

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988

Conciliation and Arbitration Act 1904
s.35 appeal against decision⁽¹⁾

Citicorp Australia Limited

and

Australian Bank Employees Union
(C No. 33734 of 1988)

Finance and banking employees

Banking services

JUSTICE COLDHAM

DEPUTY PRESIDENT POLITES

COMMISSIONER CROSS

MELBOURNE, 29 MAY 1989

Industrial dispute - dispute finding - refrain from hearing - appeal - threshold submission that decision of Commissioner refusing s.41(1)(d) applications to proceed prior to finding whether or not an industrial dispute existed was not appealable rejected - expression "industrial dispute" to be construed as being confined to an industrial dispute as defined in s.4 - compelling reasons why the Commission should determine its jurisdiction prior to entertaining discretionary application - appeal dismissed.

DECISION

On 31 October 1988 in matter C No. 2097 of 1987 Commissioner Laing declined to permit applications under sections 41(1)(d) and (j) of the Conciliation and Arbitration Act 1904 made by Citicorp Australia Limited, Citibank Limited and Citibank Savings Limited to proceed prior to his determining the question of whether or not an industrial dispute within the meaning of the Act existed between inter alia those companies and the Australian Bank Employees Union (ABEU). In so deciding, Commissioner Laing accepted an argument presented by counsel for the ABEU which is encapsulated in the following passage from his decision:

"It is apparent from all of the foregoing that the Commission has a duty to expeditiously make its determinations under s.24(1) because until there exists an 'industrial dispute' within the meaning of the Act the Commission has no jurisdiction to move to deal with a dispute. The powers that are able to be exercised in making a determination under that section are sufficient to permit a proper determination (see for example R v. Alley and others; ex parte New South Wales Plumbers and Gasfitters Employees' Union and Another and ex parte Master Plumbers and Mechanical Contractors Association of New South Wales and Another 37 ALR 1). It seems apparent from this, that the exercise of powers which may thwart the process therefore, are not available to be exercised and to that extent I accept the argument presented by Mr Hinkley."⁽¹⁾

From that decision, Citicorp Australia Limited filed a notice of appeal pursuant to section 35 of the Conciliation and Arbitration Act 1904 and the matter came on for hearing before this Full Bench on 15 May 1989. At the

⁽¹⁾ Print H5489

hearing, both parties agreed, that as a result of the operation of sections 11 and 21 of the Industrial Relations (Consequential Provisions) Act 1988, the law to be applied to the appeal was that contained in the Industrial Relations Act 1988 (the Act). This proposition is supported by the decision in Avram Holdings Transport Division and others v. Transport Workers' Union of Australia and another.⁽²⁾ Accordingly, leave to appeal is necessary. The whole matter was argued before us and in our view the questions of construction raised in the notice of appeal are of sufficient importance that in the public interest, leave to appeal from Commissioner Laing's decision should be granted.

Mr Marshall of counsel for the ABEU also argued that the decision was not appealable under section 45 of the Act. He submitted that the decision was not a decision under section 45(1)(d) because it was not made in the exercise of the Commission's discretion under section 111(1)(g) and he compared the wording of section 45(1)(d) with the previous provision under the Conciliation and Arbitration Act which referred to a decision in a matter arising under section 41(1)(d) of that Act. He further submitted that there was no refusal or failure of Commissioner Laing to exercise jurisdiction under section 45(1)(g) of the Act. We are unable to accept these submissions. In our view, where an application is made under section 111(1)(g) of the Act and the Commissioner declines to accept that application, then a decision to that effect can, without any unnecessary stretching of the language, be characterised as a decision under section 111(1)(g). Moreover, in this case, the Commissioner's decision concluded with the words "that I am not able to permit the applications under s.41(1)(d) and (j) to proceed at this time. The applications are refused . . .". In these circumstances, it seems to us that the Commissioner found he had no jurisdiction to entertain the applications and therefore refused to exercise any such jurisdiction. This clearly brings the matter within section 45(1)(g). We therefore reject the submission that the appeal is incompetent.

We now turn to the appeal on its merits. The substance of the appeal concerns in particular the proper construction of section 111(1)(g) of the Act and its relationship with other sections. Section 111 is in the following terms:

"111.(1) Subject to this Act, the Commission may, in relation to an industrial dispute:

- (a) take evidence on oath or affirmation;
- (b) make an award or order in relation to all or any of the matters in dispute, including:
 - (i) a provisional award or order;
 - (ii) an interim award or order; or
 - (iii) on application under section 112, an award that is expressed to be made by consent;
- (c) on application under section 115, certify an agreement;
- (d) give a direction in the course of, or for the purposes of, the hearing or determination of the industrial dispute;

⁽²⁾ Print H7740

- (e) make an award or order including, or vary an award or order so as to include, a provision to the effect that engaging in conduct in breach of a specified term of the award or order shall be taken to constitute the commission of a separate breach of the term on each day on which the conduct continues;
 - (f) set aside, revoke or vary an award, order, direction, determination or other decision of the Commission;
 - (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:
 - (i) that the industrial dispute or part is trivial;
 - (ii) that the 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;
 - (iv) that a party to the industrial dispute is engaging in conduct that, in the Commission's opinion, is hindering the settlement of the industrial dispute or another industrial dispute; or
 - (v) that a party to the industrial dispute:
 - (A) has breached an award or order of the Commission; or
 - (B) has contravened a direction or recommendation of the Commission to stop industrial action;
 - (h) hear and determine the industrial dispute in the absence of a party who has been summoned or served with notice to appear;
 - (j) sit at any place;
 - (k) conduct its proceedings, or any part of its proceedings, in private;
 - (m) adjourn to any time and place;
 - (n) refer any matter to an expert and accept the expert's report as evidence;
 - (o) direct parties to be joined or struck out;
 - (p) allow the amendment, on such terms as it considers appropriate, of any application or other document relating to any proceeding;
 - (q) correct, amend or waive any error, defect or irregularity, whether in substance or form;
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- (r) extend any prescribed time;
- (s) summon before it the parties to the industrial dispute, the witnesses, and any other persons whose presence the Commission considers would help in the hearing or determination of the industrial dispute, and compel the production before it of documents and other things for the purpose of reference to such entries or matters only as relate to the industrial dispute; and
- (t) generally give all such directions, and do all such things, as are necessary or expedient for the speedy and just hearing and determination of the industrial dispute.

(2) Unless the context otherwise requires, a reference in this section to an industrial dispute includes a reference to any other proceeding before the Commission.

(3) The Commission may, in writing, authorise a person (including a member of the Commission) to take evidence on its behalf, with such limitations (if any) as the Commission directs, in relation to an industrial dispute, and the person has all the powers of the Commission to secure the attendance of witnesses, the production of documents and things and the taking of evidence on oath or affirmation."

Mr Giudice of counsel for the appellant contended that the operation of sub-section (2) of section 111 means that the expression "industrial dispute" in section 111(1)(g) should be construed widely to refer to any proceeding rather than narrowly to refer only to "industrial dispute" as defined in section 4 of the Act. He argued that there is nothing in the context in which the words "industrial dispute" are used within section 111(1)(g) which would require that expression to be read down. It was then argued if this construction be correct, that Commissioner Laing had clearly formed an erroneous view of his powers and wrongly declined to exercise them. It is relevant to note that there are some differences between section 111 of the Act and section 41(1)(d) of the Conciliation and Arbitration Act, the most important of these being that section 111 is expressed to operate "subject to this Act", a matter to which we shall return later. In the meantime we turn to examine relevant aspects of the recent legislative history of sub-section (2) of section 41(1)(d) of the Conciliation and Arbitration Act.

The section was inserted into the Conciliation and Arbitration Act by section 43A of Act No. 10 of 1947. At that time, the introductory words for the section said:

"The Court or a Conciliation Commissioner may, in relation to an industrial dispute, and the Court may, in relation to any other proceedings before it . . .".

Following the boilermaker's case in 1956, the Conciliation and Arbitration Act 1956 established the Commonwealth Conciliation and Arbitration Commission, and the section became section 16AA of the Conciliation and Arbitration Act 1956. At that time, the introductory words were amended to read as follows:

"The Commission may, in relation to an industrial dispute or other proceedings before it . . .".

In substance what appears to have been done by this amendment was simply to remove the references to the court. Clearly if the section had remained in that form, there could have been little argument about the contention of the appellant in this case.

However, the section was amended by section 6 of Act No. 40 of 1959 as follows:

"(a) by omitting the words 'or other proceedings before it'; and

(b) by adding at the end thereof the following sub-section:

'(2) A reference in the last preceding sub-section to an industrial dispute shall, unless the contrary intention appears, be read as including a reference to any other proceedings before the Commission.'

In our view the purpose of this amendment can only have been to narrow the previous operation of this section by confining some of the powers set out in the section to "industrial dispute" in the defined sense. If this was not the case it seems to us there would have been no purpose at all in the amendment.

A further amendment to sub-section (2) took place in 1983⁽³⁾ but this appears to have been more concerned with drafting style than with substance. By the time the sub-section found its way into section 111 of the Act there were further alterations to its drafting but the effect of these does not appear to us to be material for the present case.

Against that background we turn to examine the expression "industrial dispute" in section 111 and the meaning to be ascribed to the words in sub-section 1(g) thereof. Leaving aside the introductory words of section 111, the expression "industrial dispute" appears in sub-sections (1)(d), (1)(g), (1)(h), (1)(s). Sub-section (1)(d) deals with giving a direction; sub-section (1)(h) with proceeding in the absence of a party and sub-section (1)(s) with the power to summon parties and witnesses. Clearly these powers should have application generally in relation to all proceedings of the Commission and there seems to us to be nothing in the context which would require the expressions to be read down. By contrast the expression is used in sub-section (1)(g) on seven occasions. On at least some of those occasions, it would appear that a narrow context is used, e.g. in sub-section (g)(iv) it is hard to avoid the conclusion that the expression "industrial dispute" should be afforded a confined meaning since reference to conduct that is hindering a settlement is an expression particularly apposite to construing the words in accordance with the statutory definition. A similar conclusion is compelled by sub-section (g)(ii) since it is hard to envisage that matters other than industrial disputes as defined might arise and be proper to be dealt with, if indeed they can all be dealt with at all, by a State industrial authority.

Since we think the term ought to be afforded the same meaning throughout the sub-section, then the conclusion is compelled that sub-section (2) does not operate to extend the meaning of the word "industrial dispute" in sub-section (1)(g).

⁽³⁾ Conciliation and Arbitration Amendment (No. 2) No. 115, 1983

It was contended by Mr Giudice that it was possible to read sub-section (1)(g) as empowering the Commission to "dismiss a matter or part of a matter if it appears that further proceedings are not necessary or desirable in the public interest". He then argued that on its face at least, part (iv) of the sub-section is not confined to "industrial dispute". However, we think it is necessary to read sub-section (1)(g) as a whole, and when this is done it is our view that the word "matter" in the opening phrase of sub-section 1(g) is confined to a matter arising in connection with an industrial dispute. This view is supported by the use of the word "the industrial dispute" rather than "an industrial dispute" on two subsequent occasions in the opening words of the sub-section. If the draftsman had intended "matter" to be given a meaning not qualified by the latter use of the expression "the industrial dispute" in the sub-section, it is hard to see why the expression "the industrial dispute" was used rather than the expression "an industrial dispute" which might well have allowed for the broader construction contended for by Mr Giudice.

Accordingly, we conclude that the context does require that the expression "industrial dispute" in section 111(1)(g) be construed as being confined to an industrial dispute as defined in section 4.

Even if we were wrong in this however, as pointed out earlier, section 111(1) is expressed to be "subject to this Act". Section 101(1) of the Act is in the following terms:

"Subject to subsection (2), where a proceeding in relation to an alleged industrial dispute comes before the Commission, it shall, if it considers that the alleged industrial dispute is an industrial dispute:

- (a) determine the parties to the industrial dispute and the matters in dispute; and
- (b) record its findings;

but the Commission may vary or revoke any of the findings."

In our view, the operation of this section is such that where a proceeding in relation to an alleged industrial dispute comes to the Commission, the Commission has an obligation, if it believes that the alleged industrial dispute falls within the statutory definition, to determine the parties to that dispute and the matters in the dispute and to record its findings. We do not believe that this obligation can be qualified by the powers in section 111(1)(g) in such a way as to enable a member of the Commission to avoid in relation to an alleged industrial dispute the obligation to make such a finding. To adopt the construction of section 111 which permits this result, is to render the opening words of the section meaningless. It was put in argument that such a construction would mean that section 111(1)(g) could never have operation because once the dispute was found, any aspect of the dispute not resolved by conciliation must pursuant to that section be resolved by arbitration. It was conceded, for this argument to be sustained, that the view must be taken that the exercise of the discretion in section 111(1)(g) was not an exercise of arbitral power. This is a proposition we cannot accept. No authority was cited for it and it seems to us that on general principles the exercise of the powers in section 111(1)(g), after hearing the parties, is clearly arbitral in character (see generally *Australian Railways Union v. The*

Victorian Railways Commissioners.⁽⁴⁾ Finally, there are no reasons of convenience why the construction contended for by the appellant should be preferred. Whilst difficult questions of fact and law can and do arise in relation to the finding of an industrial dispute, it seems to us that there are compelling reasons why the Commission should determine its jurisdiction prior to entertaining discretionary applications and that generally speaking, such an approach would be more convenient for the parties.

We dismiss the appeal.

Appearances:

G. Giudice of counsel for Citicorp Australia Limited.

S. Marshall of counsel for the Australian Bank Employees Union.

Date and place of hearing:

1989.

Sydney:

May 15.

⁽⁴⁾ 1930 44 CLR 319