18

IN THE HIGH COURT OF AUSTRALIA.

POWER

V.

WOODROW AND THE COMMONWEALTH OF AUSTRALIA

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on WEDNESDAY THE 19TH JULY, 1944.

H. J. Green, Govt. Print., Melb.

C.2774

POWER

v.

WOODROW & ANOR.

REASONS FOR JUDGMENT - LATHAM C.J.

POWER

v.

WOODROW & ANOR.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an action for damages for false imprisonment against the Commonwealth of Australia and Colonel David Douglas Woodrow, who issued a warrant for the arrest of the plaintiff as an absconder from the military forces of the Commonwealth, in pursuance of which members of the Provost Corps arrested him. He was arrested in Brisbane on or about 21st September 1943, and was taken to a military compound in Brisbane, then to a military detention camp at Groveley, and later to a military detention camp at Redbank. He was brought before the Acting Commanding Officer, Major V.D. Taylor, in orderly room and was fined £3 for absence without leave for a period of 13 days and 10 hours beginning on 8th September 1943.

The plaintiff also claims a declaration that he is not an enlisted member of the Australian Military Forces or duly appointed to the Defence Force and an injunction restraining the defendants or either of them, their agents or servants or officers, from detaining him in any military detention camp or elsewhere. The defendants are not detaining the plaintiff or threatening to detain the plaintiff and no case has been made for an injunction. A decision upon the question of false imprisonment will be seen to involve a determination of the question whether the plaintiff was at the relevant time an enlisted member of the Australian Military Forces.

A mobilisation attestation form signed by the plaintiff shows that he was in 1942 aged 29 years and that he was born in Australia. By a proclamation made on 12th December 1941 the Governor-General called upon persons specified in class III referred to in sec. 60(3) of the Defence Act 1903-1941 to enlist and serve as prescribed by the Act and regulations made thereunder. The plaintiff was included in class III and accordingly became liable to enlist and serve.

The plaintiff enrolled as required, describing himself in his mobilisation attestation form as following the occupation of a

machine /

machine miner, and he claimed exemption from service on religious grounds as a Jehovah's Witness. He was called up for medical examination at Kalgoorlie, when he refused to take the oath of enlistment. He did not attend for medical examination in pursuance of a notice given to him. He applied to a court in Kalgoorlie for registration as a conscientious objector under the National Security (Conscientious Objectors) Regulations (S.R. 1942 No. 80 as amended). A Police Magistrate heard his application and ordered pursuant to reg. 10 of those regulations that he should be enrolled under the Defence Act as a person liable to be called up for service in the forces, but to be employed only in non-combatant duties. An appeal to a Justice of the Supreme Court was dismissed.

On 29th March 1943 a second call-up notice was served on the plaintiff. He did not obey it and almost immediately left Western Australia for Queensland. He there assisted his wife in a confectionery business.

The military authorities became aware of his whereabouts and military officers saw him at his wife's shop on 31st August 1943 and he went with them to the Area Office, Water Street, Fortitude Valley, Brisbane.

There is a conflict of evidence between the plaintiff on the one hand and the witnesses for the defendants on the other hand, namely Lieutenant Brett and Captain Best, Captain Watson and Mr. E.W. Kinsman, as to conversations which took place between them and the plaintiff. Where the evidence of the plaintiff conflicts with that of the other witnesses mentioned I accept the evidence of the other witnesses as against the evidence of the plaintiff. The plaintiff did not impress me as a witness. His denial that he signed an affirmation in the presence of Lieutenant Brett and Captain Best was unconvincing and, in my opinion, was false to his knowledge. He knew perfectly well that he had signed the affirmation, but, conceiving that it created a difficulty in his case, he was prepared to deny the fact. In relation to other matters also his manner of giving evidence was unsatisfactory.

On /

On 31st August, as he was accompanying Brett to the Area Office, a conversation took place in the course of which the plaintiff said that he was a miner and was exempt from service on that ground. I accept the evidence of Brett that he said that he was no longer a conscientious objector (and of Captain Best to the same effect on this point), and that he had used a prior connection with Jehovah's Witnesses for the purpose of holding up his enlistment in the Military Forces. Brett introduced the plaintiff to Captain Best. I accept the evidence of the two officers that no conversation other than a mere introduction took place on 31st August between Best and the plaintiff, and accordingly that the allegation made in the reply to the defence that Best tricked the plaintiff into signing a form of affirmation is unsupported by evidence. It is proper to say, however, that the plaintiff evidently confused Lieutenant Brett and Captain Best and that the allegation made in terms in his pleading against Captain Best should be considered in relation to Lieutenant Brett.

In the interview at the drill hall between Brett and the plaintiff the plaintiff agreed to the alteration of his description as a Jehovah's Witness to the description "free-thinker". He initialled the alteration on the attestation form which had been sent from Western Australia to Queensland when, as was evidently the case, the military authorities were searching for the plaintiff.

Brett then took the plaintiff to Captain Watson, a man power officer, who took him to Kinsman, a national service officer, who was Captain Watson's superior officer. Kinsman said to the plaintiff that he, the plaintiff, was a miner and was unemployed, and asked him whether he was willing to work as a miner at Mount Isa or Mount Morgan. The plaintiff refused on the ground that those places were so far away from Brisbane, and Kinsman then spoke of Ipswich, and suggested that the plaintiff should go to Ipswich, see the national service officer and see if he could get a job in coal mining. Kinsman had a telephone conversation with Amess, the man power officer at Ipswich.

The /

The discussions between the plaintiff on the one hand and Brett and Kinsman on the other dealt with two alternatives - work in a particular protected industry, namely mining, and service in the Army. At that time the only work which it was proposed that the plaintiff should do was the work of mining. No other kind of work had been mentioned between the parties. Watson told the plaintiff that miners were needed in Queensland and that if he took a job in mining he would be in a protected industry, but that otherwise he would be approved for service. There is, I think, some confusion in the evidence given by Brett as to the precise form of words which was used in the conversation between them, but I am satisfied that in substance it was agreed between Brett and the plaintiff that the plaintiff should agree to serve in the military forces but that the issue of a call-up notice should be deferred if the plaintiff took employment as a miner. As the plaintiff was no longer a conscientious objector to all forms of service there was (at this stage) no longer any objection to his undertaking non-combatant military service, but he preferred making an affirmation to taking an oath. Accordingly a form of affirmation was typed out and pasted on the back of his mobilisation attestion form. It was signed by him in the presence of Best and Brett and was witnessed by Brett. As I have already said, the plaintiff denied that he signed it but I do not believe him on this point. I not only accept the evidence of Lieutenant Brett and Captain Best on this matter, but also the evidence of Major Taylor and Sergeant Henderson that in their presence on 23rd September he admitted his signature to the affirmation.

It was contended for the plaintiff that Brett procured his signature to the form of affirmation by a trick, namely, by falsely representing to him that before he could be employed in a protected undertaking so as to be exempt from service it was necessary that he should take an oath or affirmation of enlistment. Such a representation would have been peculiarly unconvincing. It would be difficult indeed for a man of even slight intelligence (and the plaintiff is not an unintelligent man) to believe that in order to obtain employment in a protected undertaking which involved exemption from

military /

military service it was necessary to take an oath of enlistment for military service. I reject the plaintiff's evidence that he was deceived in any way by Brett or any other person in relation to the making of the affirmation of enlistment.

The affirmation which the plaintiff made was in the following form:-

> "I John William Elson Power solemnly and sincerely affirm and declare that I will well and truly serve our Sovereign Lord the King and perform non-combatant duties in the Military Forces of the Commonwealth of Australia until the cessation of the present time of war or until sooner lawfully discharged, dismissed, or removed and that I will in all matters appertaining to my service faithfully discharge my duty according to law."

It will be observed that the affirmation relates to non-combatant service in the military forces. The form is taken, not from the Third Schedule to the Defence Act, but from the Schedule to the National Security (Conscientious Objectors) Regulations.

On 2nd September the plaintiff went to Ipswich and saw the national service officer there, Mr. M.J. Amess, and discussed the matter of working in the coal mines at Ipswich. He told Amess that there was something the matter with his chest and that he preferred not to undertake work as a miner. He said that he was a carpenter, and asked to be allowed to go to work for Hancock Bros. Pty. Ltd. of Ipswich, a company which was manufacturing pontoons for the Army. Amess gave a document to the plaintiff in the following form:-

COMMONWEALTH OF AUSTRALIA

N.S.F.7

DEPARTMENT OF LABOUR AND NATIONAL SERVICE

NATIONAL SERVICE OFFICE
IPSWICH

DATE 2/9/1943.

To Mr. Ingram,
Hancock Bros.,
North Ipswich.

IN REPLY TO YOUR REQUEST FOR

Carpenter, Mr. J.W.E. Power the bearer, whose signature appears hereunder, is the person who has been selected for interview with a view to engagement.

(Sgd.) J.W.E. Power.

O/C (Sgd.) M.J. Amess
per J.G. McMahon.

This /

This document plainly authorises the plaintiff to apply to Hancock Bros. for engagement, and was in effect an invitation to Hancock Bros. to engage him if they thought proper. The business of Hancock Bros. was conceded to be a protected undertaking within the meaning of the National Security (Man Power) Regulations, reg. 5.

The plaintiff went to Mr. E.C. Ingram, the foreman of Hancock Bros., and he and Ingram agree in their evidence that on 2nd September he was engaged as a carpenter to start work on 7th September.

The plaintiff started work with Hancock Bros. on 7th September without, he says, seeing any of the Brisbane military or man power authorities again. The man power officers, however, namely Messrs. Watson and Kinsman, gave evidence that the plaintiff came to see them again on 2nd September. When the plaintiff was recalled for the purpose of rebutting this evidence, he gave particulars of times of arrival at/and departure from Ipswich on 2nd September, the evidence being intended to show that he could not have reached Brisbane after the interview on that day in time to see the man power authorities at Water Street. The plaintiff says that he was accompanied by his wife when he went to Ipswich. His wife was not called to support his evidence, and no explanation was given of the failure to call her. I accept the evidence of the man power officers that further interviews did take place on 2nd September.

The plaintiff on 2nd September saw Kinsman and reported to him that he had not taken a job in mining at Ipswich. Kinsman then said that the plaintiff would be approved for service. Some mention was made of his being offered a job at Hancock's and Kinsman says that the plaintiff asked why he, Kinsman, would not let him go to that job. Kinsman says that he replied: "No, I sent you to see if you could get a job in mining". The fact that he had a job or was to obtain a job at Hancock's was not mentioned to Watson, but it was mentioned in some manner to Kinsman. A conflict or misunderstanding had apparently occurred between the man power officer Amess at Ipswich and the man power officer Kinsman at Brisbane. Conversations between them/which might have explained the matter were not admissible in evidence.

The /

The position, however, is that, as far as he could do so, Amess at Ipswich permitted the plaintiff to accept work in a protected undertaking, while, as will be seen, Kinsman at Brisbane adopted the position that if the plaintiff was not prepared to work at his occupation at mining he ought to go into the Army.

The opinion of Watson and Kinsman was that, as the plaintiff was unemployed, was a miner, and would not take a job as a miner, he should be approved for military service. Accordingly Watson, acting as a man power officer, marked his medical history sheet "approved for service", the approval being dated 2nd September. On the same day Kinsman approved Watson's approval by initialling the medical history sheet as national service officer, and adding the date 2/9/43. On the same day a form known as A.A.F. Mob. 30 (a call-up notice), Exhibit B, was sent to the plaintiff. It required him to attend on 8th September 1943 for medical examination at the Recruit Reception Depot at Redbank and to report at specified a/Drill Hall for movement to that Depot. This was the third mobilisation notice which had been given to him. This form was not in all its terms appropriate to the circumstances of the case. It states "If accepted you will be enlisted and sent from the Recruit Reception Depot to a Training Depot". The plaintiff had already taken an affirmation of enlistment. But the order to attend for medical examination was unambiguous and was authorised by Australian Military Regulation 140A. Under this regulation it is provided that every person called upon in pursuance of the Defence Act to enlist and serve in the Citizen Forces shall, notwithstanding any claim to exemption, attend for medical examination at such times and places as are specified in a notice issued in accordance with the regulation in respect of the area in which he resides. A notice was given to the plaintiff individually, as authorised by reg. 140A(4)(c). The order to attend at the Drill Hall for movement to the Redbank Depot can also be justified, in my opinion, as an order given by a military officer, namely the Area Officer, to whose orders the plaintiff was bound to conform, the Area Officer being charged with the duty of sending recruits to depots. The plaintiff did not attend as required. He consulted a solicitor and the solicitor wrote to the Area Officer

informing /

informing him that the plaintiff did not admit the validity of the notice and would defend any proceedings which might be taken against him.

On 10th September a warrant for the arrest of the plaintiff was issued, signed by the defendant, Colonel Woodrow, and, as already stated, he was arrested by members of the Provost Corps, detained, and at orderly room on 23rd September was fined £3. He was then in the camp, but he simply left the camp and did not return. He went back to his home and no further steps were taken against him by the military authorities. On 24th September he wrote a letter to the officer in charge at the Recruit Reception Depot, Redbank, in which he asked to be allowed ---------- to withdraw the affirmation that he took on 31st August 1943 and stated that the national service officers had suggested that he should go into employment in a protected undertaking and that he had done so with Hancock Bros. Pty. Ltd. In this letter he reverted to his original description of himself as a conscientious objector and as objecting to war service, either combatant or non-combatant.

The question which has to be determined is whether the members of the Provost Corps had lawful authority to arrest the plaintiff, and whether there was lawful authority for thereafter detaining him.

The powers of members of the Provost Corps as such relate only to members of the forces. They may arrest and detain for trial any soldier liable to arrest committing an offence against the Army Act (44 and 45 Vic. c. 58) - see Australian Military Regulation No. 235 - S.R. 1927 No. 149. The Defence Act sec. 114 gives power to any member of the Defence Force to arrest absconders. Absence without leave is an offence under the Army Act sec. 15(1). The plaintiff had received the order (Mob. 30) of 2nd September 1943 requiring him to attend for medical examination and movement to the Depot on 8th September. He disobeyed that order and, if he was then a soldier, was absent without leave when he was arrested on 21st September.

The affirmation which the plaintiff made on 31st August was in the form provided in the Schedule to the Conscientious Objectors Regulations and not in the form of the Third Schedule to the Defence Act. The Third Schedule to the Defence Act makes no reference to non-combatant duties, whereas the oath taken by the plaintiff is limited to non-combatant duties. Probably this is to be explained by the order of the Police Magistrate at Kalgoorlie which directed him to be registered as liable to be called up for non-combatant duties.

The Conscientious Objectors Regulations were made under the National Security Act and they prevail over any provision in the Defence Act which is inconsistent with them: see National Security Act, sec. 18. The Conscientious Objectors Regulations provide that a competent court may order a person to be enrolled under the Defence Act as a person liable to be called up for service in the citizen forces but to be employed only in non-combatant duties. When such an order has been made (and it has been made in the present case) then the Conscientious Objectors Regulation No. 14 becomes applicable:-

> "A person enrolled as a person liable under the Defence Act to be called up for service in the Citizen Forces but to be employed only in non-combatant duties shall not be required to perform any duties of a combatant nature, and if he takes an oath or makes an affirmation in accordance with Form 3 in the Schedule he shall be exempt from the obligation to take the oath or make the affirmation prescribed by the Defence Act."

Sub-reg.(3) of reg. 14 provides that such a person is to be employed in non-combatant duties. In my opinion the effect of these provisions is that when an affirmation is made in the form of the schedule to the Conscientious Objectors Regulations, notwithstanding the absence of any oath or affirmation in the form provided in the Third Schedule to the Defence Act, the person taking the oath or making the affirmation becomes a member of the forces of the Commonwealth, but that his duties are limited to the performance of non-combatant duties. Accordingly, in my opinion, the plaintiff did become a member of the Defence Forces by reason of the affirmation which he made on 31st August 1943.

Reg. 286 of the Australian Military Regulations, paragraph 1, provides that when a person who has been required to serve pursuant to

Part IV of the Defence Act absents himself without leave for a longer period than seven days from the place at which he should be present a warrant for his arrest as a deserter may be issued. The plaintiff was a person who had been required to serve as prescribed by the Defence Act and the regulations thereunder. He was so required by the proclamation of the Governor-General dated 11th December 1941. Arrest on a warrant issued under paragraph 1 of the regulation may be effected by a member of the Defence Force or by a member of a police force - paragraph 2. A person arrested under such a warrant shall be brought before a court of summary jurisdiction, or delivered directly into military custody "as if he were an officer or soldier" - paragraph 3. Thus, if the plaintiff was a member of the forces, he was subject to military discipline and could be arrested and detained if he were absent without leave. If I am wrong in my opinion that he was a member of the Forces, then reg. 286 authorised his arrest and detention "as if he were a soldier."

If nothing more appeared in the case it would follow that, as he had been lawfully directed to attend for medical examination at a specified place on 8th September, and did not so attend, he was absent without leave and was properly arrested and dealt with by the military authorities.

It is contended for the plaintiff, however, that when he received the notice to attend for medical examination and movement dated 2nd September and when he was arrested on 21st September he was "employed in a protected undertaking" and so was exempt from military service.

Reg. 14(4) of the National Security (Man Power) Regulations provides that "No person employed in a protected undertaking shall be appointed to or enlisted in the Defence Force without the permission in writing of the Director-General " [of Man Power] .

If the plaintiff had been employed in a protected undertaking before he subscribed the affirmation on 31st August it would have been necessary to consider the meaning and effect of this regulation. But he had become a member of the Defence Forces on 31st August and at that

time /

time he certainly was not employed in any sense in any protected undertaking. He then became subject to military orders and reg. 14(4) had no application to him. A person who has in fact enlisted in the military forces cannot, in my opinion, escape his obligation as a member of those forces by obtaining employment thereafter in a protected undertaking. - see Defence Act sec. 38.

Upon this view it is unnecessary to consider whether a person can be said to be employed in a protected undertaking when he has been engaged for service in such undertaking but has not commenced work therein. The word "employed" is ambiguous. It may mean "actually occupied in working", or it may mean "engaged under a contract for the purpose of working": see the discussion of these two meanings in Hall v. The Centreway Cafe Co. Pty. Ltd., 1916 V.L.R. 560, and Bishop v. Concrete Constructions Pty. Ltd., 1923 V.L.R. 638. On 31st August the plaintiff was not employed in a protected undertaking in either sense. On 2nd September he was employed in a protected undertaking in the latter sense. On 8th and 21st September he was employed in a protected undertaking in both senses. But, as I have said, it is not necessary upon the basis of the facts in this case to consider whether these circumstances brought him within the application of reg. 14(4); neither is it necessary in the present case to consider whether a person who has in fact been allowed to enlist and has enlisted in breach of reg. 14(4) is under no duty to obey military orders.

It is also unnecessary to reach a decision upon an argument submitted for the defendants to the effect that, if the plaintiff was to be regarded as employed in a protected undertaking, the Director-General of Man Power had given permission for him to enlist because Kinsman was authorised by delegation to exercise the powers conferred on the Director-General by reg. 14(4) of the Man Power Regulations. The permission was said to be constituted by Kinsman's initials confirming Watson's approval of the plaintiff for service. This confirmation by Kinsman, however, was not made with any reference to the employment of the plaintiff in any protected undertaking, and, as at present advised, I do not think that it can properly be held to be the permission in writing which reg. 14(4) requires.

Reference /

Reference was made in argument to the Defence Act, sec. 75(a), which provides that any person who, when called upon in pursuance of the Act to enlist, fails to attend at the time and place appointed for medical examination or enlistment shall be guilty of an offence. Upon the view which I have taken the plaintiff had already enlisted on 31st August. If, however, he had not so enlisted, he would have been a person who had been called upon to enlist and had failed to attend for medical examination and he would therefore have been guilty of an offence. But I was not referred to any provision which would clearly authorise the arrest of a person who was not a member of the forces by a member of the Provost Corps.

Under National Security (Military Forces) Regulations, reg. 17, a person who has been called upon under the Defence Act to enlist is bound to attend for enlistment or medical examination from time to time at such time and place as is specified in a notice issued in pursuance of the regulation by the Area Officer of the area in which he is then residing. It was proved that the notice required under this regulation had been duly given. The plaintiff was a person who had been called upon to enlist under a proclamation made by the Governor-General. It was therefore his duty to attend for medical examination at the time and place specified in the notice Mob. 30 dated 2nd September 1943. But an offence against the National Security Act, sec. 10, does not appear to be an offence in respect of which a member of the Defence Forces is authorised to arrest the offender.

I therefore do not base my decision upon sec. 75(a) of the Defence Act or upon reg. 17 of the Military Forces Regulations, and it is therefore not necessary for me to consider objections which were raised to the validity of reg. 17. As at present advised I see no reason to doubt its validity.

For the reasons stated I conclude that as a member of the Defence Force the plaintiff was liable to arrest and to detention, and the action therefore fails against the defendant Colonel Woodrow. Alternatively, even if he was not a member of the Defence Force he was liable to arrest and detention under Australian Military Regulation 286.

As /

As the arrest was not wrongful, it is not necessary to consider whether the Commonwealth can be made liable for damages in respect of an arrest made under Colonel Woodrow's authority: cf. Enever v. The King, 3 C.L.R 969.

The action is dismissed with costs.
