HIGH COURT OF AUSTRALIA

The Queen

Vs.

Australian Stevedoring Industry Board

Dixon C.J.(1), Williams(1), Webb(1), Fullagar(1) and Taylor(2) JJ.

30 April 1953

CATCHWORDS

Industrial Law (Cth.) - Stevedoring industry - Registration of employer - Cancellation or suspension - "Unfit to be registered as an employer" - Interference with proper performance of stevedoring operations - Control and supervision of employees - Inquiry by delegate of stevedoring board - Prohibition to restrain delegate prior to making order of cancellation or suspension - Bias - Prejudgment of issues - Statement to newspaper reporter - Stevedoring Industry Act 1949 (No. 39 of 1949), s. 23 (1) (a) (b).

HEARING

Melbourne, 1953, March 10-12;Sydney, 1953, April 30. 30:4:1953

PROHIBITION.

DECISION

April 30.The following written judgments were delivered: -

DIXON C.J., WILLIAMS, WEBB AND FULLAGAR JJ.

This is an order nisi for a writ Harold Gibson Neil, Local Representative and Delegate of the Board. The prosecutors are the Melbourne Stevedoring Company Proprietary Limited, and they seek a writ prohibiting the board and its delegate from proceeding further with an inquiry commenced on 24th October 1952 into the fitness of the company to continue to be registered as an employer and into the question whether the company has acted in a manner whereby the proper porformance of stevedoring operations has been interfered with. The inquiry which it is sought to prohibit was based upon s. 23 (1) of the Stevedoring Industry Act 1949. Section 23 (1) provides that where, after such inquiry as it thinks fit, the Stevedoring Industry Board is satisfied that an employer (a) is unfit to continue to be registered as an employer, (b) has acted in a manner whereby the proper performance of stevedoring operations has been interfered with, or (c) has committed an offence against the Act, the board may cancel his registration, or may suspend his registration for such period as it thinks fit. (at p111)

2. Any of the powers or functions of the board may be delegated by the board (s. 11) and apparently its powers and functions under s. 23 (1) have been delegated to the respondent Neil. One of the powers of the board is to establish in respect of a port, and to maintain, a register of employers at that port: s. 20. The board has established a register of employers for Melbourne. The company had been registered under previous legislation as an employer and so went on the board's register. s. 5 (3) (b). Section 28 provides that a person, whether on his behalf or as agent or servant of another person, shall not, except with the consent of the board, engate a person for employment as a waterside worker for work on a wharf or ship at a port at which a register of employers of waterside workers is established unless the first-mentioned person is registered as an employer under the Act. Unless an employer was registered under previous legislation, his registration lies within the discretion of the board. (at p111)

3. There are provisions dealing with the registration of waterside workers and with the suspension or cancellation of such registration which more or less correspond with those relating to employers: ss. 20 (b), 21, 24, 26, 27. A person aggrieved by a decision of the board to suspend or cancel his registration as an employer or employee as the case may be may appeal to the Court of Conciliation and Arbitration: s. 25. According to s. 29 the prohibitions upon persons engaging waterside workers, unless they and the persons they engage are registered (ss. 27 and 28), apply only in relation to the engagement of persons for employment as waterside workers for work in stevedoring operations performed in the course of trade and commerce with other countries or among the States or performed in a Territory of the Commonwealth. So far as the provisions affect trade and commerce among the States, it is evident that a question must exist whether and to what extent they are consistent with s. 92 of the Constitution. No such question arose in Huddart Parker Ltd. v. The Commonwealth [1931] HCA 1; (1931) 44 CLR 492 , or Victorian Stevedoring and General Contracting Company Pty. Ltd. v. Dignan (1931) 46 CLR 73 for at that time the decision in W. & A. McArthur Ltd. v. Queensland [1920] HCA 77; (1920) 28 CLR 530 , that s. 92 did not bind the Commonwealth still stood and had not been overruled by the Privy Council in James v. The Commonwealth [1936] HCA 32; (1936) AC 578; 55 CLR 1 . However in the present proceedings the validity of none of the provisions was challenged and our decision must therefore proceed on the assumption that they are not inconsistent with s. 92. The grounds upon which the writ of prohibition is sought go to the impossibility of the matters into which the respondent Neil is inquiring amounting to a lawful reason for cancelling or suspending the registration of the company and to the conduct of the respondent Neil which it is said makes it contrary to natural justice for him to proceed to adjudicate. (at p112)

4. The prosecutor company was notified on 15th October by letter signed by the respondent Neil that he, as Delegate of the Australian Stevedoring Industry Board, proposed to conduct an inquiry in pursuance of the powers conferred by s. 23 (1) of the Act for the purposes of determining (1) whether the prosecutor, the Melbourne Stevedoring Company Proprietary Limited, was unfit to continue to be registered as an employer, and (2) whether the prosecutor had acted in a manner whereby the proper performance of stevedoring operations had been interfered with. The letter referred to two incidents which arose in the working of the ship Mulcra at No. 10 wharf, Melbourne, on 13th October 1952. The inquiry opened on 24th October 1952, when the prosecutor company was represented by counsel and objected, first that the respondent Neil had in a press communication so prejudged the case as to disqualify himself from adjudicating, and secondly that there was no ground upon which his power to suspend the registration of the company or cancel it arose. Evidence was then called both against and for the prosecutor company. At the conclusion of the inquiry the respondent Neil said that two other matters had been reported to the Stevedoring Board which it was necessary for him to take into account, both relating to incidents occurring at

Melbourne with reference to the discharge of the ship Eugowra, commencing on 13th October 1952. The inquiry was adjourned to enable the prosecutor to consider these two further matters and prepare a case in answer to them. Counsel for the prosecutor intimated that he might take advantage of the adjournment to seek a writ of prohibition and, in the event, he adopted that course. (at p113)

5. The facts in relation to the four matters which were thus made the subject of the inquiry can be briefly stated. The prosecutor company carries on work in relation to the loading and discharge of vessels engaged in inter-State trade. Its operations are extensive and it employs a considerable staff. In the port of Melbourne the gang system prevails. The stevedore who desires to discharge an incoming vessel applies to the Australian Stevedoring Industry Board for the number of gangs required to discharge the vessel. A gang normally consists of seventeen men. There is a large number of gangs, which are identified by numbers. The board notifies the stevedore of the gangs allotted to him. The stevedore has no choice either of the gang or of the men who compose the gang. When the vessel is ready to discharge, the gangs are picked up and the men are checked in for their work by the foreman or supervisor employed by the stevedore. Every man is identified by his registration number and is furnished by the board with a folder called a "pay docket" which bears his registered number, his name and signature. This he is supposed to carry. The gang chooses a job delegate and a gang leader. The gang leader disposes of the men in the gang, that is to say decides who will work on deck, who on the wharf, who will drive the winches, and who will work in the hold. The supervisor employed by the stevedore assigns the work to the gangs, who work under a foreman whose duty it is to direct the manner in which the cargo is disposed of. At the conclusion of the work the stevedore who has obtained a gang must make a return to the Stevedoring Industry Board showing the men who worked in the gang, the hours they worked and when they were discharged. If they are listed as having worked full time they have a clean discharge. If, however, they left work at an earlier time that must be stated on what is called a red discharge. (at p114)

6. The Mulcra is a small vessel which has four hatches but with only one bulkhead which divides the first and second hatches from the third and fourth. It thus has in effect two holds only. It was loaded with barley. Four gangs were picked up on 13th October 1952 for what is called the twilight shift, the shift which was worked from 5 p.m. until 11 p.m. Gang 222, which worked No. 4 hatch, included a man named H. P. Burrows, whose number was 5018. In gang No. 189, which worked No. 2 hatch, there was a man named Robert Bussey, whose number was 4784. These men answered to their numbers when the gang was checked in. At 5 p.m., however, it was raining and the men did not begin work. Tents were erected over the hatches to protect the barley and the men sat round in the sheds or in their motor cars. At about 6.30 p.m. these two men presented themselves at the outer gate of the wharf to come in. They were drunk. The police were summoned and they were arrested for drunkenness and fined that night. In the returns put in next morning to the board by the prosecutor company Burrows was shown as having received a clean discharge and Bussey was shown as having a red discharge, which read as follows: "Left job without permission, 8 p.m. Job Delegate thinks man was sick". The men had commenced work before 8 p.m. and at that time the foreman had changed. The practice is to check over the men when the foreman is changed and that was done. To check them the foreman calls for their numbers while they are at work, but as the members of the gang habitually work together they know each other's numbers and it is not difficult for a man who gives his own number to move to another part of the hold and then give his absent companion's number. Apparently the absence of Bussey was not detected, but at 8 p.m. the absence of Burrows was discovered. (at p114)

7. On 13th October and the following days the prosecutor company was also discharging the ship Eugowra. Gang No. 69 was working a hold on this ship during the twilight shifts. The gang

included a man named D. M. Higgins, No. 5604. The company returned him as discharged with other members of the gang at 9.30 p.m. on Wednesday, 15th October. It appears that he did not work after the end of the twilight shift at 11 p.m. on 14th October. Another gang, No. 191, working the Eugowra included W. J. Powell, whose number was 6374. It was found that Powell had left the job somewhere about half past five on 17th October 1952 without the knowledge of the supervisor. (at p115)

8. The explanation of the prosecutor company of these cases is simple. Higgins was in fact reported as sick and that was recorded in the time book, but owing to a mistake, which was simply explained, the entire gang was returned as having been discharged at the due time. But within a short time after the report had gone in the error was noticed and it was reported to the board's officers who, however, refused to allow an amendment of the return. In the case of Powell, he had left the job for only about fifteen minutes and his absence had not been detected and noted. If it had been noticed that he was absent from work for a short time it might have been due to a variety of allowable causes. (at p115)

9. On this material the prosecutor contends that it is impossible to bring s. 23 into application and a writ of prohibition should go. But, as has already been stated, the prosecutor also complains that Mr. Neil had committed himself to a newspaper reporter in a manner which made it wrong that he should conduct the inquiry. On the question of what occurred it is necessary to take Neil's statement, and not the report as it appeared in the press. It appears in par. 10 of his affidavit, which is as follows:- (at p115)

10. "At about 5 p.m. on Thursday, 23rd October, 1952, James Vickers Willis, the Shipping Reporter of the 'Sun' newspaper, came into my office and spoke to me. He and other shipping reporters representing other newspapers usually called for shipping news at about that time on each day. He said to me 'You have got the Melbourne Stevedoring Co. inquiry on on Monday?' I said 'No. I've got it on tomorrow'. He said 'If its on in the morning I'd better write something on it. Does this mean that their registration will be cancelled?' I said 'No, but they have been called on to show cause why their registration should not be cancelled or suspended'. He said 'Is this the same Company that was in trouble before?' I said 'Yes, we had an inquiry and they were warned'. He said 'When would that be?' and I said 'It was in July'. He then said, 'This is the story, isn't it? Two men that were working for them were drunk on the job and were arrested and taken to Bourke Street West'. I said 'No, they were away from the job and were stopped by the gate-keeper when they were coming back. Then they were arrested'. He said 'How can you blame the employer if the men leave a job without permission and are arrested while they are away for being drunk?' I said 'We don't expect them to be able to hold the men on the job but we do expect them to exercise proper supervision to find out whether men on their pay roll are missing. If they can wander away without the Company's knowledge it suggests lax supervision and that's why we are holding the inquiry'. To the best of my recollection and belief the foregoing paragraph sets out the conversation between Mr. Willis and myself with regard to this matter". (at p116)

11. It is convenient to deal first with the question whether the respondent Neil by this utterance disqualified himself from conducting the inquiry under s. 23. As the Delegate of the Board he occupies a quasi-judicial position when he undertakes an inquiry under that provision. His function is administrative. For it is hardly necessary to say that s. 23 does not attempt to repose in him any of the judicial power of the Commonwealth; if it did so it would be void. But nevertheless the inquiry involves an examination of facts, a conclusion, and inasmuch as his power extends over the full area covered by s. 23, action either in cancelling or suspending the registration of the employer or

refusing to do so. He therefore must act judicially in the sense that he must give effect to the general principles of fairness and propriety which are sometimes given the description of natural justice. He may therefore be disqualified by bias from executing the duty arising from his delegation with reference to s. 23. It is not difficult to understand that the employer whose case he must judge should feel alarmed at a statement appearing in the press from which it might well be inferred that upon some of the contentions he wished to advance his case had been prejudged. But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be "real". The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that "preconceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded", per Charles J., Reg. v. London County Council; Ex parte Empire Theatre (1894) 71 LT 638, at p 639 . (at p116)

12. It is unfortunate that the respondent Neil permitted himself to be interviewed by a reporter on the subject in which he was called upon to act quasi-judicially. But, accepting his version of what occurred, it cannot be said that he has so conducted himself as to raise a sufficient case of bias to justify a writ of prohibition. (at p116)

13. The question whether a writ of prohibition should go to the board or its delegate on the ground that the power lawfully to cancel or suspend the registration of the prosecutor company has not arisen is one of considerable difficulty. It may be said with truth to be a question of nicety. (at p117)

14. No offence against the Act has been committed by the prosecutor company. Accordingly the question upon which the liability of the company to cancellation or suspension of its registration depends is whether it is unfit to continue to be registered or has acted in a manner whereby the proper performance of stevedoring operations has been interfered with. But the power of the board or its delegate to cancel or suspend registration does not depend upon the fulfilment of one or other of these conditions as a matter of objective truth or reality. It depends upon the satisfaction of the board or its delegate that one or other of the conditions does exist. If the board or its delegate is subjectively "satisfied" that the prosecutor company is either unfit to continue to be registered or has acted in a manner whereby the performance of stevedoring operations has been interfered with, then the power exists (assuming always the validity of the provisions) to cancel or suspend the company's registration no matter how erroneous in point of fact the opinion of the board or its delegate may be. But it does matter if the opinion is erroneous in point of law. That is to say the board or its delegate must understand correctly the test provided or prescribed by s. 23 (1) and actually apply it. It is only when the board or its delegate is satisfied of the existence of facts which do amount in point of law to what the section means by unfitness or by acting in a manner whereby the proper performance of stevedoring operations is interfered with that the board or its delegate reaches a position where one or other of them may lawfully exercise the authority which s. 23 (1) purports to bestow. The first point to observe is that it must always be open to the board or its delegate to investigate the question whether a case exists for the exercise of its powers. There can be nothing wrong or unlawful in the board or its delegate entering upon an inquiry into any of the matters described by the three paragraphs of s. 23 (1). It is therefore evident that no prohibition could go to restrain the holding of an inquiry directed to any one or more of those issues. There can be no foundation for a writ of prohibition unless and until it appears, whether from the course of the inquiry or from the

preliminary statement of the matters to which the inquiry is directed, that there can be no basis for the exercise of the power conferred by s. 23 (1) or that an erroneous test of the liability of the employer to the cancellation or suspension of his registration will be applied or that some abuse of authority is likely. In any such case a writ of prohibition may lie but it must be a writ restraining the ordering of cancellation or suspension. If on the facts no basis could exist for exercising the power it would be a proper exercise of this Court's jurisdiction to award a writ of prohibition prohibiting unconditionally or peremptorily the cancellation or suspension threatened. For in the first place the board and the delegate are doubtless officers of the Commonwealth. At all events that has not been disputed. In the second place, although the power of the board is administrative, modern English authority has extended the writ to statutory bodies exercising quasi-judicial powers affecting the rights of private persons and the board comes fairly within the application of the remedy as now understood: cf. R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ltd (1924) 1 KB 171 ; R. v. Minister of Health; Ex parte Davis (1929) 1 KB 619 ; Estate & Trust Agencies Ltd. v. Singapore Improvement Trust (1937) AC 898 ; R. v. Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd. [1947] HCA 32; (1947) 75 CLR 361, at p 367 ; R. v. City of Melbourne; Ex parte Whyte (1949) VLR 257, at pp 261-263 . If the facts are not inconsistent with the existence of a basis for exercising the board's power of suspension or cancellation but there is a real threat to apply an erroneous test or to go outside the scope of the discretion and so abuse the power, more difficulty as to the remedy in prohibition may arise. But the tenor of the writ might perhaps be moulded to meet the situation and the board and its delegate prohibited quousque, e.g. until they were satisfied lawfully or until they abandoned the unlawful course or criterion: see per Willes J. in Mayor of London v. Cox (1867) LR 2 HL 239, at pp 275, 276, and in White v. Steel [1862] EngR 796; (1862) 12 CB (NS) 383, at p 412 (142 ER 1191, at pp 1202-1203) . Now it might be said that until an order for cancellation or suspension of the registration of an employer has been actually made the Court ought not to consider whether the basis for making such an order is so wanting that the power has not arisen or whether to exercise the power means the application of an erroneous test or some other abuse, and that accordingly the Court should withhold the writ until the result of the inquiry is known. There are two observations to make upon such a view of the matter. The first is that it must be borne in mind that, subject to certain limitations not here material, while prohibition is not a writ of course, it is a writ which goes as of right when the prosecutor is directly affected by the course pursued by a tribunal to which the writ lies and the prosecutor shows satisfactorily that the tribunal is about to act to his detriment in excess of its authority. The second observation is that the existence of s. 52 in the Act supplies a strong reason for the prosecutor seeking the protection of the writ before the board or its delegate orders cancellation or suspension when it or he threatens to make such an order although the requisite basis for the exercise of the power is absent or the grounds upon which it is threatened are legally misconceived, and extraneous to the board's authority. Section 52 provides that: "An order or direction of the Board shall not be challenged, appealed against, reviewed, quashed or called in question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever". Similar provisions have been considered in this Court in R. v. Hickman; Ex parte Fox [1945] HCA 53[1945] HCA 53; ; (1945) 70 CLR 598, at p 614 ; R. v. Murray; Ex parte Proctor [1949] HCA 10; (1949) 77 CLR 387, at pp 398, 399 ; R. v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section [1951] HCA 3; (1951) 82 CLR 208, at pp 248, 249 . It is unnecessary now to discuss the extent of the operation or of the validity of s. 52, but whatever view may be taken on that question the section shows not only that the legislature desired that the authority of the board should not be impugned after it had made an order, but also that to defer the grant of the remedy until that event, where otherwise the prosecutor is entitled to a writ, may and perhaps must operate to the prejudice of the prosecutor. At common law a prosecutor

is expected to apply at the earliest stage at which his right to a writ arises, but he is not entitled to the remedy quia timet, that is before the tribunal is invoked or assumes a jurisdiction or authority over the matter and, where the complaint is that an order may be made in excess of power or notwithstanding that the power has not attached, the prosecutor must show a real likelihood or danger of such an order being made. (at p119)

15. It is in this respect only that the stage at which the present application is made becomes important. But the chief point of difficulty in the case lies in the distinction between on the one hand a mere insufficiency of evidence or other material to support a conclusion of fact when the function of finding the fact has been committed to the tribunal and on the other hand the absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power depends. It is not enough if the board or the delegate of the board, properly interpreting pars. (a) and (b) of s. 23 (1) and applying the correct test, nevertheless satisfies itself or himself on inadequate material that facts exist which in truth would fulfil the conditions which one or other or both of those paragraphs prescribe. The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact. (at p120)

16. What appears in evidence before us discloses no affirmative ground for thinking that the prosecutor company is in truth "unfit to continue to be registered as an employer" within the meaning of that phrase as used in s. 23 (1) (a) and none for a finding that it has acted in a manner whereby the proper performance of stevedoring operations has been interfered with. (at p120)

17. As to the second of these two alternative conditions of the power it is enough to say that the discharge of the two ships was duly and punctually completed and that the failure of the foremen or supervisors of the prosecutor company to prevent the men in question leaving their work as they did or to detect record or report their absence led to no retardation impediment impairment or inefficiency in the operations. (at p120)

18. In considering the question whether any basis could be found for a conclusion that the prosecutor company is unfit to continue to be registered as an employer a first step is to determine what scope s. 23 (1) (a) gives to the board or its delegate. "Unfit" is no doubt a somewhat indefinite expression but it is necessarily relative to the purpose for which fitness or unfitness is postulated. Here it refers to fitness as an employer a term defined by s. 6 (1). It means, among other things, a person who engages or offers to engage persons for employment as waterside workers for work on a wharf or ship. There is a long definition of "waterside worker" but it is enough for present purposes to say that it is based on the acceptance of employment for work in the loading or unloading of cargo into or from ships. The prosecutor company falls under the part quoted of the definition of the word "employer" and it is for that reason that the company is on the register. Fitness connotes suitability, appropriateness, qualification to fill that character. (at p120)

19. Now it is evident that unfitness is a quality postulated as belonging to the company and belonging to it as an employer of labour in what may be called stevedoring operations. It may belong to it because of the deficiencies of the organization or equipment of its undertaking, because of the want of skill, knowledge or experience in those controlling or managing the undertaking, because of practices adopted in dealing with the employment of labour and no doubt for many other

reasons relevant to the capacity or competency of the company to fulfil its functions or duties as an employer in the business of stevedoring. But these are entirely different things from faults or errors of omission or commission which a foreman or foremen, a supervisor or supervisors, may commit from time to time. Clearly par. (a) of s. 23 (1) is not directed at punishment for defaults or derelictions, however seriously the board may regard them. Section 24 (1) gives to the board a power of cancelling or suspending the registration of a waterside worker for any of certain reasons which are set out under five paragraphs, the first three of which are parallel with the paragraphs of s. 23 (1). The complaint against the prosecutor company is that its foreman or foremen and its supervisor were not sufficiently vigilant in the control of the gangs discharging the Mulcra and the Eugowra to detect the absence of Bussey, Burrows and Powell and that an incorrect return was made in the first instance as to Higgins. To that may be added what, in his affidavit, the respondent Neil says concerning the intoxication on 8th July 1952 of a waterside worker named Castlehow while working the ship Koorawatha for which the company was the stevedore, and concerning the conduct of two men named Forster and Andrew who left the ship Hans P. Carl on 11th September, 1952 when they formed members of a gang obtained by the company. (at p121)

20. Let all this be so. No ground for saying that the company is "unfit" within s. 23 (1) (a) follows from it. It affords no possible basis for such a conclusion. (at p121)

21. The explanation appears to be that the board has resorted to the power to suspend or cancel for unfitness as a means of enforcing upon employers the requirement which it is the policy of the board to impose to maintain a supervision over gangs of waterside workers which will ensure that the members do not cease or suspend work or leave the ship or wharf without discovery and that their absence is reported. During the inquiry the respondent Neil said:
"The Board's attitude is, that the registration of an Employer under the Act carries with it certain obligations. One of the important obligations, and the one with which we are concerned at the moment is, that the Employer shall supply adequate supervision and that the Employer shall maintain a proper and satisfactory standard of supervision of the registered labour allocated to that Employer by the Board. I am now giving the Melbourne Stevedoring Company an opportunity to show that they did in fact supply adequate supervision and that it was properly and satisfactorily exercised. The Board does not require any Employer 'to put a ball and chain on the men', to use your term, to hold them on the job, but the Board does require the Employer to so conduct his business as to be aware when men who have been allocated to him by the Board are not working as required and to be aware when men are unlawfully away from their job. There is a clear obligation on the Employer to take the proper and necessary action when any breaches are committed by registered waterside workers". (at p122)

22. But however proper the board's "attitude" or policy may be, it is a misconception to invoke s. 23 (1) (a) as providing for the enforcement of the policy. Yet the foregoing passage means that pars. (a) and (b) of s. 23 (1) are to be used for that purpose. (at p122)

23. The prosecutor company carries on an extensive stevedoring business in which ships are loaded and discharged day after day. When the few instances cited in the inquiry of failure to detect and report the absence of men are considered in this aspect and in relation to the facts, the proceedings before the respondent Neil can mean only one thing, and that is that the scope of s. 23 (1) (a) has been misconceived and suspension or cancellation of registration is in contemplation not by reason of unfitness but as a sanction to enforce the obligation laid upon stevedores registered as employers, the obligation of closely supervising and disciplining the members of the gangs. (at p122)

24. The foregoing considerations show that the prosecutor is entitled to a prohibition provided that it has been sufficiently made to appear that a real danger exists of the suspension or cancellation of its registration being ordered. It is enough to say that to read the record is to see that there is very real ground for apprehending that such an order will be made. (at p122)

25. For these reasons the order nisi should be made absolute for a writ of prohibition prohibiting the respondent board and the respondent Neil from cancelling or suspending the registration of the prosecutor as an employer under the Act. (at p122)

TAYLOR J. In my opinion the order nisi in this case should be made absolute. I agree substantially with the reasons appearing in the joint judgment but wish to add some observations concerning the submission of the respondents that the application for prohibition, at this stage, is premature. According to the respondent's argument, the respondent Neil has not yet taken any step which can properly be the subject of prohibition. If this means that the remedy by way of prohibition is not available until such time as cancellation or suspension is directed, the submission is, I think contrary to authority. The inquiry in this case is not a judicial proceeding instituted by some formal process, having its issues defined by pleadings and conducted in accordance with recognised rules of procedure. If it were, want of jurisdiction on the part of the respondent delegate might well have appeared on the face of the proceedings. But notwithstanding the nature of the inquiry authorized by s. 23 of the Stevedoring Industry Act 1949 the question of Neil's authority under that section came to the forefront in the initial stages and it is evident that the respondent is proceeding upon an erroneous view of the authority conferred by that section. The first evidence of this is to be found in the letter initiating the inquiry. It does not announce merely that an inquiry will be held for the purpose of determining whether the prosecutor is unfit to continue to be registered as an employer or whether it has acted in a manner whereby the proper performance of stevedoring operations has been interfered with, but specifies facts which the respondent delegate, apparently, regarded as sufficient to entitle him to resolve these issues adversely to the prosecutor. In one sense the letter is a notice to show cause why the prosecutor's registration should not be cancelled or suspended and can it be doubted that if the company had not been represented at the inquiry the delegate would have considered himself free, on these facts, to cancel or suspend the prosecutor's registration? I do not suggest that this letter stands in the same category as an originating process in a judicial proceeding or that objection could be taken on the ground that it was defective or that want of jurisdiction appeared on its face. It is not such a document and it is clear that the question of the delegate's authority cannot depend so much upon what is alleged in a letter of this kind as upon the facts disclosed during the inquiry itself. But, for the reasons appearing in the joint judgment the facts do not carry the matter any further. Upon the true construction of s. 23 the facts appearing in the transcript could not in law justify a finding either that the company is unfit to continue to be registered as an employer or that it has acted in a manner whereby the proper performance of stevedoring operations has been interfered with. A finding to either effect could only proceed from a mistaken view as to the meaning of s. 23 or from a disregard of its provisions. (at p124)

2. A perusal of the transcript sufficiently indicates to my mind that the delegate held the view during the inquiry that, upon the facts as disclosed, he had authority to cancel or suspend the prosecutor's licence and accordingly he is - without jurisdiction to do so - considering whether, in the circumstances, he should so act. This being so he has, in the course of the inquiry, exceeded the power conferred upon him by s. 23 and there is ample authority that, at this stage, prohibition may go to prevent cancellation or suspension as a result of the inquiry. (at p124)

ORDER

Order absolute for a writ of prohibition prohibiting the respondent the Australian Stevedoring Industry Board and the respondent Neil from cancelling or suspending the registration of the prosecutor as an employer under the Act in pursuance of the inquiry pending before the respondent Neil.

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