HIGH COURT OF AUSTRALIA

TOOHEY J.

RE AUSTRALIAN BANK EMPLOYEES UNION RESPONDENT

EX PARTE ILLATON PTY. LTD.
AND ANOR APPLICANTS/PROSECUTORS

O R D E R

Applications for writs of prohibition and certiorari dismissed.

Order made: *5 October 1990*
Reasons for judgment
delivered: *30 October 1990*
S.90/006

Solicitors for the First
Applicant/Prosecutor: *Cooke & Cussen*

Solicitors for the Second
Applicant/Prosecutor: *Henderson Trout*

Solicitors for the Respondent: *Maurice Blackburn & Co.*

TOOHEY J. Illaton Pty. Ltd. ("Illaton") is a company incorporated in Queensland. The Metway Group Staff Association ("the Staff Association") is an unincorporated association whose members are employees of Illaton. To understand why they are both applying to the Court for prerogative relief, it is necessary to mention Metway Bank Limited ("Metway") which is a public company, also incorporated in Queensland, and was formerly the Metropolitan Permanent Building Society ("the Building Society"). Illaton is a wholly owned subsidiary of Metway.

Metway does not employ staff, nor did the Building Society. Since December 1970 all staff engaged in connection with the Building Society were employed by Metropolitan Managers Pty. Ltd. which, on 19 August 1987, changed its name to Austman Pty. Ltd. ("Austman"). Austman is also a wholly owned subsidiary of Metway. Illaton agreed to supply labour to Austman to enable Austman to provide administrative and other services which Austman had contracted to provide to Metway.

On 3 October 1990 Illaton sought the issue of an order nisi for a writ of prohibition and writ of certiorari directed to Deputy President MacBean of the Australian Industrial Relations Commission. When the matter came on for hearing on 5 October, the Staff Association made a similar application. At the end of the hearing on 5 October I refused both applications and said I would give my reasons in writing; these are my reasons.

The applications have their genesis in proceedings begun in 1987 in the Australian Conciliation and Arbitration Commission, now the Australian Industrial Relations Commission ("the Commission"). On 10 December 1987 the Commission began the hearing of two matters. One, C No. 2834 of 1987, was the result of a log of claims served by the Federated Clerks Union of Australia ("the FCU") on a number of entities in Queensland and other States. Austman was one of those served. The other matter, C No. 9001 of 1987 ("C No. 9001"), arose following service of a log of claims by the Australian Bank Employees Union ("the ABEU") on a number of entities in various States, including Queensland. Again, Austman was one of those served.

There are other proceedings in which the FCU was and is involved that touch these applications and indeed are mentioned in the draft order prepared by Illaton. The FCU and the ABEU are in effect rivals for federal industrial coverage. But, in the end, the only proceedings in respect of which prerogative relief was sought are C No. 9001 and C No. 30101 of 1989 ("C No. 30101"). C No. 30101 arose from a log of claims served by the ABEU on Illaton. In that matter there was a notification of industrial dispute on 25 January 1989.

The story is a long and rather tangled one but it is enough for present purposes to take it up again on 21 October 1988 when Commissioner Brown published his decision in C No. 9001 and found that an industrial dispute existed between the ABEU on the one hand and Metway, Austman and another company on the other. Metway was not in existence when the ABEU's log of claims was served but Commissioner Brown held that service on the Building Society gave rise to a dispute with Metway when that body was formed.

On 9 March 1989 C No. 30101 came on for hearing before Commissioner Brown. Counsel for the ABEU explained to the Commission that this log of claims had been served by the ABEU to meet certain difficulties which had arisen out of an appeal Metway had brought against the decision of Commissioner Brown given on 21 October 1988. Speaking of the log of claims in each matter, counsel for the ABEU said:

> "The log is in identical terms. The only purpose is to overcome the potential difficulties which, of course, we do not concede, but as a matter of precaution, wishing to avoid any delays, we seek to avoid any such consequences ..."

Later in the hearing counsel observed:

> "I therefore clarify if the need arises, my statement as it is said by my learned friend to be as to purpose. It is not my submission that the only purpose for the service of this log was a purpose of catering for the possible result on appeal relating to the technical arguments. That is, in my submission; supported by the evidence previously accepted by the commission that this very same set of claims are claims propounded by the union for the purpose of obtaining better conditions for its members."

On 23 March 1989 Commissioner Brown gave three decisions. Two concerned applications by the FCU. As to the third, in C No. 30101, the Commissioner found that a dispute existed between the ABEU and the recipients of that log of claims. Illaton appealed against the three decisions. Austman had earlier appealed against one of those decisions. All four appeals were heard together; again, I am concerned only with the appeals relating to C No. 9001 and C No. 30101. The appeals were heard by a Full Bench of the Commission, which delivered its decision on 10 November 1989. So far as is relevant to the matters the subject of the applications to this Court, the Full Bench:

(a) allowed in part the appeal relating to C No. 9001 by varying the dispute finding made so as to exclude Metway

(b) dismissed the appeal relating to C No. 30101 and confirmed the finding of a dispute in that matter.

The Full Bench dealt with the appeal relating to C No. 30101 in the following way. It pointed out that Metway had been served with a log of claims by the ABEU and had been found by Commissioner Brown to be in dispute by reason of the demands served upon the Building Society. Austman had been served and included in the dispute finding. Illaton also had been served and made party to the dispute. The Full Bench held that Metway could validly be included in the dispute finding although it had no employees when the demands were served upon it; that Austman, in providing services to Metway, was "in or in connection with the industry of banking"; and that Illaton, likewise, was "in or in connection with the industry of banking".

Before continuing with this recital of events, it is appropriate to say something more of the role of the Staff Association. The Staff Association was formally constituted on 3 October 1988 to advance the industrial interests of Illaton's employees. It has been active in negotiating for its members a Voluntary Employment Agreement which was registered in the Queensland Industrial Conciliation and Arbitration Commission on or about 28 April 1989. On 23 June 1990 the *Industrial Conciliation and Arbitration Act* 1961 (Q.) was repealed and replaced by the *Industrial Relations Act* 1990 (Q.). Pursuant to that Act, Voluntary Employment Agreements are subject to a sunset clause with the result that they ceased to have effect on 30 September 1990. In those circumstances the Staff Association supported Illaton in obtaining registration in the Queensland Commission of an Enterprise Award to cover Illaton and its employees. It is apparent that Illaton, with the support of the Staff Association, wishes to maintain State industrial coverage. The ABEU, on the other hand, seeks a federal award which will include employees of Illaton. I return now to events in the Commission.

Once the appeals to the Full Bench of the Commission had been determined on 10 November 1989, proceedings continued in the Commission in relation to the matters which had been the subject of the appeal. They resumed before Commissioner Brown but latterly have been conducted before Deputy President MacBean. Matters C No. 9001 and C No. 30101 have been joined and the ABEU continues to seek an award against Illaton. Illaton opposes the making of an award and has asked the Commission to dismiss the proceedings or refrain from further hearing the matters, in exercise of the power conferred by

s.111(1)(g)(ii) and (iii) of the *Industrial Relations Act* 1988 (Cth) ("the Federal Act"). Section 111(1) empowers the Commission, in relation to an industrial dispute, to:

> "(g) dismiss a matter or part of a matter, or refrain from further hearing or from determining the industrial dispute or part of the industrial dispute, if it appears:
>
> ...
>
> (ii) that an industrial dispute or part has been dealt with, is being dealt with or is proper to be dealt with by a State industrial authority;
>
> (iii) that further proceedings are not necessary or desirable in the public interest;
>
> ..."

On 26 September 1990, at the conclusion of the evidence called before Deputy President MacBean, Illaton (and others) sought an order pursuant to s.101(1) of the Federal Act revoking the finding of an industrial dispute that had been made earlier by Commissioner Brown and affirmed by the Full Bench. Section 101(1) requires the Commission, if it considers that an alleged industrial dispute is an industrial dispute, to determine the parties to the industrial dispute and the matters in dispute. But the Commission may vary or revoke any of the findings. The catalyst for the application under s.101(1) was evidence given in the proceedings by Mr Hingley, the Federal Secretary of the ABEU, and by Mr Petie, the Queensland State Secretary of the ABEU. This evidence, it was said by Illaton, demonstrated that the ABEU was seeking an award that was no different to the existing terms and conditions under which employees of Illaton worked, hence that there was no longer a "real and genuine disputation, or the likelihood thereof" before the Commission.

In the light of this application, Deputy President MacBean heard submissions from the parties as to the course he should follow. Illaton argued that its application under s.101(1) of the Federal Act should be heard and determined immediately as it concerned the jurisdiction of the Commission to deal with the matters before it. The ABEU contended that Illaton should make its submissions to Deputy President MacBean both as to jurisdiction (which bore on the application under s.101(1) of the Federal Act) and as to Illaton's application that the Commission should dismiss C No. 9001 and C No. 30101 or refrain from further hearing those matters (the

application under s.111(1)(g) of the Federal Act) and that the ABEU should then respond to those submissions.

On 27 September Deputy President MacBean gave his ruling as to the procedure he would follow. He said:

> "The hearing now before the commission is one which in terms of convenience, practicality and plain common sense, requires that priority be given to concluding all matters now on foot before it in a speedy and just fashion."

Deputy President MacBean amplified his ruling in a written decision handed down at the same time as he announced the procedure he intended to follow. In effect he said that the matters before the Commission had occupied its members in extensive hearings over a long period and that he had heard evidence from 46 witnesses and had received 447 exhibits. The hearing was expected to last a further three weeks. To adopt the procedure suggested by Illaton would mean a further delay, exacerbated by the fact that there could be a substantial duplication of submissions. The Deputy President added:

> " The opportunity exists for all the matters now before the Commission to be finalised in terms of the completion of evidence and submissions within the presently agreed timetable which has been set down and known to the parties for several months. There is an obligation on the Commission under s.110 and s.111 of the Industrial Relations Act (the Act) to adopt procedures which will enable the Commission to deal with matters in an efficient, effective and fair manner so as to expedite hearings before it.
>
> The hearing now before the Commission is one which, in terms of convenience, practicality and plain common sense requires that priority be given to concluding all matters now on foot before it in a speedy and just fashion. This can only be guaranteed if the Commission proceeds on the basis of allowing Mr Douglas [counsel for Illaton] to finalise his case in each of the applications under s.101(1) and s.111(1)(g)(ii) and (iii) and allowing Mr Hinkley [counsel for the ABEU] to respond in full to all applications with the right of reply to Mr Douglas."

Deputy President MacBean was of course faced with a submission on behalf of Illaton that he must as a matter of law hear and determine the question of jurisdiction before proceeding further. This he declined to do, relying upon the decision of this Court in

Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd. (1989) 167 C.L.R. 513 as justification, in the circumstances, for the course he proposed to follow. It will be necessary to refer to that decision at a later stage of these reasons. Deputy President MacBean announced his intention to proceed on Monday 8 October, in accordance with his decision as to the course to be followed. He declined an application on behalf of Illaton to refer his decision to the Federal Court pursuant to s.46(1) of the Federal Act. Illaton then sought the prerogative relief referred to at the outset of these reasons. It was common ground between the parties that no appeal from the decision of Deputy President MacBean lay to the Full Bench of the Commission pursuant to s.45(1) of the Federal Act. It is unnecessary for me to express any view on that understanding of the scope of s.45(1).

The primary submission advanced by Illaton and endorsed by the Staff Association was that, once the jurisdiction of Deputy President MacBean to proceed further with matters C No. 9001 and C No. 30101 had been challenged, it was incumbent on him to proceed no further until he had determined that he had jurisdiction to do so. Such a submission was, of course, essential to the claim for prerogative relief. Neither prosecutor sought to challenge the convenience of the course proposed by Deputy President MacBean; clearly that is a matter with which this Court cannot be concerned in the present applications.

As a general proposition, "Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it": Wade, *Administrative Law*, 6th ed. (1988), p.283. The point is made this way in *Halsbury's Laws of England*, 4th ed. (1989), vol.1(1), par.68:

> " Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the jurisdictional issue; but that ruling may be reviewed by the court."

It is true that, before the Commission may assume jurisdiction under the Federal Act in regard to an alleged industrial dispute, the dispute "must be real and not a mere fiction": Gibbs C.J. in *The Queen v. Cohen; Ex parte Attorney-General (Q.)* (1981) 157 C.L.R. 331, at p.337. And the question whether a dispute is real and genuine is a question of fact, to be determined by this Court when prerogative

relief is sought: *The Queen v. Alley; Ex parte N.S.W. Plumbers & Gasfitters Employees' Union* (1981) 153 C.L.R. 376, at p.382. But in the present case there has been no determination by the Commission as to whether or not it now lacks jurisdiction by reason of what was said by Mr Hingley and Mr Petie. The basis of the present applications lies, as it must, in the argument that Deputy President MacBean must first determine his jurisdiction to proceed further.

On that basis the applications must fail. This is not a situation in which the parties are before the Commission with the question of jurisdiction a clean sheet. They are before the Commission on the footing that Commissioner Brown earlier determined that an industrial dispute existed between the parties and on the further footing that the correctness of that decision was affirmed by the Full Bench. That is not to say that a tribunal may not lose jurisdiction in a particular matter by reason of subsequent events, though that would be an unusual case. When a tribunal has been properly seized of a matter and it is contended that subsequent events have operated to rob the tribunal of its jurisdiction, the tribunal must examine the facts and resolve the contention for itself, subject to any appeal or application for prerogative relief that may lie elsewhere. But it does not follow, as a matter of law, that the tribunal may proceed no further until it has disposed of the argument as to jurisdiction. In some circumstances it may be appropriate to do so. In other circumstances, particularly when a long hearing is approaching its close, it may be appropriate to proceed to hear evidence and receive submissions on all outstanding matters before determining the question whether jurisdiction has ceased to exist. Those options are not foreclosed because the challenge that jurisdiction no longer exists takes the form of a substantive application, as in the present case.

The appropriateness of taking that course will be determined by a range of considerations, among them the saving of time and money to all concerned and the avoidance of duplication. But these are matters for the tribunal and, in the present case, there is nothing to indicate that the course proposed by Deputy President MacBean is inappropriate in the circumstances. It must be remembered that what the Commission now has before it is an application to revoke an earlier finding that an industrial dispute existed. Whether that application should succeed is a matter for the Commission; it is enough to say that the relevance of the objects sought to be achieved by a union through industrial coverage has attracted the attention of this Court on more than one occasion: see *The Queen v. Cohen; Ex parte Attorney-General (Q.); The Queen v. Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 C.L.R. 178.

There is a further reason why the applications cannot succeed. As mentioned earlier, Deputy President MacBean is faced with two applications, one for an order revoking the finding that an industrial dispute exists (s.101(1)) and the other for an order that the Commission dismiss C No.30101 or refrain from further hearing it on the grounds mentioned in s.111(1)(g)(ii) and (iii). In *Ex parte Citicorp*, this Court rejected an argument that the Commission should not exercise the power conferred by s.41(1)(d) of the *Conciliation and Arbitration Act* 1904 (Cth) (the predecessor of s.111(1)(g)) or the power conferred by s.111(1)(g) of the Federal Act until it had made a finding whether any industrial dispute existed. The Court described the relevant power as a power to refuse to exercise jurisdiction. Hence, the Court said, the purpose attending s.24(1) of the former Act (the predecessor of s.101(1)) "would not serve to indicate an intention precluding the power from being exercised on the basis that, if jurisdiction were to exist, it should not be exercised": at p.517.

In other words, the existence of a provision such as s.111(1)(g) is an indication that the Commission may dismiss a matter before it on the grounds contained in the paragraph without first deciding whether jurisdiction to entertain the matter exists. And, the Court pointed out, at p.517, "although it might be a rare case in which it would be appropriate to exercise the power on that basis, there are nonetheless good practical reasons in relation to that rare case for the power to be so construed". In the present case, of course, there has already been a finding that an industrial dispute exists.

It follows from what has been said that Deputy President MacBean is not bound, as a matter of law, to determine the application under s.101 of the Federal Act before hearing and determining the application under s.111(1)(g). Furthermore, it would be quite inappropriate for this Court to circumvent a decision by Deputy President MacBean as to whether an industrial dispute no longer exists and make such a decision itself. The evidence of Mr Hingley and Mr Petie must be taken in context and it is apparent that there is considerable scope for argument as to what the ABEU seeks to achieve by industrial coverage, short term and long term. To the extent that these considerations are relevant to the continued existence of an industrial dispute, they are matters for Deputy President MacBean, at least in the first instance.

It was for these reasons that I refused the applications by Illaton and the Staff Association for prerogative relief.