v. *Charles Marshall Pty. Ltd.* (3).]

The question of the intention of the commissioner or of his decision does not arise. Section 51 of the *Conciliation and Arbitration Act*, being an express statement of the intention of the legislature on the subject of inconsistency, is here of importance. [He referred to *Wenn* v. *Attorney-General (Vict.)* (4); *Ex parte McLean* (5); *Federated Saw Mill etc. Employés of Australasia* v. *James Moore & Son Pty. Ltd.* (6); *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (7).] The observations of *Isaacs* J. in *Cowburn's Case* (8) seem to run counter to the views of their Lordships in *Charles Marshall Pty. Ltd.* v. *Collins* (9). Before the award is made the State law cannot obstruct the Commonwealth machinery for settling the dispute, but otherwise it can operate completely with the one exception of s. 27 of the *Conciliation and Arbitration Act*. At the time of the making of the award the State law cannot present an obstruction to it being made, but after it is made the State law cannot operate to alter the terms or confer or impose inconsistent rights or obligations or deal with the same subject matter as is contained in the award. Apart from that, and in so far as the award is silent on any matter, the State law is not forbidden the field in any way. It is irrelevant to ascertain the intention of the conciliation commissioner: see *Collins* v. *Charles Marshall Pty. Ltd.* (10). It should not be assumed that at the time

(1) (1926) 37 C.L.R., at p. 522.
(2) (1952) 86 C.L.R. 283, at pp. 293, 294, 321.
(3) (1955) 92 C.L.R. 529, at p. 548.
(4) (1948) 77 C.L.R. 84, at pp. 110, 119.
(5) (1930) 43 C.L.R. 472, at p. 483.
(6) (1909) 8 C.L.R. 465, at pp. 538, 547.
(7) (1910) 10 C.L.R. 266, at p. 331.
(8) (1926) 37 C.L.R., at p. 491.
(9) (1957) A.C. 274, at p. 286; (1957) 96 C.L.R. 1, at p. 8.
(10) (1955) 92 C.L.R., at p. 553.

this award was made the conciliation commissioner had power to prescribe long service leave. There was at that time no reference to long service leave in the *Conciliation and Arbitration Act* and the power, if any, to prescribe long service leave must have arisen from the power to settle a dispute in respect of an industrial matter. Assuming it to be an industrial matter, the claim for long service leave in terms of the log, if assented to, required the making of an award of indefinite duration and would have been bad for the reasons given in *Reg.* v. *Hamilton Knight*; *Ex parte The Commonwealth Steamship Owners Association* (10). The conciliation commissioner could not have prescribed a termination payment in relation to long service leave. The claim was for leave, not for a payment of money in the event of an employee entitled to long service leave leaving the employment. There could then have been no inconsistency with the present State Act.

R. Else-Mitchell Q.C., in reply.

Cur. adv. vult.

Nov. 18

THE COURT delivered the following written judgment:—

This is an appeal by special leave from an order of the Chief Industrial Magistrate at Sydney made under ss. 4, 12 and 14 of the *Long Service Leave Act* 1955 (N.S.W.), No. 38 of 1955. The order was for payment to the complainant, who is the respondent in this appeal, of a sum of £294 payable by the defendant appellant under that Act on account of long service leave on the termination of the complainant's employment by the defendant after almost twenty-seven years of service. The appeal was instituted on the footing that the case was within the federal jurisdiction of the Chief Industrial Magistrate's Court. The reason is that the defence raised before the chief industrial magistrate was that the parties were bound by a federal award or determination settling an industrial dispute and that to apply the provisions of the State *Long Service Leave Act* 1955 was inconsistent with the settlement, so that *pro tanto* those provisions were invalid under s. 109 of the Constitution.

The appellant now repeats the contention here.

The award in question is the *Footwear Manufacturing Industry Award* 1951 made by a conciliation commissioner on 14th March 1951 and expressed to come into operation as from the beginning of the first pay period to commence in April 1951 and to remain in force until 31st March 1954. At the time of the expiry of the

(1) (1952) 86 C.L.R., at pp. 292-294, 305, 306, 318-325.

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fixed period of the award thus specified, s. 48 of the *Conciliation and Arbitration Act* 1904-1952 governed the continuance of its operation and by sub-s. (2) of that section it was provided that the award should stay in force until a new award be made. The award however contained no provision concerning long service leave and no reference or allusion to it whatsoever. That was not because the power of the conciliation commissioner to deal with such a question was expressly excluded, as was the case when the award was made which formed the subject of the decision in *Collins* v. *Charles Marshall Pty. Ltd.* (1). For when the award in the present case was made no such express exclusion existed. It may be that as a result of the limitation upon the fixed period for which an award may be made no provision for long service leave could have been made for the reasons in effect given in *Reg.* v. *Hamilton Knight*; *Ex parte Commonwealth Steamship Owners Association* (2). But that may be passed by. The absence from the award of any provision relating to long service leave might be thought to form at the threshold a fatal obstacle to the success of the appellant's case. The theory upon which the operation of State law gives way in favour of an award providing an inconsistent industrial regulation imputes to the *Conciliation and Arbitration Act* an intention to confer power upon the arbitrator to make on a subject of dispute an exhaustive determination containing an industrial regulation that, on the subject with which it deals, will cover the ground to the exclusion of any different or further provision. It was by *Clyde Engineering Co. Ltd.* v. *Cowburn* (3) and *H. V. McKay Pty. Ltd.* v. *Hunt* (4) that that result was established. Clearly enough an award or an agreement having the force of an award did not in itself answer the description of a law of the Commonwealth within the meaning of s. 109 of the Constitution. For that reason, no doubt, s. 30 of the *Commonwealth Conciliation and Arbitration Act* 1904 provided that when a State law or an award, order or determination of a State Industrial Authority is inconsistent with an award or order lawfully made by the federal Arbitration Court, the latter should prevail and the former, to the extent of the inconsistency, be invalid. In *Ex parte McLean* (5) his understanding of the principle on which the Court had acted was stated by *Dixon* J. It is convenient to repeat two short passages. The first refers to the familiar test of inconsistency. "The inconsistency does not lie

(1) (1955) 92 C.L.R. 529; (1957) A.C. 274; (1957) 96 C.L.R. 1.
(2) (1952) 86 C.L.R. 283, at pp. 293-295, 318-324.
(3) (1926) 37 C.L.R. 466.
(4) (1926) 38 C.L.R. 308.
(5) (1930) 43 C.L.R. 472.

in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter" (1). The second states the result of the decided cases as to the application of s. 109 to awards. "The view there taken, when analyzed, appears to consist of the following steps, namely: (i) The power of the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State enables the Parliament to authorize awards which, in establishing the relations of the disputants, disregard the provisions and the policy of the State law; (ii) the *Commonwealth Conciliation and Arbitration Act* confers such a power upon the tribunal, which may therefore settle the rights and duties of the parties to a dispute in disregard of those prescribed by State law, which thereupon are superseded; (iii) s. 109 gives paramountcy to the Federal statute so empowering the tribunal, with the result that State law cannot validly operate where the tribunal has exercised its authority to determine a dispute in disregard of the State regulation" (2). If this be the principle, and it has been repeatedly acted upon, how can an award which has nothing to say about long service leave as a topic and contains no provision compliance with which is not compatible with the *Long Service Leave Act* 1955, lead to the invalidity of that Act so far as it otherwise would affect persons who are in fact bound by the award? The answer given for the appellant is that the silence of the award on the subject reflects a determination by the conciliation commissioner arrived at in settlement of the industrial dispute that there should be no industrial provision for long service leave and that for that reason the ground is covered to the exclusion of the State Act subsequently passed. It appears that the industrial dispute for the settlement of which the award was made arose out of the delivery of a log of claims to various employers by or on behalf of the Australian Boot Trade Employees' Federation, a registered organisation of employees. One of the claims was entitled "Long Service Leave". It contained what must be taken as a demand, although it was expressed proleptically as the term of an award. The claim was as follows:—"(a) Any employee having been continuously in one of the industries covered by this Award

(1) (1930) 43 C.L.R., at p. 483. (2) (1930) 43 C.L.R., at pp. 484, 485.

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for a period of ten years shall be granted, in addition to holidays prescribed in clauses 18 and 19 hereof an additional period of 12 weeks' continuous leave on full pay. (b) Leave for long service shall, after ten years' service leave has been granted, again be granted at five-yearly intervals and at the first of these periods leave shall be for 12 continuous weeks' leave, and at subsequent five-yearly intervals shall be extended in each case by an additional four weeks' continuous leave." In the reasons which the conciliation commissioner gave for his determination he referred to this claim thus—" Long Service Leave. This claim was refused. I have held on prior matters that the granting of long service leave was one for industry generally and should not be dealt with on a piece meal basis." Plainly " piece meal " in this sentence means by particular awards. As the power to legislate for industry generally resides with the States it may be that the conciliation commissioner had State legislation in his contemplation. But, be that as it may, there is nothing to show that he meant that his determination should cover the ground of long service leave to the exclusion of any right arising from any other source of authority. If he had entertained any such intention he should have expressed it in his award: see s. 47 of the *Conciliation and Arbitration Act* 1904-1952. But, had he done so, it may be doubted whether such a provision would have been within the ambit of the dispute arising from the organisation's log and the employers' failure to agree to its demands. The difficulties do not stop there. There is no decision of this Court which applies the doctrine formulated in *McLean's Case* (1) to anything but the provisions of an award or an agreement having the force of an award. The doctrine has not been applied to the conclusion or reasons of a federal industrial arbitrator that lead to, or lie behind, his award, and there seems no support in the Act for treating that piece of legislation as giving paramountcy to anything but the provisions of the award.

There is still a further consideration. After all it is not the will of the arbitrator which now gives force to his settlement of the dispute. The period of his award as he fixed it has expired. In fact it had expired before the *Long Service Leave Act* 1955 was passed. The actual position is that s. 49 (3) (*a*) of the *Conciliation and Arbitration Act* 1956 (No. 44 of 1956), operating upon so much of s. 7 of that Act as inserted s. 16AT (now numbered s. 58), is the statutory provision which keeps alive and gives force to the determination of the conciliation commissioner of 14th March 1951. It only does so in so far as it is expressed in the award. The terms

(1) (1930) 43 C.L.R. 472.

of the award have force only because it is to be deemed to be an award of the Commonwealth Conciliation and Arbitration Commission so that what is now s. 58 can operate upon it.

The fact is that there is an entire lack of foundation for the contention that the *Long Service Leave Act* 1955 is displaced in its application to those bound by the *Footwear Manufacturing Industry Award* 1951.

For the foregoing reasons the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *H. D. McLachlan Chilton & Co.*
Solicitors for the respondent, *Abram Landa & Co.*

R. A. H.