RE HEALTH SERVICES UNION OF AUSTRALIA;

EX PARTE THE STATE OF VICTORIA AND ANOR

JUDGMENT
(oral)
16 December 1993

DAWSON J.

RE HEALTH SERVICES UNION OF AUSTRALIA;

EX PARTE THE STATE OF VICTORIA AND ANOR

These are applications for orders nisi for writs of prohibition and certiorari arising out of two separate findings by the Australian Industrial Relations Commission of the existence of an industrial dispute. The first finding was made on 14 December 1992 upon the basis of the failure to comply with a log of claims served by the Health Services Union of Australia ("the HSUA") on a number of employers including the applicants. At the time it made that finding of the existence of a dispute, the Commission made an interim award dealing with the termination of employment. The first applicant sought leave to appeal against the finding and the interim award. Subsequently the appeal against the interim award was withdrawn and the award was varied by consent. Leave to appeal against the finding of dispute was refused.

On 4 March and 11 May 1993 the applicants applied to McHugh J. for a stay of proceedings generally. On

both occasions his Honour refused the application[1]. On the first occasion he did so observing that the applicants had not applied to the Commission for a stay of proceedings[2]. On the second occasion he expressed the view that the applicants' case did not have sufficient prospect of success to warrant his granting a stay[3].

After this Court had given its decision in *Re State Public Services Federation; Ex parte Attorney-General (Western Australia)*[4] ("the SPSF Case"), the HSUA served a further log of claims which, in effect, modified some of the earlier claims with a view to avoiding the risk of the earlier claims being found to be fanciful and, for that reason, not capable of giving rise to a genuine dispute. This second log of claims was the basis of the second finding of dispute which was made on 2 December 1993.

---

(1) See *Re Australian Nursing Federation; Ex parte Victoria* (No. 1) (1993) 67 A.L.J.R. 377; 112 A.L.R. 177; *Re Australian Nursing Federation; Ex parte Victoria [No. 2]* (1993) 67 A.L.J.R. 571.

(2) *Re Australian Nursing Federation; Ex parte Victoria* (No. 1) (1993) 67 A.L.J.R., at p.385; 112 A.L.R., at p.187.

(3) *Re Australian Nursing Federation; Ex parte Victoria [No. 2]* (1993) 67 A.L.J.R., at pp.565-577.

(4) (1993) 67 A.L.J.R. 577; 113 A.L.R. 385.

Orders nisi for prohibition and certiorari were granted by McHugh J. on the first occasion when he refused a stay. The grounds relied upon then raised constitutional issues involving the State of Victoria. These applications seek to raise the same issues and, in addition, to raise an issue whether the refusal to accede to the first or the second log of claims was capable of giving rise to a genuine industrial dispute. I have indicated to the parties that I intend to grant the orders nisi sought, including the additional ground. That leaves for decision the application which the applicants also make for a stay of proceedings.

The applicants have not sought to appeal in the Commission against the finding made on 2 December 1993. Indeed, they have made application that the matter be referred for hearing by a Full Bench. Nor have the applicants sought in the Commission to stay the proceedings. In the present applications before me, they do not seek to stay proceedings on the interim award which was varied - they appreciate that they would have some difficulty in making such an application - but they otherwise seek to stay proceedings generally.

I indicated during argument that I would be loathe to depart from the views expressed by McHugh J. on the occasions on which he refused a stay and that, unless there were circumstances which threw a different light upon the matter I would not be disposed to grant the application for a stay. It must now be clear that an application for a stay order under O.55, r.10 of the High Court Rules - which is the provision under which the applicants make their application - is sparingly granted and then only with caution.

The applicants pointed to the additional ground concerning the genuineness of the dispute which would raise questions agitated in the SPSF Case. However, whilst I was prepared to grant orders nisi upon that ground in addition to the others, I am bound to say that I do not think that upon the material before me it adds significantly to the strength of the applicants' case. The applicants also pointed to a change in the position of the number of relevant employees who are now employed under individual contracts of employment, but this does not seem to me to be a circumstance which would warrant a departure from the conclusion previously reached by McHugh J.

The applicants sought to question the view expressed by McHugh J. that certainty was best served by regulation by an industrial tribunal - a regime which had hitherto existed. But as the respondent pointed out, the view taken as to the strength of the applicants' case must inevitably have a bearing upon the question of certainty. The regime which is likely to prevail is the one which is best preserved in the interests of certainty pending final determination of proceedings.

It seems to me that the applicants are in a difficult position in making their application for a stay order by reason of the existence of the interim consent award in this case. True it is that they do not seek to stay proceedings on that award, but I do not think that it can be completely isolated from the present application. There is, to say the least, some inconsistency between the acceptance of the jurisdiction of the Commission on the occasion of consenting to the award and seeking to stay the making of further orders on the basis of lack of jurisdiction.

In addition to that, no application for leave to appeal or for a stay of proceedings has been made in

the Commission. The applicants say the grounds on which such an application might be made to the Commission have already been considered by it and rejected in other cases. But I am not prepared to assume that if an application were made in this case and good grounds for a stay of proceedings were made out, the Commission would be deaf to those submissions. After all, the applicants' arguments relate to the balance of convenience in circumstances which are continually changing, as much as to the strength of their legal arugments. And the former matter is something which is peculiarly appropriate for decision by the Commission.

I endorse with respect the remarks of McHugh J. in *Re Australian Nursing Federation; Ex parte Victoria* (No. 1)(5):

> "Ordinarily, the Commission will have a far greater knowledge of the facts and circumstances affecting the dispute than a Justice of this Court can hope to gain in an application for a stay of proceedings pursuant to the inherent jurisdiction or O.55 r.10 of the *High Court Rules*. Furthermore, if the application is refused by the Commission before this Court is asked to

(5) (1993) 67 A.L.J.R., at p.386; 112 A.L.R., at p.188.

grant a stay, the Court will have the benefit of the Commission's reasons for refusing the stay."

For these reasons the application for a stay is refused.

This and the preceding six pages comprise my reasons for judgment in *Re Health Services Union of Australia; Ex parte the State of Victoria and Anor.*