REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[PRIVY COUNCIL.]

CHARLES MARSHALL PROPRIETARY LIMITED . . . . . } APPELLANT;

AND

COLLINS . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL
1957.
Feb. 18, 19, 20;
Mar. 19.
Viscount Simonds, Lords Morton of Henryton, Cohen and Somervell of Harrow.

Constitutional Law (Cth.)—Consistency between Federal and State laws—Award of conciliation commissioner—Dealing comprehensively with conditions of employment but not with long service leave—Long service leave outside jurisdiction of conciliation commissioner—State Act prescribing long service leave for, inter alia, persons covered by award—Validity—The Constitution (63 & 64 *Vict. c.* 12), *s.* 109—*Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 13 (1) (*c*), 25 (*c*), 51—*Factories and Shops* (*Long Service Leave*) *Act* 1953 (*No.* 5706) (*Vict.*), *ss.* 7, 9 (2), (4).

The *Factories and Shops* (*Long Service Leave*) *Act* 1953 (Vict.), s. 7 (1) provides that every worker, as defined in the Act, shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer. Section 7 (2) (*a*) provides that a worker who has completed twenty years of continuous employment with his employer is entitled to thirteen weeks of long service leave and thereafter to an additional three and one-quarter weeks' long service leave on the completion of each additional five years of continuous employment with such employer. Section 7 (2) (*c*) provides that a worker who has completed ten but less than twenty years of continuous employment with his employer and whose employment is terminated by the employer for any cause other than serious and wilful misconduct or by the worker on account of illness, incapacity or domestic or any other pressing necessity justifying such termination is entitled to such

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amount of long service leave as equals one-eightieth of the period of his continuous employment. Section 9 (2) provides that where the employment of a worker is for any reason terminated before he takes any long service leave to which he is entitled or where any long service leave entitlement accrues to a worker because of the termination of his employment the worker shall be deemed to have commenced to take his leave on the date of such termination of employment and he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly. Section 9 (4) provides that the ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and in one of a number of specified ways. On a prosecution against an employer for a breach of the Act it was proved that the employment in question was governed by the Metal Trades Award 1952 given by a conciliation commissioner pursuant to the provisions of the *Conciliation and Arbitration Act* 1904-1952. The award did not deal with the question of long service leave, which was outside the jurisdiction of the conciliation commissioner, but did deal comprehensively with conditions of employment generally including the subject of annual leave. Clause 19 (*b*) of the award provided that employment might be terminated by a week's notice or by the payment or forfeiture of a week's wages. Clause 19 (*c*) (i) provided that an employee not attending for duty, subject to immaterial exceptions, should lose his pay for the actual period of such non-attendance, but did not prohibit the employer from allowing him his pay.

Held that there was no conflict between the Act and the award so as to render the Act inoperative by virtue of s. 109 of the Constitution.

Decision of the High Court, *Collins* v. *Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529, affirmed.

APPEAL from the High Court to the Privy Council.

Charles Marshall Proprietary Limited appealed to the Privy Council by special leave from the decision of the High Court of Australia : *Collins* v. *Charles Marshall Pty. Ltd.* (1).

D. I. Menzies Q.C., *R. M. Eggleston* Q.C. and *R. A. Gatehouse*, for the appellant.

G. Gowans Q.C. and *J. G. Le Quesne*, for the respondent.

Their Lordships took time to consider the advice they would tender to Her Majesty.

Mar. 19.

LORD SOMERVELL OF HARROW delivered the judgment of their Lordships as follows :—

This is an appeal from the High Court of Australia by special leave granted by Her Majesty in Council on 1st June 1956.

(1) (1955) 92 C.L.R. 529.

The issue in the appeal is whether an Act of the State of Victoria, the *Factories and Shops* (*Long Service Leave*) *Act* 1953 (hereinafter called the State Act), is inconsistent with a law of the Commonwealth and therefore invalid to the extent of the inconsistency under s. 109 of the Constitution. The provisions of the Commonwealth law which are alleged to create the inconsistency are contained in the Metal Trades Award 1952, made by a conciliation commissioner under the *Conciliation and Arbitration Act* 1904-1952 (Cth.). Both parties accept the position as found by the High Court that the provisions of the award are by the terms of the *Conciliation and Arbitration Act* brought into force as part of the law of the Commonwealth for the purposes of s. 109.

Sections 7 and 9 which are the main operative sections of the State Act are as follows :—

7. (1) Subject to this Act every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer.

(2) The amount of such entitlement shall be—

(*a*) on the completion by a worker of twenty years continuous employment with his employer—thirteen weeks long service leave and thereafter an additional three and a quarter weeks long service leave on the completion of each additional five years in continuous employment with such employer ;

(*b*) in addition, in the case of a worker who has completed more than twenty years continuous employment with his employer and whose employment is terminated—

(i) by the employer for any cause other than serious and wilful misconduct ; or

(ii) by the worker on account of illness incapacity or domestic or any other pressing necessity where such illness incapacity or necessity is of such nature as to justify such termination—

such amount of long service leave as equals one-eightieth of the period of his continuous employment since the last accrual of entitlement to long service leave under par. (*a*) of this subsection ;

(*c*) in the case of a worker who has completed at least ten but less than twenty years of continuous employment with his employer and whose employment is terminated—

(i) by the employer for any cause other than serious and wilful misconduct ; or

(ii) by the worker on account of illness incapacity or domestic or any other pressing necessity where such illness

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incapacity or necessity is of such nature as to justify such termination—

such amount of long service leave as equals one-eightieth of the period of his continuous employment.

9. (1) When a worker becomes entitled to long service leave under this Act such leave shall be granted by the employer as soon as practicable (but save as otherwise expressly provided in this section not before the thirty-first day of December One thousand nine hundred and fifty-four) having regard to the needs of his establishment; but subject to this Act—

(*a*) the taking of such leave may be postponed to such date as is mutually agreed or in default of agreement as the Industrial Appeals Court having regard to the problems involved directs but no such direction shall require such long service leave to commence before the expiry of six months from the date of such direction;

(*b*) the taking of such leave may (if the entitlement has accrued) be advanced to such date before the thirty-first day of December One thousand nine hundred and fifty-four as is mutually agreed;

(*c*) in no case shall any entitlement to long service leave be lost or in any way affected by the foregoing provisions of this sub-section or by failure or refusal of the employer to grant the leave.

(2) Notwithstanding anything in the last preceding sub-section where the employment of a worker is for any reason terminated before he takes any long service leave to which he is entitled or where any long service leave entitlement accrues to a worker because of the termination of his employment the worker shall be deemed to have commenced to take his leave on the date of such termination of employment and he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly.

(3) The employer and worker may agree that any accrued entitlement of long service leave will be taken in two periods; but save as aforesaid long service leave shall be taken in one period.

(4) The ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and shall be paid in one of the following ways:—

(*a*) In full when the worker commences his leave; or

(*b*) At the same times as it would have been paid if the worker were still on duty; in which case payment shall, if the worker in writing so requires, be made by cheque posted to a specified address; or

(*c*) In any other way agreed between the employer and the worker—

and the right to receive ordinary pay in respect of such leave shall accrue accordingly.

(5) Any long service leave shall be inclusive of any trade or public holiday occurring during the period when the leave is taken, but shall not be inclusive of any annual leave occurring during such period.

Under s. 17 (1) (*d*) any person who fails to comply in any respect with any provision of the Act is guilty of an offence.

The appellant was prosecuted at the instance of the respondent, a factory inspector, for not granting a dismissed employee named Kemp pay for a period of long service leave to which he was admittedly entitled under s. 7 (2) (*c*) of the State Act if applicable. The Metal Trades Award 1952, admittedly applied to the appellant and Kemp and it was submitted that it was inconsistent with s. 7 (2) (*c*) and therefore rendered it inapplicable to the appellant.

The Metropolitan Industrial Court at Melbourne dismissed the information on the ground of the inconsistency alleged. The respondent appealed to the High Court. The first point taken by the present appellant was that the appeal to the High Court was not competent by reason of the provisions of s. 31 of the *Conciliation and Arbitration Act*. That point failed and the decision on that point is not challenged. On the point under s. 109 the appeal succeeded. The High Court holding there was no inconsistency set aside the order of the Metropolitan Industrial Court and remitted the information to that court for rehearing.

The appellant submits in the first place that this award on its true construction regulates all the terms and conditions of employment; that it occupies the whole field; that long service leave is a term or condition of employment; and that therefore the Act so far as applicable to metal trade workers is inconsistent with the award although the award makes no reference to long service leave and does not purport to deal with it.

If this is right the appeal succeeds. Alternatively the appellant submits that there is an actual conflict between the relevant provisions of the State Act and provisions of the award.

There was no issue between the parties as to the tests of inconsistency as laid down in *Ex parte McLean* (1) and other cases. It was common ground that no "*inter se*" issue within s. 74 arose (*O'Sullivan* v. *Noarlunga Meat Ltd.* (2)).

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

(2) (1956) A.C. 1; 95 C.L.R. 177.

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There is an express reference to long service leave in ss. 13 and 25 of the *Conciliation and Arbitration Act* which deal with the powers of a conciliation commissioner and the court respectively :—

13.—(1.) A Conciliation Commissioner shall not be empowered to make an order or award—

(*a*) altering the standard hours of work in an industry ;

(*b*) altering the basic wage for adult males (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed ;

(*c*) providing for, or altering a provision for, annual or other periodical leave with pay, sick leave with pay or long service leave with pay ;

(*d*) determining or altering the basic wage for adult females (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult female, without regard to any circumstance pertaining to the work upon which, or the industry in which, she is employed) or the principles upon which it is computed.

(2.) The last preceding sub-section does not prevent a conciliation commissioner from including in an order or award provisions for annual or other periodical leave with pay or sick leave with pay being provisions to the same effect as provisions contained in an order or award which is superseded by the first-mentioned order or award.

25. The Court may, for the purpose of preventing or settling an industrial dispute, make an order or award—

(*a*) altering the standard hours of work in an industry ;

(*b*) altering the basic wage for adult males (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed ;

(*c*) providing for, or altering a provision for, annual or other periodical leave with pay, sick leave with pay or long service leave with pay ;

(*d*) determining or altering the basic wage for adult females (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult female, without regard to any circumstance pertaining to the work upon which, or the industry in which, she is employed) or the principles upon which it is computed.

The Commonwealth power from which the award is derived comes from s. 51 (xxxv.). There is of course no Commonwealth power to legislate on industrial relations generally but only with respect to conciliation and arbitration for the prevention and settlement of industrial disputes. The powers of the court and a commissioner are necessarily limited. An award cannot give a form of relief that is not relevant to a matter in dispute *Reg.* v. *Galvin*; *Ex parte Amalgamated Engineering Union, Australian Section* (1)).

Against this background the appellant's submission seems a remarkable one. An award will of course normally be construed as exhaustive in relation to matters with which it expressly deals. The appellant cited *Clyde Engineering Co. Ltd.* v. *Cowburn* (2) and *Colvin* v. *Bradley Bros. Pty. Ltd.* (3). In each case the award and the State Act dealt with the same subject matter. In *Cowburn's Case* (2) there were, as *Rich* J. said "different mimimum wages and different maximum hours" (4) provided by the Act and the award respectively. In *Colvin's Case* (3) an order under a State Act prohibited the employment of females at milling machines altogether whereas the award allowed their employment unless this had been declared unsuitable by a Board of Reference.

The award in the present case is a composite document in that it embodies orders made either by the court or by commissioners in earlier disputes when the commissioners had wider powers than they now have under s. 13 of the Act set out above. The award deals with basic wages, margin wages, apprenticeship, travelling and camping allowances, hours of work, overtime, holidays and Sunday work, contract of employment, annual and sick leave and other miscellaneous matters which need not be enumerated. There is no reference to long service leave. The logs setting out the dispute or disputes which led to the award were not before the Court. It is plain that the question of long service leave had not been raised. If it had been raised the commissioner would have had to refer it to the court. If the appellant's submission were right it would mean that the commissioner had prevented the State from dealing with a "matter" which he could not himself deal with.

Their Lordships agree with the High Court that long service leave is an entirely distinct subject matter from those matters which are determined and regulated by the award. In other words long service leave differs in kind from public holidays and from annual leave. It is a separate item in industrial relations. This could

(1) (1952) 86 C.L.R. 34, at p. 40.
(2) (1926) 37 C.L.R. 466.
(3) (1943) 68 C.L.R. 151.
(4) (1926) 37 C.L.R., at p. 522.

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seem obvious in principle but is placed beyond argument in the present context by the provisions of ss. 13 and 25 of the *Conciliation and Arbitration Act* which specify it as a separate item.

An obligation to grant long service leave imposes no doubt a burden on employers. It may or may not, according to the circumstances, justify a reconsideration of other conditions such as wages, hours or annual leave. Most terms and conditions of employment are inter-related in this way, but this does not mean that an award as to wages or annual leave is for that reason *inconsistent* with a provision for long service leave or canteens or some other separate matter.

This being so their Lordships are of opinion that there are no grounds in principle or authority for construing this award as covering the " field " of long service leave.

The respondent sought to reinforce his case by an argument based on s. 51 of the *Conciliation and Arbitration Act* which reads as follows :—51. When a State law, or an order, award, decision or determination of a State Industrial Authority, is inconsistent with, or deals with any matter dealt with in, an order or award, the latter shall prevail, and the former shall, to the extent of the inconsistency, or in relation to the matter dealt with, be invalid.

It was submitted that the words " or deals with any matter " made it more difficult for the appellant to argue that the award had disposed *sub silentio* of a matter with which it did not expressly deal. Their Lordships agree with the High Court that the argument is " difficult to support " and for the purposes of this case may be ignored.

There remains for consideration the alleged particular inconsistencies. There is, it is said, actual conflict between certain specific provisions of the award and the relevant provisions of the State Act.

It is of course possible for Acts dealing primarily with different subject matters to have inconsistent provisions on particular matters. Apparent inconsistencies may however disappear, as here, when the words are construed in the limited context of the respective Acts. If in dealing with annual leave a man said, " I only get a fortnight's holiday a year ", he would not mean that he worked seven days a week for fifty weeks.

The first point was based on the terms of the award dealing with dismissal on notice. By cl. 19 (*b*) employment can be terminated by a week's notice or by the payment or forfeiture of a week's wages. This is, it is said, inconsistent with s. 9 (2) of the State Act in that men who have served for ten years or more if dismissed get more than

one week's pay. The argument was developed and other provisions relied on but it fails *in limine* once it is realised that the two documents are dealing with separate and distinct matters. The words of the award are appropriate to the general position of wage earners with which it is dealing. They do not purport to be applicable to long service leave, should provision be made for those who have so served. If the award had itself dealt in later clauses with long service leave one might well have expected the " general " clause to be made expressly subject to the provisions of the later special clause. The absence of such words creates no inconsistency when the matters are dealt with as here in separate and independent documents. On the basis of this conclusion on the first submission the whole award must be read as subject to the provisions of a State Act, if any, dealing with long service leave.

Reliance was also placed on cl. 19 (*c*) (i) of the award which reads as follows :—(*c*) (i) An employee (other than an employee who has given or received notice in accordance with sub-cl. (b) of this clause) not attending for duty shall, except as provided by cl. 20 of this award, lose his pay for the actual time of such non-attendance. This, it is said, means " no work no pay ", whereas the State Act provides for thirteen or more weeks of pay for no work. The answer as stated above can be reinforced in this case by the fact that the clause makes no reference for annual leave which under cl. 21 of the award means two weeks of pay with no work. The word " duty " may well have been inserted to make it clear that the clause was not to operate when the employee was not due to attend either under his contract or under the award, or under any valid State Act.

For the above reasons, which are in substance the same as those given in the judgments of the High Court, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant will pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Park, Nelson & Co.*
Solicitors for the respondent, *Freshfields.*

R. D. B.