CASE NOTES

CONSTITUTIONAL LAW — AWARD OF CONCILIATION COMMISSIONER — REGULATING INDUSTRIAL CONDITIONS — SUBSEQUENT STATE LEGISLATION — PRESCRIBING LONG SERVICE LEAVE FOR WORKERS — NO INCONSISTENCY

Collins v. Charles Marshall Pty. Ltd.[1]

An information was laid against the Defendant Company under s. 17 (1) (a) of the Factories and Shops (Long Service Leave) Act 1953,[2] for having failed to grant long service leave to an employee in accordance with the scheme laid down in that Act. The Victorian Metropolitan Industrial Court dismissed the information holding that the employment was completely regulated by an award under the Commonwealth Conciliation and Arbitration Act, and so the Victorian Act was inconsistent therewith and *pro tanto* invalid. On appeal the High Court held no such inconsistency existed and remitted the matter back for a re-hearing.

In effect, this was a test case to determine the validity of the Victorian Act so far as it purported to relate to employees under federal awards.

However, before this substantive matter could be determined, the question of the jurisdiction of the High Court to hear the appeal had to be decided. The magistrate had exercised federal jurisdiction, and normally an appeal would lie to the High Court under s. 73 of the Constitution. But s. 31[3] of the Conciliation and Arbitration Act appeared to take away this right as the question here involved the interpretation of an award within that section. Both parties united in attempting to avoid its application, though the Commonwealth intervened to raise arguments in support of its validity.

Section 71 of the Constitution vests the judicial power of the Commonwealth in the High Court 'and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.' By s. 73 the High Court is granted appellate

[1] [1955] A.L.R. 715. High Court of Australia, Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ.

[2] Now Labour and Industry Act 1953, s. 163.

[3] Section 31 provides: '(1) There shall be an appeal to the Court from a judgment or order of any other Court (a) in proceedings arising under this Act (including proceedings under s. 59 of this Act or proceeding for an offence under this Act) or involving the interpretation of this Act; and (b) in proceedings arising under this Act (including proceedings under s. 59 of this Act or proceedings for an offence under this Act) or involving the interpretation of this Act; and (c) in proceedings arising under an order or award or involving the interpretation of an order or award, and the Court shall have jurisdiction to hear and determine such appeal. (2) Except as provided in the last preceding sub-section, there shall be no appeal from a judgment or order from which an appeal may be brought to the Court under that sub-section.'

jurisdiction 'with such exceptions and subject to such regulations as the Parliament prescribes' to hear appeals from any other federal court, or court exercising federal jurisdiction. Sections 75 and 76 confer, or allow Parliament to confer, on the High Court original jurisdiction concerning the nine matters therein set out including (s. 76) matters '(ii) arising under any laws made by the Parliament'. Section 77 completes the matter by providing that

> with respect to any of the matters mentioned in the last two sections the Parliament may make laws:
> (i) Defining the jurisdiction of any federal court other than the High Court;
> (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
> (iii) Investing any court of a State with federal jurisdiction.

Section 31 attempts to give to the Arbitration Court appellate jurisdiction in relation to the four matters it specifies, and to prevent any other court from exercising such jurisdiction.

In a joint judgment Dixon C.J., McTiernan, Williams, Webb, Fullagar and Kitto JJ., before considering the actual validity of the section, drew attention to a number of difficulties in applying it in accordance with its literal terms. Firstly, it is clear the words 'judgment or order of any other court' cannot include the High Court itself – it being the supreme federal court. In addition, s. 73 of the Constitution expressly prevents the High Court from being excluded from hearing appeals from a State court where an appeal lies to the Privy Council, and s. 31 cannot constitutionally take away that jurisdiction. Finally, they felt that the wording of the section was not a particularly apt application of the power to make 'exceptions' under s. 73. Nevertheless, it was clear that the intention of the section was to confine the appeals to the Arbitration Court, and it was therefore necessary for them to consider its validity on a wider basis.

The validity of the section must be based on the combined effect of ss. 76 (ii) and 77 (i) of the Constitution. But s. 76 (ii) is confined to matters 'arising under any laws made by the Parliament', whereas s. 31 is wider and purports to cover (i) proceedings under the Act; (ii) proceedings involving the interpretation of the Act; (iii) proceedings under an order or award; (iv) proceedings involving the interpretation of an order or award. A proceeding may arise under an order or award without necessarily arising under the Act (this case is an example), and an order or award is not a law of the Commonwealth.[4] It must follow, therefore, that so much of s. 31 is invalid as purports to give to the Arbitration Court exclusive appellate

[4] *Ex Parte McLean* (1930) 43 C.L.R. 472, 479 and 484.

jurisdiction in proceedings which do not arise under the Act even though they do arise under an order or award or involve the interpretation of the Act or of an order or award. Taylor J., in a separate judgment, agreed with this conclusion and added that he doubted whether the section could be read down.

This was sufficient to satisfy the question of jurisdiction in this case, though it may still have left the section with some validity. But the Court felt there was a further basis for attack on the section rendering it wholly invalid. The section attempts to give an appeal from State courts although those courts may not be exercising federal jurisdiction; indeed it draws no distinction between federal and State jurisdiction. The Commonwealth sought to justify this by relying on ss. 71 and 77 (i), arguing that s. 77 (i) enabled Parliament, with respect to any of the matters in ss. 75 and 76, to confer appellate jurisdiction on a federal court created under s. 71 and this could extend to conferring jurisdiction to entertain appeals from a State Court exercising federal or State jurisdiction.

The Court, however, considered such an argument ran contrary to the general scheme and spirit of Ch. III of the Constitution, and involved an interpretation which was opposed to the federal system which the Constitution created. In addition, it would produce the 'incongruous' result of parallel rights of appeal. A consideration of the history of the United States Constitution and a comparison of the differences between the two Constitutions tended, they felt, to confirm the view that appellate power over State Courts exercising State jurisdiction cannot be conferred on a federal court.

Taylor J. arrived at a similar conclusion, adding that this would be so 'even though such orders and judgments have been made or given in any one of the matters specified in ss. 75 and 76. Indeed, it is difficult to see how it can be said that such an appellate jurisdiction would constitute part of the judicial power of the Commonwealth and the provisions of s. 77 (i) must be taken to be limited by this concept.'

Taylor J. also referred to the question whether the expression 'jurisdiction' in s. 77 refers to both original and appellate jurisdiction. There were, he said, considerations arising from a general view of Ch. III that supported the view that the section was confined to original jurisdiction only. However, he held that such a view was precluded by the wording of s. 77 itself, especially as interpreted by prior decisions.[5] The other members of the Court appeared to have been prepared to assume it covered both original and appellate jurisdiction.

Having satisfied itself as to jurisdiction, the Court was able to deal

[5] *Ah Yick v. Lehmert* (1905) 2 C.L.R. 593, 602-4; *State of New South Wales v. The Commonwealth*, 20 C.L.R. 54, 90, per Isaacs J.; *Lorenzo v. Carey* (1921) 29 C.L.R. 243; *Commonwealth v. Limerick Steamship Co.* (1924) 35 C.L.R. 69, 114-15.

with the question of substance raised. The magistrate had held that the Victorian Act was inconsistent with the Commonwealth Metal Trades Award, and that by virtue of s. 109 it was *pro tanto* invalid. He did not advert to s. 51[6] of the Commonwealth Conciliation and Arbitration Act, and before the High Court neither party contended that it supported any conclusion which would not be arrived at under s. 109 alone. It was, therefore, unnecessary for the Court to consider s. 51 further, but the members of the Court did cast some doubts on its validity observing that 'it is difficult to support the provision as directly operating to amplify or extend s. 109.'

The Metal Trades Award deals very extensively with the working conditions of those covered by it, including a basic wage, hours of work, holidays, etc. It was contended by the respondent that the Victorian Act, in providing long service leave for all employees in certain circumstances, was inconsistent therewith because: (a) The award had dealt with the industrial relation of employer and worker 'completely, exhaustively and conclusively' so as to show an intention that it alone was to govern all matters with which it was concerned. That is, it covered the field of the relationship. (b) It was impossible to obey both instruments in all respects simultaneously. For example, the award provided that an employee not attending for duty shall lose his pay for the actual time of non-attendance, whereas the very basis of the Act is payment without attendance at work.

The Court, however, had little hesitation in rejecting these submissions. It pointed out at the outset that, as the award was made by a Conciliation Commissioner, the Arbitration Act[7] prohibited him from making any provision for long service leave. This was solely within the jurisdiction of the Arbitration Court, and it had made no such award.

As to the major argument that the award completely covered the field of industrial relations between employer and worker, the Court concluded, 'It [the award] may be an exhaustive statement of the relations of employer and employee in the industries concerned upon the matters which it determines or regulates. But long service leave is an entirely distinct subject matter, one to which the award is not and cannot be addressed.' Taylor J. agreed, saying, 'the award does not in any way deal with the subject of long service leave nor can it be regarded as an exhaustive declaration of the conditions binding upon the parties with respect to service and employment in the industries specified in the award. At the most it is exhaustive only so far as it purports to deal with those matters which were in

[6] Section 51. 'When a State law, or an order, award, decision or determination of a State Industrial Authority, is inconsistent with, or deals with a matter dealt with in, an order or award, the latter shall prevail, and the former shall, to the extent of the inconsistency, or in relation to the matter dealt with, be invalid.'

[7] See ss. 13 and 25.

dispute between the parties and it is quite silent on the question of long service leave.'

It had also been contended that provision in the award for annual leave was sufficient to exclude the Act but the Court held that 'annual leave is an entirely distinct conception from long service leave.'

As to the second main argument that there was direct conflict between the Act and the award, Taylor J. said, 'The two provisions deal with quite different subject matters, the former [the award] being intended merely as a provision restricting the rights of employees to receive wages *by force of the Award* . . . to wages payable for work done.' The other members of the Court adopted a similar view.

At first sight this decision would appear to be a clear indication that states may legislate for long service leave without the risk of federal awards cutting down their operation. However, it should be noted that the Arbitration Court has power to provide for long service leave, and any provision it should make would supersede state legislation. Secondly, it should be noted that in this case only the award, and not the original logs of claim, were put in evidence. Had the logs been put in and had they included a claim for long service leave, it may well have been that that matter would then have been within the ambit of the dispute and therefore covered by the award, even though the award made no mention of that subject. This is supported by the words of Taylor J. that 'it [the award] is exhaustive only so far as it purports to deal with those matters *which were in dispute* between the parties'; in addition, the other members of the Court proceeded on the basis that 'there is no reason to suppose that the subject was within the area of the original dispute for the settlement of which the award was made. We know nothing about that dispute. The logs of claim are not in evidence.' It would also require a closer examination of s. 51, especially the words: 'deals with a matter *dealt with* in an award.' If this section is valid, it would be necessary to decide whether a matter is 'dealt with in an award' when it is refused and not referred to in the resulting award.

If this were so, it would produce the unsatisfactory result that the applicability of state long service provisions would depend on the chance wording of individual logs and could produce different results in different industries.

J. F. FOGARTY