5, 1957

No. 21 of 1956.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

CHARLES MARSHALL PROPRIETARY, LIMITED *Appellant*

AND

GERALD ALEXANDER COLLINS. . . . *Respondent.*

Case for the Appellant

RECORD.

INTRODUCTION.

1. This is an appeal from the High Court of Australia brought pursuant to special leave granted by Her Majesty in Council on the 1st day of June 1956 upon a Report from the Judicial Committee dated the 23rd day of April 1956. p. 33.

2. The question at issue is whether a statute of the State of Victoria, viz., The Factories and Shops (Long Service Leave) Act 1953 (hereinafter referred to as " the State Act ") is inconsistent with a law of the Commonwealth, consisting of the combined operation of the Commonwealth Conciliation and Arbitration Act 1904–1952 (hereinafter referred to as " the Commonwealth Act ") and an award made thereunder (hereinafter referred to as " the Metal Trades Award "). This is a constitutional question which arises under s. 109 of the Commonwealth Constitution which is as follows :—

> " Where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

3. It was recently decided in *O'Sullivan* v. *Noarlunga Meat Limited* [1956] 3 W.L.R. 436 that such a question is not an *inter se* question.

EARLIER PROCEEDINGS.

4. The Appellant was prosecuted upon the information of the Respondent, who is an Inspector of Factories and Shops of the State of Victoria, for an offence alleged to have been committed against the State Act in not granting a dismissed employee, one Kemp, pay for a period of long service leave to which he was entitled under the State Act, and having p. 1.

pleaded " not guilty " the Appellant contended, *inter alia*, that the State Act was inconsistent with the Commonwealth Act and the Metal Trades Award, which bound the Appellant in relation to the said Kemp, and was to that extent invalid.

pp. 2–6. 5. The information was heard by the Metropolitan Industrial Court at Melbourne which on the 28th February 1955 dismissed the information on the ground of the inconsistency alleged. From that decision the p. 7. Respondent by special leave appealed successfully to the High Court of p. 32. Australia which set aside the order of the Metropolitan Industrial Court and remitted the information to that Court for re-hearing. It is from that decision of the High Court that this appeal is brought.

THE STATE LAW.

6. The State Act imposes upon employers the obligation to grant employees 13 weeks' long service leave with pay after 20 years of continuous service. Provision is made in certain cases for leave *pro rata* for shorter periods of service. Sections 7 and 9 of the Act are as follows :—

" ENTITLEMENT TO LONG SERVICE LEAVE.

7. (1) Subject to this Act every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer.

(2) The amount of such entitlement shall be—

(*a*) on the completion by a worker of twenty years' continuous employment with his employer—thirteen weeks' long service leave and therafter an additional three and a quarter weeks' long service leave on the completion of each additional five years of continuous employment with such employer ;

(*b*) in addition, in the case of a worker who has completed more than twenty years' continuous employment with his employer and whose employment is terminated—

(i) by the employer for any cause other than serious and wilful misconduct ; or

(ii) by the worker on account of illness incapacity or domestic or any other pressing necessity where such illness incapacity or necessity is of such nature as to justify such termination—

such amount of long service leave as equals one-eightieth of the period of his continuous employment since the last accrual of entitlement to long service leave under paragraph (*a*) of this subsection ;

(*c*) in the case of a worker who has completed at least ten but less than twenty years of continuous employment with his employer and whose employment is terminated—

(i) by the employer for any cause other than serious and wilful misconduct ; or

(ii) by the worker on account of illness incapacity or domestic or any other pressing necessity where such illness incapacity or necessity is of such nature as to justify such termination—

such amount of long service leave as equals one-eightieth of the period of his continuous employment."

"How and When Long Service Leave is to be Taken.

9. (1) When a worker becomes entitled to long service leave under this Act such leave shall be granted by the employer as soon as practicable (but save as otherwise expressly provided in this section not before the thirty-first day of December One thousand nine hundred and fifty-four) having regard to the needs of his establishment; but subject to this Act—

(*a*) the taking of such leave may be postponed to such date as is mutually agreed or in default of agreement as the Industrial Appeals Court having regard to the problems involved directs but no such direction shall require such long service leave to commence before the expiry of six months from the date of such direction;

(*b*) the taking of such leave may (if the entitlement has accrued) be advanced to such date before the thirty-first day of December One thousand nine hundred and fifty-four as is mutually agreed;

(*c*) in no case shall any entitlement to long service leave be lost or in any way affected by the foregoing provisions of this subsection or by failure or refusal of the employer to grant the leave.

(2) Notwithstanding anything in the last preceding subsection where the employment of a worker is for any reason terminated before he takes any long service leave to which he is entitled or where any long service leave entitlement accrues to a worker because of the termination of his employment the worker shall be deemed to have commenced to take his leave on the date of such termination of employment and he shall be entitled to be paid by his employer ordinary pay in respect of such leave accordingly.

(3) The employer and worker may agree that any accrued entitlement of long service leave will be taken in two periods; but save as aforesaid long service leave shall be taken in one period.

(4) The ordinary pay of a worker on long service leave shall be paid to him by the employer when the leave is taken and shall be paid in one of the following ways:—

(*a*) In full when the worker commences his leave; or

(*b*) At the same times as it would have been paid if the worker were still on duty; in which case payment shall, if the worker in writing so requires, be made by cheque posted to a specified address; or

(*c*) In any other way agreed between the employer and the worker ;

and the right to receive ordinary pay in respect of such leave shall accrue accordingly.

(5) Any long service leave shall be inclusive of any trade or public holiday occurring during the period when the leave is taken, but shall not be inclusive of any annual leave occurring during such period."

7. It is the provisions of Sections 7 (2) (*c*) and 9 (2) that the Appellant
p. 1. was alleged to have infringed in that Kemp, having been in its employ 10
for 13 years and 4 months, approximately, was dismissed by the Appellant on the 12th day of February 1954 for a cause which was held to be something
p. 4, l. 37. other than serious and wilful misconduct, and was not granted the pay in
p. 5, l. 11. respect of the long service leave to which he would have been entitled if the State Act validly applied to Kemp and the Appellant.

THE FEDERAL LAW.

8. By the Commonwealth Act there had been established *inter alia* an Australian wide system of arbitration for the settlement of industrial disputes extending beyond the limits of one State. Part of the function of arbitration was performed by the Commonwealth Court of Conciliation 20 and Arbitration established under the Commonwealth Act and part was performed by the Conciliation Commissioners appointed under the Commonwealth Act. Disputes to which the Commonwealth Act applied were after the formulation of claims and hearings by the Court or a Conciliation Commissioner, settled by awards which by virtue of the Commonwealth Act bound those to whom they applied.

APPELLANT'S CONTENTIONS.

9. It was and is the first contention of the Appellant that an award made under the Commonwealth Act and which regulates the terms and conditions of employment generally leaves no room for the operation of 30 any State law relating to any terms or conditions of that employment, and that any State law is inconsistent, and therefore invalid, so far as its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award.

10. It was and is the second contention of the Appellant that any provision of the State Act which makes different provision from that made by an award under the Commonwealth Act is inconsistent with Commonwealth law and is accordingly invalid.

11. It was and is the third contention of the Appellant that its industrial relationship with its employee, Kemp, being governed, as it 40 was, by the Metal Trades Award made under the Commonwealth Act, the State Act was inconsistent with Commonwealth law, both because the Metal Trades Award did relate to the terms and conditions of the Appellant's employment of Kemp generally and was exhaustive and

exclusive and so left no room for the operation of the State law with respect to that relationship, and because there was actual conflict between the provisions of the Metal Trades Award and the State Act. It was this third contention that was rejected by the High Court in allowing the Respondent's Appeal.

HIGH COURT DECISION.

12. The appeal to the High Court was heard by the Full Court consisting of the Chief Justice and Justices McTiernan, Williams, Webb, Fullagar, Kitto and Taylor. The Court other than Justice Taylor delivered a joint judgment and Justice Taylor delivered a separate concurring judgment. pp. 9-32.

13. The decision of the High Court, in addition to dealing with the question of the validity of the State Act, dealt with the jurisdiction of the High Court to hear the appeal in face of Section 31 of the Commonwealth Act, which attempted to confine appeals involving the interpretation of the Commonwealth Act or an Award made thereunder to the Commonwealth Court of Conciliation and Arbitration. Upon the argument of this point Counsel for the Commonwealth of Australia were given leave to intervene to support the validity of Section 31. The Appellant did not contest the jurisdiction of the High Court to hear the appeal. The High Court decided that Section 31 of the Commonwealth Act could not operate to preclude an appeal to the High Court from the decision of the Court exercising Federal jurisdiction, as did the Metropolitan Industrial Court in this case. The Appellant accepts this part of the decision of the High Court, and limits its appeal to the question of inconsistency.

INCONSISTENCY.

14. The case requires consideration of two different aspects of inconsistency between State and Commonwealth laws.

15. The first aspect is that described in the following quotation from the Joint Judgment which describes the kind of inconsistency referred to in paragraph 9 above :—

> ". . . the chief ground relied upon is that Federal law has dealt with the industrial regulation of the relations between the employer and the worker completely, exhaustively or exclusively so as to show an intention that the award alone shall govern all the matters with which it is concerned. It is said that the State law, if valid, would deal with an industrial question falling within the field which Federal law itself exclusively or exhaustively governs." p. 18, l. 33.

16. This first aspect is that referred to by the Privy Council in *O'Sullivan* v. *Noarlunga Meat Limited* [1956] 3 W.L.R. at p. 444 in these words :—

> " The meaning of section 109 which has already been referred to in dealing with the preliminary plea was stated in the following words in the judgment of Fullagar, J. ' The test of inconsistency which is now generally applied was laid down in *Clyde Engineering*

Co. v. *Cowburn* (1926) 37 C.L.R. 466, (1926) A.L.R. 214. It has been applied in a number of later cases: see especially *H. V. McKay Pty. Ltd.* v. *Hunt* (1926) 38 C.L.R. 308; *Hume* v. *Palmer* (1926) 38 C.L.R. 441; *Ex parte McLean* (1930) 43 C.L.R. 472; *Colvin* v. *Bradley Bros. Ltd.* (1943) 68 C.L.R. 151; and *Wenn* v. *Attorney-General for Victoria* (1948) 77 C.L.R. 84. In *Clyde Engineering Co.* v. *Cowburn* (1926) 37 C.L.R. at p. 489, Isaacs, J., said, "If a competent Legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field." The test was analysed and fully stated by Dixon, J., in *Ex parte McLean* (1930) 43 C.L.R. at p. 483, (1930) A.L.R. 377, in a passage which is often cited. His Honour said: "When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and section 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume* v. *Palmer* (1926) 38 C.L.R. 411, (1927) A.L.R. 66). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsitency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter." ' In applying this principle it is important to bear in mind that the relevant field or subject is that covered by the law said to be invalid under the section."

17. The test of inconsistency of this kind is not in question and the issue here is the application of the accepted test to the State and Federal laws under consideration.

18. The second aspect of inconsistency, which is that referred to in paragraph 10 above, is that there may be actual inconsistency in the sense that the Federal and State laws contain different provisions so that the Federal law permits what the State law forbids or the Federal law forbids what the State law permits. This was described by Latham, C.J., in *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) 66 C.L.R. at p. 573 in these terms:—

> "Federal and State laws, each within the powers of the respective enacting legislatures, may be inconsistent in terms in the sense that there is a direct conflict between them so that it is impossible to give effect to both laws."

19. Again the test is not in question and the issue is its application to the State and Federal laws under consideration.

APPLICATION OF SECTION 109.

20. The Federal law to be considered is the Commonwealth Act and the Metal Trades Award. The Appellant accepts the following statement from the joint judgment :—

> " The basis of the application of sec. 109 to a State law affecting industrial relations regulated by an award is not that the award is a law of the Commonwealth within the meaning of sec. 109 but that the Conciliation and Arbitration Act constitutes the inconsistent Federal law inasmuch as it means that an award purporting to make an exhaustive regulation shall be treated as the exclusive determination of the industrial relations which it affects. p. 18, l. 44.
>
> The award itself is, of course, not law, it is a factum merely. But once it is completely made, its provisions are by the terms of the Act itself brought into force as part of the law of the Commonwealth. In effect, the statute enacts by the prescribed constitutional method the provisions contained in the award.
>
> —*Per* Isaacs, C.J., and Starke, J., *Ex parte McLean* (1930) 43 C.L.R. 472, at p. 479."

The examination that is required therefore is an examination of the Metal Trades Award and of the State Act to see whether—

(1) the Metal Trades Award does show an intention that it alone shall govern all the matters with which it is concerned ;

(2) the Metal Trades Award is concerned with terms and conditions of employment generally and in particular with the recreational leave which an employer is bound to grant and a worker is entitled to have ;

(3) the application of the State Act to the relationship of those employers and employees bound by the Metal Trades Award would interfere with the settlement which the award made and in particular would impose upon employers and employees obligations different from those arising out of the award.

21. As to paragraph 20 (1) hereof it is submitted that an examination of the Metal Trades Award leaves no room for doubt that it was intended to govern exhaustively all the matters with which it is concerned and that where it was intended that State laws governing matters covered by the award should continue to apply it was expressly so provided.

22. As to paragraph 20 (2) hereof it is submitted that an examination of the Metal Trades Award reveals that it is a comprehensive award dealing with all aspects of the industrial relationship of the employers and employees to whom it applies. In addition to dealing with wages, hours of work, classification of employees, shift work and a number of

particular aspects of the employment not of direct importance here, it deals in particular with the contract of employment (19), the payment of wages (18), holidays (15), annual leave (21) and sick leave (20). There is no provision in the award relating to long service leave. Indeed the award was made by a Conciliation Commissioner and at the date of the award the granting of long service leave with pay was a matter for the Commonwealth Court of Conciliation and Arbitration and not for a Conciliation Commissioner. See The Commonwealth Act, sections 13 (1) (*c*) and 25 (*c*). The decision of the High Court is based upon this division of arbitral authority. In the respectful submission of the Appellant too much importance has been attributed to this division of arbitral authority and this has tended to obscure the real question, which is whether the Metal Trades Award was, when it was made, intended as an exhaustive settlement of the industrial relationship between employers and employees bound thereby and was made on the footing that employees were not entitled to long service leave with pay. The State Act, which introduced the scheme of long service leave in the State, was passed on the 17th November 1953.

23. As to paragraph 20 (3) hereof the Appellant submits in the first place that the Metal Trades Award was intended to be an exhaustive settlement of the industrial relationships of the employers and employees bound thereby and was made on the footing that employees were not entitled to long service leave and to introduce long service leave into that relationship would destroy or vary the settlement so made. Apart from anything else the grant of any one kind of recreational leave, be it holidays, annual leave or leave after ten years, is something to be considered by an Arbitrator in relation to other kinds of recreational leave and for a State law to impose an obligation upon employers to grant recreational leave after ten years to employees who have been granted specified recreational leave by an Arbitrator is to upset the Arbitrator's settlement.

24. In the second place the Appellant submits that the State Act contradicts the Metal Trades Award in a number of respects. The Metal Trades Award by clauses 11, 18 and 19 provides for employment from week to week which may be terminated by a week's notice and for payment either weekly or fortnightly for time worked except as otherwise provided.

In particular, clause 19 (*b*) provides that employment shall be terminated by a week's notice on either side given at any time during the week or by the payment or forfeiture of a week's wages as the case may be, and further provides that " this shall not affect the right of the employer to dismiss any employee without notice for malingering, inefficiency, neglect of duty or misconduct, and in such cases the wages shall be paid up to the time of dismissal only." Clause 19 (*c*) provides that, subject to certain exceptions, an employee not attending for duty shall lose his pay for the actual time of such non-attendance.

The effect of the State Act is to require an employer to grant, in appropriate cases, long service leave after the employment of an employee has been terminated in accordance with the Metal Trades Award and to pay the dismissed employee ordinary pay during that period of leave and

in this and in other ways the operation of the State Act is to extend an employment which according to the Metal Trades Award has come to an end. To take the particular case of Kemp, the Appellant was entitled to terminate his employment without notice for neglect of duty, etc., and in any case by a week's notice or upon payment of a week's wages. This right to dismiss was exercised, and according to the Metal Trades Award the employment came to an end. Nevertheless, if the State Act applies Kemp was entitled to two months' long service leave during which ordinary pay would accrue and annual leave might accrue and during which Kemp was forbidden (by section 14 of the State Act) to engage in any other employment for hire or reward.

25. It is further submitted for the Appellant that the considerations referred to in paragraph 24 hereof aid the conclusion that the State Act enters the field occupied by Federal law as submitted in paragraph 23 hereof.

HIGH COURT'S REASONS.

26. The Chief Justice and Justices McTiernan, Williams, Webb, Fullagar and Kitto point out that it is necessary to deal with the two aspects of inconsistency already mentioned and after stating the application of Section 109 of the Constitution to the Commonwealth Act and awards made thereunder in terms already quoted proceeded to examine the provisions of the Metal Trades Award and the State Act. On the first aspect of inconsistency Their Honours decided that the Metal Trades Award could not be regarded as an exhaustive and exclusive law upon the industrial relationship of those bound thereby so that it left no room for the operation of State law, because, at the time when the award was made the Conciliation Commissioner who made it was, by the Commonwealth Act, denied power to award long service leave with pay, that power having been conferred on the Commonwealth Court of Conciliation and Arbitration. As to the second aspect of inconsistency Their Honours said that there was no real conflict between any provisions of the Metal Trades Award and those of the State Act. Justice Taylor in a separate judgment reached the same conclusions.

p. 20.
p. 20, l. 36.
p. 23, l. 11.
p. 23, l. 29.
p. 31.

27. For the reasons already indicated in paragraphs 22–25 hereof it is respectfully submitted that Their Honours reached the wrong conclusion on both the aspects of inconsistency with which they dealt.

REASONS.

28. The Appellant respectfully submits that this appeal should be allowed and the judgment of the High Court reversed for, among others, the following

REASONS

(1) BECAUSE the decision of the Metropolitan Industrial Court was right.

(2) BECAUSE the High Court in reversing the decision of the Metropolitan Court was wrong.

(3) BECAUSE the High Court was wrong in deciding that the Commonwealth Act and the Metal Trades Award did not determine exhaustively and exclusively the recreational leave that an employer bound thereby was obliged to grant to an employee bound thereby.

(4) BECAUSE the High Court was wrong in deciding that there was no conflict between the provisions of the Metal Trades Award and those of the State Act.

(5) BECAUSE the High Court should have decided that the State Act was inconsistent with the Commonwealth Act and the Metal Trades Award in relation to those bound thereby and that the State Act was to the extent of that inconsistency invalid.

(6) BECAUSE the High Court should have held that the Appellant was not bound by the State Act to grant long service leave to Kemp.

DOUGLAS I. MENZIES.

R. M. EGGLESTON.

ROBERT GATEHOUSE.

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