[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

HALL AND OTHERS;

Ex parte COMMISSIONER FOR RAILWAYS (N.S.W.)

H. C. of A. 1958.

Sydney, *Aug.* 12, 13.

Dixon C.J., McTiernan, Taylor and Menzies JJ.

Industrial Law (Cth.)—Conciliation and arbitration—Award—Variation—Conciliation commissioner—Long service leave—Dismissed employees—Payment—Provision in statute and award—Effect—Extension of benefits by statute—Powers—Competence of commissioner—Prohibition—Conciliation and Arbitration Act 1904-1951, *ss.* 13, 16; 1904-1956, *s.* 58—*The Constitution* (63 & 64 *Vict.* c. 12) *ss.* 51 (*xxxv.*), 109—*Government Railways Act* 1912-1950 (*N.S.W.*), *s.* 100A—*Railways Traffic, Permanent Way and Signalling Wages Staff Award* (*30th September* 1952), *cl.* 63 (*c*).

The Railways Traffic, Permanent Way and Signalling Wages Staff Award 1952, made by a conciliation commissioner, provides by cl. 63 as follows:—"... (c) Payment for any holidays or leave standing to an employee's credit, and long service leave due under the *Government Railways Act* shall be made in each case where an employee resigns, retires, dies or is dismissed as follows:—(i) In the case of resignation, retirement or dismissal—to the employee. (ii) In the case of death—to the employee's widow, or if he does not leave a widow, to his legal personal representative."

Held, that the sub-clause does not attempt to interfere with the power of the State to legislate with respect to long service leave, nor does it go beyond the scope of the authority of a conciliation commissioner considered as a person exercising power pursuant to s. 51 (xxxv.) of the Constitution. The sub-clause gives no right to long service leave but in effect expresses a principle to be applicable to resignation, retirement, dismissal or death of an employee to whom long service leave has accrued.

Order Nisi for Prohibition.

Upon application made on 5th May 1958 on behalf of the Commissioner for Railways (N.S.W.) *Taylor* J. granted an order nisi directed to Vivian Gerald Hall, a former conciliation commissioner appointed under the *Conciliation and Arbitration Act* 1904-1952, Leslie Paul Austin, a commissioner appointed under the *Conciliation and Arbitration Act* 1904-1956, and The Australian Railways Union and The National Union of Railwaymen of Australia, being

organisations registered under the latter Act, calling on the respondents to show cause before the Full Court of the High Court why a writ of prohibition should not issue directed to the respondents prohibiting them from proceeding further with or upon cl. 63 (c) (i) of the Railways Traffic, Permanent Way and Signalling Wages Staff Award 1952 insofar as such clause related to payment for long service leave due under the *Government Railways Act* 1912 (N.S.W.) as amended, in the case of dismissal of an employee upon the grounds that—(a) a conciliation commissioner under the *Conciliation and Arbitration Act* 1904-1952 or a commissioner under the *Conciliation and Arbitration Act* 1904-1956 was not empowered to make an order or an award making provision for or in relation to or altering a provision for or in relation to long service leave with pay and that the said cl. 63 (c) (i) purported to make or alter such a provision; (b) a conciliation commissioner or a commissioner as aforesaid could not validly exercise jurisdiction in respect of benefits conferred upon an employee under the provisions of s. 100A of the *Government Railways Act* 1912, as amended; (c) the said clause did not relate to an industrial matter within the meaning of the *Conciliation and Arbitration Act* 1904-1956.

The Court was informed upon the return of the order nisi that it had been served upon both the respondents Hall and Austin.

Further facts and the relevant provisions of the award appear in the judgment of the Court hereunder.

Sir *Garfield Barwick* Q.C. (with him *H. Jenkins*) for the prosecutor. The general effect of a termination of employment is to destroy the right to leave, for the concept of leave supposes the continuance of the relationship of master and servant. [He referred to *Baker* v. *Williams* (1); *Christensen* v. *Railways Commissioners for N.S.W.* (2) and *Collins* v. *Charles Marshall Pty. Ltd.* (3).]

[TAYLOR J. referred to *Commissioner for Government Transport* v. *Chapman* (4).]

Reg. v. *Blackburn; Ex parte Transport Workers' Union of Australia* (5) is here distinguishable. The conciliation commissioner has here sought to confer upon dismissed employees benefits as they may be varied, enhanced, or reduced from time to time by the State legislature. It is not open to him to do so; it is beyond par. (xxxv.) of s. 51 of the Constitution, and it is not an industrial matter. Clause 63 (c) (i) of itself confers nothing. It depends upon the continuance of the *Government Railways Act* and the provisions in that

(1) (1912) 12 S.R. (N.S.W.) 449; 29 W.N. 116.
(2) (1921) 21 S.R. (N.S.W.) 141; 38 W.N. 7.
(3) (1955) 92 C.L.R. 529, at p. 553.
(4) (1957) 97 C.L.R. 160.
(5) (1952) 86 C.L.R. 75.

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Act for its own efficacy. [He referred to *Harrison* v. *Goodland* (1).] Under s. 51 (xxxv.) of the Constitution or as an industrial matter it is not open to a conciliation commissioner to disburse benefits, or under Commonwealth legislation to allow benefits to be disbursed according to what might or might not be done in the future by some person quite independent of the control of Commonwealth legislation or the conciliation commissioner. "Long service leave due" means "long service leave accrued". There cannot be an industrial dispute as to what will appear in the State Act in the future. The conciliation commissioner is concerned with the policy of the New South Wales legislature. Validity for this legislation must be found in par. (xxxv.) and nowhere else. No other section justifies the prescription in the clause. No case yet decided goes so far as to say that a conciliation commissioner may lay down, for the future, what is to be the effect of State legislation. The effect of future State legislation cannot be the subject of an industrial dispute, and nor is it an industrial matter.

R. M. Eggleston Q.C. (with him *E. A. H. Laurie*), for The Australian Railways Union. Under the *Government Railways Act* 1912, as amended, a person otherwise entitled cannot demand leave if the exigencies of the railway service do not permit him to take it, but the commissioner is not given a discretion to say whether leave is to be granted. [He referred to the *Government Railways Act* s. 100A, and to *Shugg* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2).] The criterion is not the discretion of the commissioner but the exigencies of the railway service. In the circumstances the conciliation commissioner did no more than supply what he conceived to be a deficiency in the entitlement to long service leave. [He referred to *Reg.* v. *The Members of the Railways Appeals Board and the Commissioner for Railways (N.S.W.)*; *Ex parte Davis* (3) and *Australian Railways Union* v. *Victorian Railways Commissioners* (4).] What the conciliation commissioner has done imposes no limitation on the authority of Parliament. Rights under State legislation have been taken up and made the subject of federal law: see *Pidoto* v. *Victoria* (5) and *H. V. McKay Massey Harris Pty. Ltd.* v. *The Commonwealth* (6). This respondent relies on *Reg.* v. *Blackburn*; *Ex parte Transport Workers' Union of Australia* (7).

[McTIERNAN J. referred to *Reg.* v. *Hamilton Knight*; *Ex parte The Commonwealth Steamship Owners Association* (8).]

(1) (1944) 69 C.L.R. 509.
(2) (1937) 57 C.L.R. 485, at pp. 488, 491.
(3) (1957) 96 C.L.R. 429.
(4) (1930) 44 C.L.R. 319.
(5) (1943) 68 C.L.R. 87.
(6) (1944) 69 C.L.R. 501.
(7) (1952) 86 C.L.R. 75.
(8) (1952) 86 C.L.R. 283.

That particular issue was determined in *Reg.* v. *Findlay*; *Ex parte The Commonwealth Steamship Owners' Association* (1). This case is *a fortiori*. No difficulty is here occasioned to the State legislature: that legislature is not bound to add additional rights by way of amendment to the *Government Railways Act*, and there is in fact, no fetter or restriction placed on the State power to legislate. If this be so the clause is valid and operates according to its terms. Any effect upon State legislation arises from the operation of s. 109 of the Constitution. In this case the State is perfectly free to pass any law it likes.

F. C. Hutley and *J. M. Linton*, for the respondent National Union of Railwaymen of Australia, adopted the arguments submitted to the Court on behalf of the respondent Australian Railways Union.

There was no appearance by or for either the respondent conciliation commissioner or the respondent commissioner.

H. Jenkins, in reply. The clause in the award should be construed as having no ambulatory effect. There cannot be an industrial dispute as to benefits which may or may not be given by some future legislation of the State. [He referred to *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (2); *Commissioner for Government Transport* v. *Chapman* (3) and *Reg.* v. *Blackburn*; *Ex parte Transport Workers' Union of Australia* (4).]

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

This is an order nisi for prohibition to restrain further proceedings by way of enforcement of a particular clause in the Railways Traffic, Permanent Way and Signalling Wages Staff Award. That award was finally made on 30th September 1952. It had a fixed currency from 30th September 1952 to 30th June 1956 and is now in operation by virtue of s. 58 of the *Conciliation and Arbitration Act* which provides that after the expiration of that time the award is to continue in force.

The award was made by Mr. Conciliation Commissioner V. G. Hall, who subsequently retired from that office. His retirement occasioned some difficulty about the direction of the writ, but the order nisi is directed also to Mr. Commissioner Austin to whom the duties of the description formerly performed by Conciliation Commissioner Hall were assigned. But in the view we take we can pass the difficulty by.

Clause 63 of the award contains four paragraphs, but we are concerned only with the third or a portion of it. That paragraph is as follows: " (c) Payment for any holidays or leave standing to

(1) (1953) 90 C.L.R. 621.
(2) (1920) 28 C.L.R. 129.
(3) (1957) 97 C.L.R., at p. 171.
(4) (1952) 86 C.L.R., at pp. 76, 90.

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an employee's credit, and long service leave due under the *Government Railways Act* shall be made in each case where an employee resigns, retires, dies or is dismissed as follows :—(i) In the case of resignation, retirement, or dismissal—to the employee. (ii) In the case of death—to the employee's widow, or if he does not leave a widow, to his legal personal representative." Then follows a proviso that is not material.

The order nisi was obtained by the Railways Commissioner for New South Wales. His object is to challenge so much of this provision as relates to long service leave. Apparently he might not have challenged the provision had it not been for its operation in the case of employees who were dismissed. It operates so as to give them the monetary equivalent to long service leave pay. It should be noticed that the clause does not profess to confer a right to long service leave. It supposes that long service leave is due under the State *Government Railways Act*, and then annexes certain further rights to a money equivalent on resignation, retirement, dismissal or death.

In view of the provisions of s. 13 of the *Conciliation and Arbitration Act* 1904-1951 (Cth.)—as it then existed—the question at once would strike one as to whether the conciliation commissioner had jurisdiction at all in a matter which was connected with long service leave, and indeed that is referred to as the first ground in the order nisi. Section 13 (1) of the Act as it then stood provided : " 13.—(1) A Conciliation Commissioner shall not be empowered to make an order or award . . . (*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." As at the date when the award was made, Act No. 34 of 1952 of the Commonwealth had come into operation. That Act came into operation on 27th June 1952 ; the award did not come into operation until 30th September 1952. Act No. 34 of 1952 amended s. 16 of the Act of 1904-1951 and introduced sub-s. (6) and (7). The operation of those provisions was the subject of a decision of this Court in *Reg.* v. *Blackburn* ; *Ex parte Transport Workers' Union of Australia* (1).

The effect of the provisions need not be described in detail, but we thought that they removed the question whether a tribunal had exceeded its jurisdiction as defined by s. 13 from the operation of the principle of invalidity and made the question one of a decision as between two competing authorities. We considered that the effect was to leave the question of the application of this purely statutory division of function to the direction and determination of the Chief Judge and the Arbitration Court as it then stood,

(1) (1952) 86 C.L.R. 75.

leaving s. 13 in effect as a directory provision. The discussion of this interpretation appears in the judgment of the Court (1).

We think it is clear, on the facts of this particular case, that the question was not one, as it then stood, of jurisdiction. No reference was in fact made to the Arbitration Court—under s. 16—of the question whether the commissioner should go on, and accordingly under sub-s. (7) of s. 16 of the Act as it then stood it was competent for the conciliation commissioner to proceed. He went on without objection and made this particular provision in his award.

At the time when he adopted cl. 63 of his award long service leave was the subject of a provision in the *Government Railways Act* to which, as appears from what I have read, cl. 63 refers. The provision was inserted in the *Government Railways Act* by Act No. 40 of 1941, s. 2. The provisions with which we are concerned particularly are those of sub-ss. (2) and (3). At the date of the award it had been amended by s. 2 (1) (e) of Act No. 19 of 1950 of New South Wales, but the amendment was not material to the present question.

Those were the provisions which obtained when the award was actually pronounced. Subsequently the benefits conferred by s. 100A were extended by four other Acts of Parliament of New South Wales, viz., s. 2 of Act No. 31 of 1953, s. 5 of Act No. 27 of 1955, s. 5 of Act No. 21 of 1957 and s. 5 (1) of Act No. 5 of 1958.

The attack made on behalf of the commissioner upon cl. 63 (c) is not based on any deficiency in the ambit of the industrial dispute which gave rise to the award. In fact, the log of claims is not brought before us, but we are told that the provision in cl. 63 (c) is in the same form as in previous awards and in fact follows the claim made in the log. So that we do not begin with any doubt as to the intended ambit of the dispute. The attack is made upon the sub-clause upon the ground that it works some interference with the State power of legislation and that it goes beyond the scope of the authority of the commissioner, considered as a person exercising power pursuant to par. (xxxv.) of s. 51 of the Constitution. It will be noticed from what I have said that the paragraph does affect the consequences of a legislative grant of long service leave. It does not affect the grant itself, it does not affect the operation of the provision conferring rights to long service leave. What it does is, in the case of a person who has become entitled to long service leave, to confer upon him, his widow or his personal representative as the case may be a further right, a right to a money sum. The right conferred by the clause is that when his title has accrued, so to speak, under the *Government Railways Act* he becomes entitled to a monetary equivalent should he resign, retire, die or be dismissed.

(1) (1952) 86 C.L.R., at p. 93.

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It was pointed out by Mr. *Jenkins* that the effect is that, taking one's stand in 1952 when the award was made, it operates to add those rights not only to the right to long service leave as it then had been defined but also to that right as it might be altered improved or enlarged by any enactment which might afterwards amend the *Government Railways Act*.

During the argument it was pointed out that there may be some question of interpretation of sub-cl. (c), as to whether that is its meaning, but it is the interpretation that hitherto has been accepted in its day-to-day operation.

We do not think that the argument is correct. It does not in truth go to the power of the commissioner to adopt cl. 63 (c).

What cl. 63 (c) does in effect is to express a principle which shall be applicable to resignation, retirement or dismissal or death of an employee to whom long service leave has accrued. The legislature of New South Wales remains at liberty to exercise its powers to the full in repealing the *Government Railways Act*, in amending it and so forth. All the award says is that when rights are given they shall enure, in the manner described, to the man who resigns or is dismissed or retires, and in the case of his death, to his widow or his personal representative. Those rights are to be expressed in a money sum which is to be calculated according to his long service leave.

Any effect which such a provision may have on State legislative power is entirely the consequence of s. 109 of the Constitution and of the manner in which s. 109 has been interpreted and applied in relation to the industrial power in decisions of this Court, which may be taken to be summarised in *Ex parte McLean* (1).

There can be no question in our view of the competence of the conciliation commissioner, provided the ambit of the industrial dispute suffices, to make such a provision as it contained in cl. 63 (c) (i) and (ii) and we do not think that there is any sound ground upon which the order nisi for prohibition can be supported.

For those reasons we think that the order nisi should be discharged.

The order nisi will be discharged with costs.

Order nisi discharged with costs.

Solicitor for the prosecutor, *S. Burke* (Solicitor for Railways).

Solicitor for the respondent, Australian Railways' Union, *W. C. Boyland*.

Solicitor for the respondent, National Union of Railwaymen, *R. Turner*.

J. B.

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