

HIGH COURT OF AUSTRALIA

Federated Aml.Govt.Railway Ser

Vs.

New South Wales Rly.Traffic

(Griffith C.J., Barton and O'Connor JJ.)

17th December 1906

Griffith C.J.

This matter came before the Court as a case stated by the President of the Commonwealth Court of Conciliation and Arbitration under sec. 31 of the *Commonwealth Conciliation and Arbitration Act 1904*. The New South Wales Railway Traffic Employés Association are an association within the literal meaning of that term as defined in sec. 4 of the Act, which defines "Association" as meaning "any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employés, or for furthering or protecting the interests of employers or employés." They made application in due course to the registrar of the Arbitration Court for registration, and their application was opposed by the Federated Amalgamated Government Railway and Tramway Service Association on various grounds, but the registrar intimated that he would grant the application. The opponents then appealed to the President against his decision. Upon the hearing of the appeal it was objected, amongst other objections, that the applicants, being an association of State railway servants, could not be registered under the Act, and that the Act, in so far as it purported to include State railway servants within its provisions, was *ultra vires* and void. The President, treating the objection as a question of law arising in a proceeding in the Arbitration Court, stated a case for the opinion of this Court. The point so stated arises under paragraph xxxv. of [sec. 51](#) of the [Constitution](#) under which the Commonwealth Parliament has powers to make laws with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," and sec. 4 of the *Commonwealth Conciliation and Arbitration Act 1904*, which defines an industrial dispute for the purposes of that Act as "including disputes in relation to employment upon State railways."

There can be no doubt that this is a question of law, nor that it is a question of great importance. But it is objected that it is not a question arising in a proceeding before the Court, and that the President has therefore no power to state a case with respect to it, and that this Court has no jurisdiction to hear such a case. It is contended that the President, in hearing an appeal from the registrar, is not acting as the Court, but in the exercise of a personal authority conferred on him as President of the Court, and that, so acting, he constitutes a different and separate tribunal, to which the power to state a case for the opinion of the High Court does not attach. Sec. 11 of the Act provides that there shall be a Commonwealth Court of Conciliation and Arbitration which shall be a Court of record and shall "consist of a President." Division II. of Part III. of the Act, headed "The Jurisdiction of the President and of the Court," comprises three sections, the first of which (sec. 16) charges the President with certain extra-judicial duties by way of mediation, to which it is not necessary to refer. Sec. 17 provides that:—"The President may review annul rescind or vary any act or decision of the registrar in any manner which he thinks fit;" and sec. 18 provides that:—"The Court shall have

jurisdiction to prevent and settle, pursuant to this Act, all industrial disputes." In my opinion, notwithstanding the difference in language between secs. 17 and 18, the duty of the President under sec. 17 is judicial and not ministerial. It is a duty cast upon him as the President and sole member of the Court constituted by the Act. I cannot accept the suggestion that in the discharge of this duty he is exercising a jurisdiction conferred upon him personally as distinguished from the Court.

The only question that remains is whether an appeal from a decision of the registrar is a "proceeding before the Court" within the meaning of sec. 31, sub-sec. (2). Sec. 54 provides that the registrar shall keep a register of all organizations registered under the Act. Sec. 55 provides that certain specified associations may, on compliance with the prescribed conditions, be registered as organizations. Sec. 60 requires the registrar, if it appears to him that certain conditions exist in the case of any registered organization, to make application to the Court for the cancellation of the registration. One of them is that the organization has been registered erroneously or by mistake. If the registrar on application to him refuses to apply to the Court for the cancellation of the registration of an organization, the Court may, on the application of any person interested, order the registration to be cancelled. There can be no doubt that an application to the Court under this section is a "proceeding before the Court" within the meaning of sec. 31, sub-sec. (2). If the objection now under consideration is a good one, the only result would be that the President, if he desired to obtain the opinion of the High Court, would formally affirm the decision of the registrar granting registration, whereupon the objector or appellant (whom I assume to be a person interested) would apply to the registrar to make application for cancellation of the registration, and then, whether the registrar made that application or not, the Court would deal with the matter, and obtain the opinion of the High Court on a case stated. The point raised, therefore, is purely one of form, and involves no question of substance. If necessary I think that the present case should be regarded as an appeal from a refusal of the registrar to apply for cancellation of the registration of the applicant association. But I do not think it necessary to have recourse to this fiction. The term "proceeding" is a term of very wide application. In my opinion the term "proceeding before the Court" includes every matter brought before the President in the exercise of the judicial functions conferred upon him by the Act.

I think also that the objectors, who were an association of persons in the railway service of New South Wales, were persons interested, since the registration of the applicants might under sec. 59 have deprived them of a right of registration, which possibly they might have had. I think, further, that the objection, being one to the status of the applicants, was, in effect, one to the jurisdiction of the Court itself, and that such an objection may with the sanction of the Court be made by any person, if only as *amicus curiae*. (See *Corporation of London v. Cox*^[1] .

It was further objected by the applicants that the question sought to be raised is as to the validity of an Act passed by the Commonwealth Parliament, and that the Court will not in its discretion decide such a question, or even allow it to be raised, except in a litigation between parties in which the point is necessarily and distinctly raised. Without disputing the general proposition, I do not think that it applies to a case in which the Court is asked to exercise a jurisdiction the existence of which depends upon the constitutional validity of the Statute in question. A point of jurisdiction, when it is seriously raised, or if it suggests itself to the Court without being taken by a party, cannot properly be disregarded. Nor is a Court justified in making an order which it has no jurisdiction to make by the mere fact that no objection is offered.

For these reasons I am of opinion that the objections taken by Mr. Shand to the hearing of the case were untenable.

Barton J.

I concur.

O'Connor J.

There is nothing in the preliminary objection. The Act no doubt distinguishes between the cases in which the President acts ministerially, as in mediating between industrial disputants not judicially before him under sec. 16, or in annulling some act of the registrar under sec. 17, and the cases in which he acts judicially. But Mr. Shand's objection is founded on the view that the President has two separate judicial capacities, one as President constituting "The Court" as described in the Act, the other as President acting judicially in those matters which the Act expressly empowers the President to deal with. It must be admitted that in the latter case equally as in the former the President constitutes a judicial tribunal—but it is contended that in the former case that tribunal is "The Court" and in the latter it is not "The Court" but another tribunal which is described as "The President." There is only one judicial tribunal constituted by the Act. Sec. 4 defines "The Court" as "The Commonwealth Court of Conciliation and Arbitration constituted pursuant to this Act." The Court is constituted by sec. 11 in the following words:—"There shall be a Commonwealth Court of Conciliation and Arbitration, which shall be a Court of Record, and shall consist of a President." Whenever the President sits judicially he constitutes "The Court," and he cannot sit judicially without constituting "The Court." There is no warrant in the Act for the contention that the President sitting as a tribunal hearing one class of judicial proceedings is "The Court," but when sitting as a tribunal hearing another class of judicial proceedings he is not "The Court." Reference was made to sec. 32 which enables certain matters to be decided by the "President sitting in Chambers." A Court ordinarily speaking conducts its business in public—but it has always been the practice in the several jurisdictions of the Supreme Court for Judges, when they so deem it advisable, to deal with the class of proceedings mentioned in sec. 32 in Chambers either in public or in private. It is to make it quite clear that this method can be followed in the Federal Arbitration Court that similar power has been expressly conferred on the President by that section. But whether the President sits in Court in the ordinary sense of the word or in his own Chambers under that section, he constitutes the Court under the Act. In other words, whenever the President sits judicially he constitutes the Court, and as he sits judicially in reviewing under sec. 17 a decision of the registrar, the proceeding on that review is a "proceeding before the Court" within the meaning of sec. 31, and he may state a case for the opinion of the High Court on any question of law arising in that proceeding. As to the other matters mentioned by my learned brother the Chief Justice, I entirely agree with his observations.

Question answered accordingly.

Solicitors, for respondents, Brown & Beeby, Sydney.

Solicitors, for interveners, Crown Solicitors for the Commonwealth, the State of New South Wales, and the State of Victoria.

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17 December 1906

Griffith C.J., Barton and O'Connor JJ.

Rolin moved for leave to intervene

Shand K.C. (with him, Ferguson and Holman), for the respondents.

Shand K.C.

Rolin, for the State of New South Wales.

The following judgments on the preliminary question were read, and the argument on the main point was allowed to stand over.

August 20

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