INDUSTRIAL DISPUTES IN THE COMMONWEALTH JURISDICTION

R. v. PORTUS; EX PARTE AUSTRALIAN AIR PILOTS' ASSOCIATION

In the recent case of *R.* v. *Portus; ex parte Australian Air Pilots' Association*[1] the High Court was once more called upon to examine the meaning of the conciliation and arbitration power in s.51 (xxxv) of the Constitution.[2] Through the process of almost constant litigation the High Court has sought to work out (and is still seeking to work out) the nature and scope of s.51 (xxxv) and hence the jurisdiction and powers of the industrial tribunals created under that head of power.[3] This formative process assumes added importance when it is recalled how difficult it has proved in the past to alter the terms of the conciliation and arbitration power by referendum.[4]

In the present case the High Court had to decide whether there existed such an "industrial" relationship between the disputants as would enable them to be parties to an "industrial dispute" within the meaning of s.51 (xxxv). Briefly, this is how the case developed. An employer served a log of claims (relating to conditions of employment) on the relevant employees' union and also on thirteen other employers engaged in the same industry. The demands in the log were not acceded to by any of the respondents, whereupon the matter was brought before a Commonwealth Conciliation Commissioner for hearing and determination. An objection was there raised to the Commissioner's jurisdiction to hear the claims, but he over-ruled it, holding that an "industrial dispute" existed between the claimant employer on the one side, and the respondent employers and the employees' union on the other. In prohibition proceedings brought at the instance of the union, the High Court held, by majority, that no "industrial dispute" existed between the claimant employer and the thirteen respondent employers, but that such a dispute did exist between the claimant employer and the respondent employees' union.[5]

The majority of the Court[6] based their decision on the ground that no "industrial" relationship existed between the claimant employer and the thirteen respondent employers. "It seems quite clear that an industrial dispute within s. 51 (xxxv) of the Constitution cannot arise from a demand by one employer upon another employer, unconnected except by the fact that their businesses are of the same description, a demand that the employer upon whom it is made shall pay a given wage to his employees or provide them with specified conditions. The two employers stand in no industrial relation to one another. The fact that they compete with one another for business or . . . for labour establishes no industrial relation between them . . . they are . . . not actual or potential co-operators in the performance of productive or other industrial work".[7] As regards the respondent employees' union, however, the same considerations did not, in their view, apply, and by construing the log as operating distributively the three majority judges were able to hold that an "industrial dispute" ex-

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[1] (1954) A.L.R. 76.

[2] *I.e.*, the provision enabling the Commonwealth to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

[3] Notably the Commonwealth Arbitration Court and the Commonwealth Conciliation Commissioners.

[4] On no fewer than six occasions has the Commonwealth sought wider industrial powers by referendum, but in each case the move has been defeated by the electors.

[5] In a memorandum accompanying the log of claims the claimant employer had sought to have the conditions asked for applied to all air pilots, whether employed by the respondent employers or not. The High Court took the view, however, that the parties to the dispute were limited to those set out in the log of claims and accordingly did not have to consider whether the claims were invalid on the ground that they sought to create a common rule.

[6] The majority judgment was delivered by Dixon, C.J. with whom Fullagar and Taylor, JJ. concurred.

[7] (1954) A.L.R., at 79, *per* Dixon, C.J.

isted between the union and the claimant employer, but only as between them.

Of the minority judges, Webb, J. approached the problem on the same lines as the majority, but held that there could be an "industrial dispute" between competing employers in the same industry, at least if the dispute related to "industrial matters" as defined in the Conciliation and Arbitration Act.[8] He did not, however, seek to distinguish between an employer-employer dispute *simpliciter* and one where (as in the present case) employees were also participants on one side. It was, on the other hand, this additional participation by employees which led Kitto, J., the other dissenting judge, to hold that an "industrial dispute" existed between the parties. While agreeing with the majority that the relationship between competing employers in the same industry was not "industrial", he regarded the inclusion of the employees' union as providing the necessary industrial element in the whole dispute. The mere fact that all the employers had not acted in concert was not, in itself, sufficient to alter the essentially industrial character of the dispute.[9]

Determination of the authoritative scope of this decision raises considerable difficulties. The precise issue involved concerned the standing as an "industrial dispute" of a dispute between an employer on the one side, and employers and employees on the other. The reasoning of the majority was, it appears, not directed to the exact relationship in issue, but to the rather different question of employer-employer disputes *simpliciter*. By their readiness to sever the two aspects of the dispute they did not expressly decide whether an "industrial dispute" could ever arise where (as in this case) employers on one side of the dispute were joined by employees. Presumably, however, such a dispute would not, in their view, be "industrial" and that part of it relating to employers and employees could be brought within s.51 (xxxv) only if it were capable of separation from the composite dispute. From the majority decision, therefore, there appears to emerge the broad principle that any dispute involving competing employers on both sides of the dispute is not (and cannot) be "industrial" in character and that the inclusion of employees will not save the composite dispute from being outside the scope of s.51 (xxxv).

On a strict view of precedent, however, such a principle appears wider than was necessary to determine the precise facts in issue. On this basis, the High Court might later, without technically overruling the majority decision in this case, hold that employer–employer disputes *simpliciter* could be industrial in character.[10] It appears most unlikely that the High Court would do so, however, for, quite apart from the difficulty of circumventing the strongly-worded principle laid down in the majority decision, this would, at best, leave an awkward and illogical pocket in this branch of the law.

Whatever the authoritative scope of this decision, the case raises significant issues of principle, the particular settlement of which by the High Court is likely to have important repercussions in the industrial sphere. To many this decision must have come as a surprise, for not only had the High Court in a series of decisions moved steadily closer to the acceptance of the principle that employer-employer disputes were *prima facie* industrial, but also various

[8] There was, in his view, "no reason why an employer . . . cannot validly make demands on other employers in the same industry, at all events if they have the legal power to concede demands of the kind and the demands actually made are in respect of "industrial matters" as defined by s.4 of the Conciliation and Arbitration Act, (Cwlth.) No. 13, 1904 — No. 34, 1952. There is nothing before this Court to indicate that the employers have not the legal power to concede the claims in the log". *Id.*, at 81, *per* Webb, J.

[9] "If the union had chosen to serve the self same log upon the fourteen employers . . . and the employers had resisted the demand, it would be conceded on all hands that an industrial dispute had arisen. Likewise, if the fourteen employers had jointly made a similar demand on the union, and the union had rejected the demand or failed to concede it . . . . I have not been able to see what difference it makes that the employers do not see eye to eye with one another . . . and therefore had not acted in unison." *Id.*, at 84, *per* Kitto, J.

[10] *I.e.*, provided such disputes related to "industrial matters" as defined in s.4 of the Conciliation and Arbitration Act, 1904-1952 (Cwlth.).

judges of that Court had suggested that this was in fact the case.[11]

Starting with the position that a dispute between an employer and his employees (provided it related to "industrial matters") was industrial in character, the High Court broadened the concept to enable a union to act as party principal in such a dispute. An "industrial dispute" could arise, therefore, even though the employees of the employer concerned were satisfied with their employment conditions[12] — the High Court had thus moved away from the original contractual basis of the "industrial" relationship. In 1942 the concept was further extended to include disputes between competing unions of employees.[13] In these and other cases,[14] moreover, various judges of the High Court had, as already indicated, suggested that employer-employer disputes were "industrial" in character. ' "Industrial dispute", as introduced into the Federal Constitution, was a concept applicable to all forms of future industrial conflict that assumed national character and was not an institution in a state of arrested development . . . It includes, where the necessary co-operation exists, disputes between employers and employees, employees and employees, and employers and employers."[15]

In the present case, the High Court[16] based its decision on the notion that there was not, and could not, be industrial co-operation between competing employers in the same industry.[17] That Court has long insisted, that for a relationship to be "industrial", there must, in terms of continuity of production in industry, be both a need for and an actual condition of continuing industrial co-operation between the parties involved.[18] In so far as employer-employee and employee-employee relationships are concerned, it has held that this requirement is fulfilled. By its refusal, however, to recognise that "industrial co-operation" can exist between competing employers in the same industry, the High Court has, it may be suggested, taken too restrictive a view of that concept. While it is difficult to envisage either a need for or an actual state of continuing industrial co-operation existing between employers in different industries, the position may, in certain circumstances, be otherwise with respect to competing employers in the same industry.[19] For instance, as between a supplier of building materials and a builder (both being employers) there is, it would appear, both

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[11] See e.g., *Federated Municipal and Shire Employees' Union* v. *Melbourne Corporation* (1919) 26 C.L.R. 508, 554, *per* Isaacs and Rich, JJ.; *Burwood Cinema Limited* v. *Australian Theatrical Employees' Association* (1925) 35 C.L.R. 528, 548, *per* Starke, J.; *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387, 443, *per* McTiernan, J.; *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex parte Australian Paper Mills Employees' Union* (1943) 67 C.L.R. 619, 631, *per* Rich and Williams, JJ.

[12] *Burwood Cinema Case* cited *supra* n.11.

[13] *Paper Mills Case* (1943) 67 C.L.R. 619.

[14] See cases cited *supra* n.11. That this was the generally accepted view before *R.* v. *Portus*, is also illustrated by the Arbitration Court case of *H. V. McKay Pty. Ltd.* v. *Federated Moulders' (Metals) Union* ((1927) 25 C.A.R. 1128) where Lukin, J., as one of the alternative grounds of his decision, held that, in the light of the judgments and reasoning in the *Burwood Cinema Case* ((1925) 35 C.L.R. 528.) and *Clyde Engineering Co. Ltd.* v. *Cowburn* ((1926) 37 C.L.R. 466), it was clear that an employer could bind another employer in the same industry (with whom, in the circumstances of that case, he was in competition) by joining him as respondent to the award together with the interested employees' union ((1927) 25 C.A.R. at 1143).

[15] *Municipalities Case* (1919) 26 C.L.R. 508, at 554, *per* Isaacs and Rich, JJ.

[16] Kitto J., one of the two dissenting judges, agreed with the majority on this question.

[17] "There is not such a relation, indeed, there is no relation at all subsisting between the two employers. They are competitors in business: not actual or potential co-operators in the performance of productive or other industrial work. The disagreement is not one between parties where accord is required or expected if industry is to be carried on regularly and without impediment or disturbance." (1954) A.L.R., at 79, *per* Dixon, C.J.

[18] "Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation." *Municipalities Case* (1919) 26 C.L.R. 508, at 554, per Isaacs and Rich J.J.

[19] It is recognised that the scope of "industry" may give rise to difficulties in certain

a need for and an actual state of continuing industrial co-operation in the building industry. It is this industrial co-operation which maintains continuity of production in that industry.

There is, moreover, perhaps another leg to the "industrial co-operation" test, which so far has not been considered by the High Court. Even if it is assumed that a state of continuing industrial co-operation cannot exist between competing employers in the same industry, it is still possible that the very circumstances leading up to a dispute between them may, in certain cases, create *ad hoc* both a need for and an actual condition of industrial co-operation between those employers. A claim, for instance, by one employer that another employer shall pay his employees certain wages or work them certain hours may, at that point in time, be considered to have such a result. Competitors (if they be so considered) become potential, if not actual co-operators — their co-operation is necessary if industrial production in that industry is to be maintained.

On principle, moreover, the "industrial co-operation" test would seem to be directed to the question whether an "industrial" relationship exists between the disputants at the moment when they appear before the Commonwealth Arbitration Court or Conciliation Commissioners. It does not decide the further necessary question whether the subject-matter of the dispute itself is "industrial", that is, whether the dispute relates to "industrial matters".[20] A dispute, therefore, between employers and employees (whose relationship the High Court has said is *prima facie* "industrial") may still not be an "industrial dispute" (within the meaning of s.51 (xxxv)) unless it passes this further test. Thus a claim by an employees' union that an employer shall contribute funds for the election of one of its members to Parliament would clearly not be regarded as providing the bases of an "industrial dispute". Likewise (assuming for present purposes that the relationship between competing employers in the same industry is "industrial") a claim by one employer that another employer shall limit his profits to a particular figure would not provide the basis of such a dispute. But (again on the same assumption) a dispute, as in the present case, directly concerning "industrial matters" — the conditions on which other employers in the same industry shall work their employees — has every title to be considered "industrial" in character. Despite the statutory definition of "industrial matters",[21] it is true that difficulties may arise in determining what is "industrial" and what is not. But this problem exists with respect to disputes involving all the various combinations of employer and employee relationships — it would not be confined to employer-employer disputes alone.

There are, therefore, reasons of principle for suggesting that, in certain cases at least, the relationship between competing employers in the same industry is an "industrial" one. If this were so, then a dispute between such employers relating directly to "industrial matters" might have been considered an "industrial dispute" within the meaning of s. 51 (xxxv).

Industrial arbitration was introduced into this country primarily to settle disputes in industry and so to prevent the disruptive consequences of the strike and the lockout. It is doubtless true that most, if not all, disputes occurring at the turn of the century were between employers and employees and that this was the particular relationship which the framers of the Commonwealth Constitution had in mind when they inserted s.51 (xxxv) in that instrument. But that does

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cases. As defined in s.4 of the Conciliation and Arbitration Act 1904-1952 (Cwlth.) that term includes a branch or branches of an "industry". It refers also to an "industry", whether considered as a craft of employees or an industry from the employers' viewpoint. (*Federated Engine Drivers Ic. Association of Australasia* v. *Broken Hill Pty. Co. Ltd.*, (1911) 12 C.L.R. 398; *Tramways Board* v. *Municipal Officers' Association* ((1944) 68 C.L.R. 628) when applying the "industrial co-operation" test, therefore regard must be had to the nature and scope of "industry" in the particular context.

[20] *I.e.*, as defined by s.4 of the Conciliation and Arbitration Act 1904-1952 (Cwlth.).

[21] Ibid.

not necessarily mean that "industrial disputes" should and will be limited to that conception. That the High Court has not regarded itself as so bound is evident from the developments already mentioned and, in particular, from the extension of the notion of "industrial dispute" to embrace employee — employee disputes.[22] Industry and industrial relations in this country have become so varied and complex and the disputes which can (and do) occur in relation to them so multifarious in character,[23] that the High Court will doubtless continue to be called upon to decide whether relationships, not envisaged by the framers of the Constitution, should be regarded as "industrial". The difficulties experienced in the past in having the scope of s.51 (xxxv) altered by referendum,[24] have, to a large extent, placed upon the High Court the responsibility of determining the future pattern of industrial regulation in this country,[25] in terms, what is more, of a statically worded power. It is for that Court, therefore, to decide whether to halt the expansive definition of the conciliation and arbitration power or pursue a progressive, though generic, policy of interpretation to accord with the economic, social and technological developments of the mid-twentieth century.[26]

The High Court has, for the present at least, halted the expansive definition of "industrial dispute" in this particular regard. But ' "industrial dispute" is not an institution in a state of arrested development',[27] and one may be permitted to conjecture that the concept will at some future time, be extended to embrace employer-employer disputes, at least between employers in the same industry and, provided, of course, such disputes relate to "industrial matters". As already suggested, this might still be done without expressly overruling *R.* v. *Portus*,[28] but in view of the difficulties involved, employer-employer disputes will doubtless continue to remain outside the scope of s.51 (xxxv), until such time as the High Court sees fit to overrule that decision.

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MARRIAGE UNDER DURESS
H. v. *H.*

The decision of Karminski, J. in *H.* v. *H.*[1] is interesting from the point of view of the principles of English Private International Law relating to questions of choice of law in suits for nullity of marriage and also raises the

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[22] *E.g., Paper Mills Case* (1943) 67 C.L.R. 619.

[23] The complex nature of "industrial interests" is well illustrated by the United Kingdom case of *Crofter Handwoven Harris Tweed Co.* v. *Veitch* (1942) A.C. 435, where the House of Lords held that employers and unions may have such an industrial interest in the manner in which another employer obtains his raw material as to enable them to combine for the protection of that interest, against that other employer, without committing the tort of conspiracy. The manner in which an employer obtains his raw material may well effect the terms of competition between all employers in an industry and so determine the wages and other working conditions which they can offer to their employees.

[24] See n.4 *supra.*

[25] Particularly since the labour standards laid down in the Commonwealth industrial jurisdiction determine or influence those prescribed in State jurisdictions.

[26] "Industry itself is constantly changing — scientific, social and other causes bring about great transformations. Disputes will . . . vary accordingly . . . but so long as the fundamental concept of 'industrial dispute' is present, none of these evolutionary modifications prevent the matter from being within the ambit of the (conciliation and arbitration) power." *Burwood Cinema Case* (1925) 35 C.L.R., at 539, *per* Isaacs, J.

[27] *Municipalities Case* (1919) 26 C.L.R., at 554, *per* Isaacs and Rich, JJ.

[28] (1954) A.L.R. 76.

[1] (1954) P. 258.