RE THE AMALGAMATED METAL WORKERS' UNION;

EX PARTE HORWOOD BAGSHAW LIMITED

JUDGMENT

WILSON J.
(IN CHAMBERS)

31/8/87

Adelaide

RE THE AMALGAMATED METAL WORKERS' UNION;

EX PARTE HORWOOD BAGSHAW LIMITED

This is an application for writs of prohibition, certiorari and mandamus directed to the Australian Conciliation and Arbitration Commission ("the Commission") in respect of a decision and order made on 24 April 1987 and 1 May 1987 respectively by Commissioner Brown in relation to an industrial dispute between the applicant Horwood Bagshaw Limited ("the Company") and the Amalgamated Metal Workers' Union ("the Union").

The dispute began in January 1986 when notices of dismissal were distributed to certain workers (who were members of the Union) employed by the Company. It is unnecessary to canvass the history of the dispute since that time. It is fully described in the decision of Commissioner Brown and further reference is made to it in the decision of the Full Bench of the Commission dated 25 June 1987 when it dismissed the Company's attempt to appeal from Commissioner Brown's decision.

In substance Mr Bleby advances two grounds in support of an order nisi. The first is that the Commissioner denied natural justice to the Company in so far as he failed, following the two hearings held in November 1986, to inform the parties that he proposed to proceed to a variation to the relevant Award. This failure is alleged to have denied to the Company an opportunity to adduce further evidence

relevant to that topic. In my opinion this ground cannot be sustained. At all times the Company must have been aware of the possibility that the Commissioner would find it expedient to settle the dispute by varying the Award.

In the early days of the dispute the Company made application pursuant to s.34 of the Conciliation and Arbitration Act 1904 (Cth) to the President for the dispute to be referred to the Full Bench. In support of that application the Company contended that certain words in cl.42 of the Award were ambiguous and unclear, the words in question being "the ordinary and customary turnover of labour". Although the President declined to refer the matter to the Full Bench the meaning of the phrase was central to a consideration of the matters in dispute. Indeed, in the course of the lengthy hearings before the Commissioner, the Company gave detailed evidence through its Managing Director and other personnel describing the history of the Company, the manner of its operations and the effect of economic forces upon it. Mr Bleby argued that this evidence was led in order to bring the dismissals within the exception to the redundancy provisions, as being due to "the ordinary and customary turnover of labour". But it is also relevant to the question whether the circumstances surrounding the dismissals were such as to bring them within the intended reach of the redundancy principles as enshrined in the Award and consequently whether there was any need for clarification of its

provisions. The Company interrupted the hearing of the dispute by seeking in this Court a writ of prohibition directed to Commissioner Brown. The order nisi was discharged on 14 October 1986 because the Court was not satisfied that the Commissioner had decided upon a course which would lead him to exceed his jurisdiction. The possibility that he might decide to vary the Award in an attempted resolution of the dispute was canvassed in the hearing and is mentioned in the decision of the Court: Re The Amalagamated Metal Workers' Union; Ex parte Horwood Bagshaw Ltd (1986) 60 A.L.J.R. 696; 67 A.L.R. 532. Following that decision, the Company could have been left in no doubt that if the Commissioner was to continue to exercise his jurisdiction to settle the dispute the possibility of a variation was a real one. Yet at the two hearings before the Commissioner in November the Company was content to engage in generalities in support of a request for conciliation and - if conciliation failed - for a further hearing with respect to variation. At those hearings the Union representative argued that no further hearings were necessary in order to determine the question of variation. The Company sought to appeal to the Full Bench, basing its application on an alleged denial of natural justice. The Full Bench concluded that there was no arguable case for the alleged denial of natural justice. I agree.

I now turn to the second ground advanced by Mr Bleby. It is that the Commissioner in substance has exercised judicial power although the Commissioner's conclusion has been expressed, technically, in the form of a variation. In support of this ground of the application Mr Bleby refers to certain passages in the decision of Commissioner Brown. He refers to the conclusion of the Commissioner that the employees dismissed by the Company in 1986 for the reasons given by the Company were in fact redundant because the employer no longer desired to have performed the job which each employee was doing. Having come to that conclusion, the Commissioner referred to the Company's letter to him following the decision of the High Court and decided "that it [the Commission] has no need to draw upon the power conferred by section 59 to remove ambiguity or uncertainty". It is argued that in then proceeding to vary cl.42 of the Award when he was of the view that no variation was necessary, the Commissioner was, in substance, making a declaration of entitlement to an existing award provision and hence purporting to exercise judicial power.

On the other hand a careful reading of the Commissioner's reasons is capable of yielding a different conclusion. The matter in issue was whether the circumstances surrounding the dismissals were such as to place them outside the reach of severance pay applicable

to redundancies. They would fall outside if those dismissals satisfied the true meaning of the phrase in cl.42, "the ordinary and customary turnover of labour". The Commissioner concluded that the circumstances of the dismissals were such as to place them within the intended reach of the redundancy clause. His concern then was to settle the dispute by making a variation to the Award that would reflect that conclusion. The statement by the Commissioner that he did not need to draw upon the power conferred by s.59 to remove ambiguity or uncertainty was made in the context of the Company's specific request in October 1986 - made, it will be remembered, after a lengthy hearing - "to embark upon a s.59 enquiry" (my emphasis). I think all that the Commissioner was saying was that it was not necessary to embark afresh upon a full scale s.59 enquiry merely to remove the ambiguity or uncertainty surrounding cl.42 of the Award in its application to the circumstances giving rise to the dispute. He was not saying that the Award was free of any uncertainty but rather that, having regard to the evidence already adduced, he was equipped to proceed to remove that uncertainty by way of a variation.

The dispute was as to whether the dismissals in question were made in circumstances which entitled the workers to severance pay consistently with the redundancy provisions of the Award. In approaching that question,

the Commissioner analysed the reasons of the Full Bench in the Termination, Change and Redundancy Case (1984) 9 I.R. 115 and found that the application of the principles therein expressed to the facts surrounding the dismissals in question led to the conclusion that the dismissals were in fact due to redundancy and not to the ordinary and customary turnover of labour. In my view, the purpose - and the sole purpose - of the variation made by the Commissioner was to make clear what the intention of the Award had always been and to give effect to both the intent of the Award and the Commission's intention in the Termination, Change and Redundancy Case. The Commissioner did not purport to enforce the Award and the variation does not constitute an order for the payment of severance pay binding on the Company. The order of 1 May 1987, notwithstanding its retrospective operation and limited duration, cannot reasonably be interpreted as an exercise of judicial power. See Re Brack; Ex parte The Operative Painters and Decorators Union of Australia (1984) 58 A.L.J.R. 125; 51 A.L.R. 731.

I conclude that the Company has failed to make out a prima facie case for relief by way of prerogative writ. The application is therefore refused.