[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE ASSOCIATION OF PROFESSIONAL ENGINEERS OF AUSTRALIA AND ANOTHER;

EX PARTE

THE STATE OF VICTORIA AND OTHERS

PROSECUTORS.

H. C. OF A. 1957.

SYDNEY, *Dec.* 9, 10, 19.

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

Industrial Law (Cth.)—Log of claims—Allegation that log vague and indefinite—Impossibility of construing failure to respond thereto as equivalent to an intention to dispute an industrial demand—Prohibition—Sufficiency of log as foundation for industrial dispute—Conciliation and Arbitration Act 1904-1956.

The Association of Professional Engineers on behalf of its members and all engineers eligible for membership, the qualifications for which were set out, served upon employers including certain States and State agencies a log of claims in respect of employment involving professional engineering duties, which log stipulated for the payment of minimum salaries in the various engineering categories therein mentioned and required that in each particular employment a salary should be paid appropriate to the duties thereof, such salary to be fixed by agreement between the individual employer and professional engineer subject to the observance of the minimum rate of salary prescribed for the particular category. The States and State agencies did not reply to the service of the log, and upon the association bringing the matter on before a conciliation commissioner for determination sought an order absolute for a writ of prohibition to restrain the hearing and determination of the matter upon the grounds that the log was expressed in a manner so vague and indefinite that it was impossible to construe a failure to respond thereto as equivalent to an intention to dispute an industrial demand.

Held, that the log exhibited no such vagueness or uncertainty as to make it incapable of giving rise to an industrial dispute with which a conciliation commissioner might deal and accordingly the order nisi for prohibition should be discharged.

PROHIBITION.

On 28th October 1957 *Kitto* J., on the application of the States of Victoria and Queensland, the Public Service Board of Victoria, the Forests Commission of Victoria, the Public Service Commissioner

H. C. OF A. 1957.

THE QUEEN v. THE ASSOCIATION OF PROFESSIONAL ENGINEERS OF AUSTRALIA; EX PARTE VICTORIA.

Dixon C.J., McTiernan J. Williams J. Webb J. Taylor J.

Queensland, and the Commissioner of Irrigation and Water Supply, Queensland, as prosecutors, granted an order nisi for a writ of prohibition directed to The Association of Professional Engineers of Australia and John Hereford Portus, Esquire, Conciliation Commissioner calling upon the respondents and each of them to show cause before the Full Court of the High Court why a writ of prohibition should not issue directed to the respondent the said John Hereford Portus prohibiting him from proceeding further to hear and determine or otherwise deal with the industrial dispute alleged to exist between the prosecutors and the respondent the said The Association of Professional Engineers of Australia upon the grounds that there was not before the said commission an industrial dispute within the meaning of that expression as used in the Constitution or as used in the *Conciliation and Arbitration Act* 1904-1956 between the said respondent association and any of the prosecutors because: (1) an award could not be made by the commission (a) in the terms of or (b) on the basis of a certain letter dated 13th December 1956 from the said respondent association to the prosecutors and the accompanying log of claims, and in particular (i) the log of claims demanded that salaries shall be fixed by agreement to be made from time to time between particular employers and employees; and (ii) the log of claims demanded that salaries be fixed by reference to determinations to be made from time to time by the said association or by the Institute of Engineers of Australia or by other bodies. (2). The said letter and log of claims were so ambiguous, indefinite, uncertain and contradictory that a failure or refusal to agree to the claims therein made did not give rise to such an industrial dispute.

The relevant facts and arguments of counsel appear sufficiently in the judgment of the Court hereunder.

D. I. Menzies Q.C. and *J. McI. Young*, for the prosecutors.

P. D. Phillips Q.C. and *J. A. Keely*, for the respondent association.

There was no appearance for or on behalf of the respondent conciliation commissioner.

Cur. adv. vult.

Dec. 19

THE COURT delivered the following written judgment:—

This is an order nisi for a writ of prohibition directed to Mr. Portus, a member of the Commonwealth Conciliation and Arbitration Commission, for the purpose of restraining him from proceeding with the hearing and determination of an industrial dispute. The dispute is alleged to exist between on the one hand the State of Victoria and the State of Queensland and certain agencies of those

States, besides many other employers, and on the other hand, The Association of Professional Engineers, Australia. The alleged dispute is the outcome of the service on employers, including the States and the agencies already mentioned, of a log of claims on behalf of the association, accompanied by a letter from the secretary of the association. We may neglect for present purposes the large number of other employers upon whom the log was served. They no doubt are parties to the alleged dispute if there be one, but it is only with the two States and their respective agencies that we are now concerned. The States mentioned objected before Mr. Portus to his proceeding with the hearing of the dispute on the ground that the log and the accompanying letter did not amount to a demand capable of giving rise to an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1956 and the Constitution. In response to the service of the log and the accompanying letter, the two States and their agencies appear simply to have made no reply. There is no question upon this order nisi about the industrial character of the dispute. Counsel for the two States who are prosecutors said that upon this proceeding it was not intended to argue that any part of the alleged dispute was not capable of possessing an industrial character because some of the employment was governmental and administrative: cf. the case of the *Federated State School Teachers' Association of Australia* v. *State of Victoria* (1). Nor is there any dispute that the alleged dispute, if it exists, extends beyond the limits of any one State. The case made in support of the order nisi is that the log of claims and the accompanying letter are expressed in a manner so vague and indefinite that it is impossible to construe a failure to respond thereto as equivalent to an intention to dispute an industrial demand. In one of the two grounds of the order nisi, it is stated that the letter and log of claims are so ambiguous and indefinite, uncertain and contradictory, that a failure or refusal to agree to the claims therein does not give rise to such an industrial dispute. The other ground need not be set out but its effect is rather to particularise the same contention. Thus it puts the view that instead of demanding rates of remuneration the claim in the log really amounts to no more than a request that the employers should agree individually with employees upon the remuneration to be paid to each of them respectively.

The Association of Professional Engineers is an organisation registered under the *Conciliation and Arbitration Act* 1904-1956 whose members are employed, whether permanently, temporarily

(1) (1929) 41 C.L.R. 569.

H. C. OF A. 1957.

THE QUEEN v. THE ASSOCIATION OF OF PROFESSIONAL ENGINEERS OF AUSTRALIA; EX PARTE VICTORIA.

Dixon C.J., McTiernan J. Williams J. Webb J. Taylor J.

or usually with what is called the industry of engineering, provided they possess a qualification obtained from one or other of a list of universities and other bodies or a qualification answering to some other given description. The log begins with a claim for the members of the association and all other professional engineers eligible for membership of the association, and that is followed up by a reference to a schedule which contains the conditions of eligibility for membership of the association. It is a long catalogue but it shows that a person to be eligible must not only be employed on a full-time or part-time basis with the so-called industry of engineering but that he must have one or other of certain academical qualifications. It is enough to look down the list in the schedule to see that these qualifications are high and ought to ensure the possession of no inconsiderable professional knowledge. They end, as perhaps might be expected, in a clause of a rather general description enabling the committee to admit to membership the holders of fellowships, associateships, diplomas, certificates or other technical and academic or scientific qualifications in engineering deemed by the committee to be equivalent or superior to the qualifications set out in detail and to admit also persons who have passed the prescribed examinations for any of the foregoing. But the general result of a perusal of the schedule is to suggest that the log deals with a body of professional engineers who have obtained degrees or other adequate academical qualifications.

In beginning with a claim on behalf not only of the members of the association but of all other professional engineers eligible for membership of the association, the organisation is of course availing itself of the decision of this Court in the *Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1). The log of claims is of a kind which does not resemble the claims with which we are familiar in the case of ordinary industrial employment whether the log be framed with respect to a craft or to an industry. The present log has evidently been drawn specially and one may suppose with a consciousness of the difficulties of bringing the very varied employments of professional engineers within the scope of an industrial dispute susceptible of submission to the Conciliation and Arbitration Commission. The first difficulty the draftsman appears to have encountered is to define the professional engineering duties which would come within the scope of his claims. The definition says that the expression means duties carried out by a person in any particular employment the adequate discharge of any portion of which duties requires qualifications of

(1) (1935) 54 C.L.R. 387.

the employee as (or at least equal to those of) a graduate of the Institution of Engineers, Australia. The Institution of Engineers, Australia, is a body which was incorporated by Royal Charter in 1938. The bye-laws of that body give the grades of membership which go downwards from an honorary member. The grades are member, associate member, graduate, junior, student or associate. It is not necessary to discuss the classification in full. It is enough to say that the qualifications of members are high and include professional experience. To become an associate member a candidate for election or transfer into the grade must produce evidence that he has attained twenty-five years of age and has passed (or been exempted in whole or in part from passing) the Associate Membership Examination of the Institution, and that he has trained as an engineer and has been engaged for at least four years in the practice of the profession and gained thereby experience satisfactory to the Council of the Institution of Engineers, Australia. The period of four years may be reduced to three by the council in the case of persons holding degrees in engineering of universities. The qualifications of a " graduate " require that the candidate for election or transfer into that grade should produce evidence that he has passed, or has been exempted in whole or in part from passing the Associate Membership Examination of the Institute, and in the case of partial exemption has passed the subjects for which exemption has not been granted. References to exemption appear in effect to mean an exemption based on proof of the acquisition from bodies other than those primarily contemplated of equal qualifications.

The claims are made on behalf of a class called " Professional Engineers", whether or not members of the association. The term " Professional Engineer " is defined by reference to the definition already set out of " professional engineeering duties " so that the minimum requirement for inclusion in the class is the possession of the qualifications demanded of a graduate of the Institution of Engineers, Australia. The term professional engineer is also expressed to include " Qualified Engineer " and " Chartered Engineer ", and these terms are in fact used as descriptions of respectively the lower and higher grades of professional engineers for the purposes of the log. " Qualified Engineer " means a person who is, or is qualified to become, a graduate of the Institution of Engineers, Australia, or a member of the Association of Professional Engineers, Australia. As has been said the academical qualifications for membership of the association are considerable, not less, it seems, than those of a graduate of the Institution. " Chartered

H. C. OF A. 1957.

THE QUEEN v. THE ASSOCIATION OF PROFESSIONAL ENGINEERS OF AUSTRALIA; EX PARTE VICTORIA.

Dixon C.J., McTiernan J. Williams J. Webb J. Taylor J.

Engineer" is then defined for the purpose of the claim to mean a professional engineer in any particular employment the adequate discharge of any portion of the duties of which requires qualifications of the employee as (or at least equal to those of) an Associate Member of the Institution of Engineers; the qualifications required for associate membership have been set out already. It will be seen that these definitions may involve some practical difficulty, not in their application to particular persons but in their application to particular employments. That is, difficulty could rarely arise in determining whether a man possesses the qualifications of a professional engineer but it may more often be difficult to say whether in the case of a particular employment the adequate discharge of some portion of the duties involved does or does not require the qualifications stated. It was explained at the bar that this difficulty arose from the fact that engineers tend to drift into purely administrative positions as they get higher in their profession and that it was desired to cover persons who still need an engineering qualification in the course of or in spite of their ascent of the administrative ladder.

The first claim in the log is expressed in these terms: "For an employment involving the performance of Professional Engineering duties. (i) Qualified Engineer. The minimum rate of salary which shall be paid to a qualified Engineer shall be £1,650 per annum. (ii) Chartered Engineer. The minimum rate of salary which shall be paid to a Chartered Engineer shall be £2,200 per annum." This no doubt is clear enough as a demand, and any indefiniteness, if the matter stood there, would arise only from the somewhat imprecise scope of the terms "Qualified Engineer" and "Chartered Engineer", defined as they ultimately are by reference to the definition of professional engineering duties. But this claim does not stand unqualified. It is qualified by a very long proviso. The prosecutors say that the proviso robs the claim of its prima facie meaning. Fortunately it is not necessary to set out the proviso; it is enough to describe it. It attempts to express several qualifications upon the main claim. In the first place it says that the salaries mentioned are to be minima beneath which no salary must go. It then proceeds to say that each particular employment by the employers shall be paid such a salary respectively as is appropriate to the duties thereof and each salary shall be fixed by agreement between the employer and the professional engineer concerned but the salary for each particular employment shall observe the minimum appropriate for that employment whether for a qualified engineer or a chartered engineer as the case may be.

It was contended by the prosecutors that this amounts to a claim that on each actual salary employer and employee be ordered to agree; that it was in effect a demand that in every case salaries should be governed by a compulsive agreement of an unspecified and future kind. That is not the manner in which we think the so-called proviso should be construed. What is really meant is that while the minima must be observed they are not to be taken as the rates which are to be paid but only as the ultimate minima and that the actual salary of the individual officer is to be left open and is to depend upon the ordinary process of agreement between employer and employee. That is shown by the next expression which says that the professional engineer may if he so desires be represented in any dealings upon such matters by the association.

Then the proviso proceeds to deal with a difficulty the exact nature of which has not been made clear, as it might have been, by evidence. It seems to be an attempt to guard against the possibility of the minimum rates being accepted for purposes of certain State awards as the basis of calculation of the actual salaries. Next the log claims a provision for the adjustment of every salary, presumably including those fixed by agreement, in accordance with variations of the basic wage. Then there is a demand which does not seem material to present purposes and is directed against possible prejudices which may arise out of the claims.

The contention on behalf of the States who are prosecutors in prohibition is that mere failure to answer this log cannot be a ground for inferring that there was a formal or sufficient disagreement on industrial matters, which is prima facie evidence of the existence of an industrial dispute, sufficient that is to say to support an exercise of the authority conferred under the *Conciliation and Arbitration Act*. It would serve no useful purpose to go over all the criticisms that have been made of this log as indefinite. It may at once be conceded that at, so to speak, the edges of the application of the definition of engineering duties there may be uncertainty as to this or that given case. It may be conceded that qualifications coming from a large number of academical sources may satisfy the definition of professional engineer. It may be conceded too that uncertainty may be found in saying whether this or that individual falls within the definition of qualified or of chartered engineer although that uncertainty will less frequently occur. But we think the substance or general scope and reach of these definitions cannot be attended by much doubt. The demand for minimum salaries is perfectly clear. It is not, we think, open to any real doubt that, subject to the minimum salaries, the general

H. C. OF A. 1957.

THE QUEEN v. THE ASSOCIATION OF PROFESSIONAL ENGINEERS OF AUSTRALIA; EX PARTE VICTORIA.

Dixon C.J., McTiernan J. Williams J. Webb J. Taylor J.

demand is that salaries shall be fixed on an individual basis with the help of the intervention on behalf of the engineer of representatives of the association. It is, we think, impossible to suppose that the officers of the Governments who received this log are unaware of its central intendment. If it be true that the log was intended to make demands for categories not as they now stand but as they might be adopted under the charter of the Institution, that would not rob the demand of the character of an industrial dispute; but the preferable reading of the log seems to be that it makes demands on behalf of persons in these categories as they are at present defined. No doubt demands which are not intelligible or convey nothing clearly to the mind of the person to whom they are addressed may fail in giving rise to an industrial dispute. The doctrine by which this Court has allowed paper demands to form evidence, sufficient evidence, of a real dispute has not hitherto been qualified by any principle which requires paper demands to be in any specific form or to be incapable of misreading or misconstruction. It surely must be sufficient that the party to whom they are addressed ought fairly to understand what he is requested to do on the specific matters which form the subject of the alleged grievance. Every case of this description must stand on its own basis. But it is sufficient to say in the present case that this log is very far from exhibiting such a vagueness or uncertainty as to make it incapable of giving rise to an industrial dispute with which a conciliation commissioner may deal. Of course it is for the conciliation commissioner to say how he will deal with it. If he thinks fit to make an award he must deal with any difficulties which really exist as to the precise area covered by definitions and demands and attempt to keep within the real practical scope of the dispute; but that usually happens in the case of industrial disputes.

We think that the grounds of the order nisi for a writ of prohibition cannot be sustained on the material before us and the order nisi should be discharged with costs.

Discharge the order nisi with costs to be paid by the prosecutors.

Solicitor for the prosecutors, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

Solicitors for the respondent, The Association of Professional Engineers of Australia, *Rylah & Rylah.*

R. A. H.