NOTES

ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PTY LTD v. WARDLEY

1. *Introduction*

The constitutional status of State anti-discrimination legislation[1] was considered by the High Court for the first time in *Ansett Transport Industries (Operations) Pty Ltd* v. *Wardley*.[2] The issue of inconsistency under section 109 of the Constitution arose between the Airline Pilots Agreement 1978 ("the Agreement"), an agreement certified under the Conciliation and Arbitration Act 1904 (Cth), and Part III[3] of the Equal Opportunity Act 1977 (Vic.) ("the Act"), which prohibits discrimination against a person on the grounds of sex or marital status.

By a majority of four to two,[4] the Court upheld the validity of the State Act by refusing to make the declarations sought by the plaintiff ("Ansett") with the result that Ansett could not dismiss the defendant, Mrs Wardley, on the grounds of her sex without contravening section 18(2)(b)[5] of the Act. However, the decision does not ensure security of employment as contemplated by the Act. It is by no means clear that the Equal Opportunity Board ("the Board") could order the reinstatement of Mrs Wardley in the event of her dismissal during the first year of employment. Again, in view of the elaborate grievance procedure established by the Agreement for the benefit of pilots employed by Ansett for more than twelve months, it appears that the outcome of this procedure would override a contrary determination by the Board. Two members[6] of the High Court appear to have affirmed decisions in which the award was interpreted to have conferred a right of dismissal. This leaves open the possibility of framing an award which confers a right of dismissal on grounds of sex or any ground whatsoever. It is suggested that considerations peculiar to awards require that courts be reluctant to infer from an award an intention to deal with a matter not explicitly within the terms of that award.

2. *An Outline of the Proceedings*

Mrs Wardley first applied for employment as a trainee pilot with Ansett early in 1976. After the second interview she was informed that her application had been unsuccessful, although it appears that she scored better than the average of the successful applicants on most of

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[1] Sex Discrimination Act 1975 (S.A.); Anti-Discrimination Act 1977 (N.S.W.); Equal Opportunity Act 1977 (Vic.).

[2] (1980) 28 A.L.R. 449.

[3] The material sections are ss 16 and 18.

[4] Stephen, Mason, Murphy and Wilson JJ.; Barwick C.J. and Aickin J. dissenting.

[5] S. 18(2). It is unlawful for an employer to discriminate against an employee on the ground of sex or marital status—
(b) by dismissing an employee or subjecting the employee to any other detriment.

[6] Note 2 *supra*, 466 *per* Mason J.; 488 *per* Wilson J.

the criteria on which applicants were assessed.[7] Wardley subsequently lodged a complaint with the Registrar of the Equal Opportunity Board alleging that Ansett had discriminated against her on the grounds of her sex in refusing to offer her employment.

The Board adopted[8] the view expressed by Lawton L.J. in *Clay Cross (Quarry Service) Ltd* v. *Fletcher*,[9] in relation to similar legislation of the United Kingdom,[10] that "[i]f a woman is treated less favourably than a man there is a presumption of discrimination". The submission by counsel for Ansett that the prohibition in section 18(1)[11] of the Act was qualified by the terms of section 16(2)[12] so as to permit discrimination because of the likelihood of pregnancy, was emphatically rejected. It had been submitted that the words "in connexion with pregnancy or childbirth" included the propensity to bear children and that in an industry involving a rigid career structure with substantial training and labour replacement costs, a female applicant was thereby in a materially different situation to a male. The Board stated that such an interpretation would "open the way to . . . discrimination against members of the female sex because of their child bearing potential which is the very essence of the distinction between the sexes . . ." and stressed that "the child bearing potential of women should not be used to limit women's role in society".[13]

Pursuant to section 40(2) of the Act, the Board ordered Ansett to refrain from committing any further act of discrimination against Wardley, to engage her in the next intake of trainee pilots and to pay damages. Ansett instituted proceedings in the Supreme Court of Victoria seeking declarations that it was not subject to the Act since it was inconsistent with the Agreement, hence section 109 of the Constitution applied. The summons were removed to the High Court on the application of the Attorney-General of Victoria. Pending the outcome of these proceedings, Ansett complied with the orders made by the Board.

The High Court held that the first declarations relating to the issue of whether and on what terms Ansett should employ Wardley, were no longer in issue. In fact no question of inconsistency could arise between the orders of the Board and the Agreement which operated at a time

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[7] *Wardley* v. *Ansett Transport Industries (Operations) Pty Ltd* Equal Opportunity Board (Victoria), June 6 1979, 6.

[8] *Id.*, 8.

[9] [1979] 1 All E.R. 474, 480.

[10] Equal Pay Act 1973 (U.K.); Sex Discrimination Act 1975 (U.K.).

[11] S. 18(1). It is unlawful for an employer to discriminate against an employee on the ground of sex or marital status—
(a) in determining who should be offered employment;
(b) in the terms on which the employer offers employment; or
(c) by refusing or deliberately omitting to offer employment.

[12] S. 16(2)(a) no account shall be taken of special treatment afforded to women in connexion with pregnancy or childbirth; and
(b) a comparison of the cases of persons of the other sex or of a different marital status shall be a comparison where the relevant circumstance in the one case are the same; or are not materially different in the other.

[13] Note *supra*, 11.

when there was no relationship of employment between Ansett and Wardley.[14] In particular, the Agreement does not deal with the criterion of eligibility, a matter which is probably not within the definition of "industrial matters" in section 88H of the Conciliation and Arbitration Act 1904 (Cth).[15]

A further declaration was also refused. Counsel for Ansett contended that Clause 6B of the Agreement conferred a right to dismiss pilots employed for less than twelve months for any reason at all and hence could not be qualified by the State Act. Counsel for Wardley asserted that Clause 6B was merely procedural and submitted in the alternative that section 88H of the Conciliation and Arbitration Act 1904 (Cth) does not authorise the conferral of an unfettered right to dismiss. However, the majority held that Ansett could not dismiss an employee in contravention of Part III of the Act.

3. *Clause 6B: Right of Dismissal?*

The problem of interpreting Clause 6B revolved around the appropriate inference to be drawn from the silence of the Agreement as to the grounds of dismissal. Clause 6B required that a pilot be given reasons for his dismissal in writing but made no explicit reference to the grounds upon which the pilot might be dismissed. Did this imply an unfettered right, as was contended for by Ansett, or did it mean that the grounds for dismissal were not within the ambit of the award at all? Wilson J. could see "nothing to suggest that the parties intended to deal with sex discrimination . . . or indeed, with any other reason the employer might have for terminating the employment".[16] Similarly, Mason J. concluded that Clause 6B did not deal with the right of dismissal being of the view that it is an essential procedural clause, the provisions of which "accord with the notion of seniority which pervades the entire Agreement".[17]

Stephen J., on the other hand, had difficulty in conceiving of a right of dismissal which existed independently of the requirement of notice and hence concluded that the clause was not merely procedural but in fact the source of the right to dismiss.[18] Nevertheless, he rejected Ansett's submission and concluded that the right was intended to operate subject to the general law. Stephen J. decided that the Agreement could only regulate the employment relationship within the area of industrial relations, of which the subject of sex discrimination formed no part.[19] Since there was "not the slightest indication"[20] of the Agreement having been made in settlement of a dispute which in any way raised the issue of sex discrimination, there was nothing to link the otherwise distinct subject matters. Hence, the absence of any explicit qualification to the

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[14] Note 2 *supra*, 468 *per* Mason J.; 484 *per* Wilson J.
[15] *Id.*, 484 *per* Wilson J.
[16] *Id.*, 486.
[17] *Id.*, 465.
[18] *Id.*, 459.
[19] *Id.*, 458.
[20] *Id.*, 457.

right was meaningless in terms of attempts to interpret the clause as conferring an absolute right.

It is not apparent precisely how Murphy J. characterised the clause since his conclusion that it did not confer an unqualified right[21] does not reveal whether this was because the clause did not confer a right or because the right conferred was qualified by the general law.

Aickin J., with whom Barwick C.J. agreed, emphasised the fact that the Conciliation and Arbitration Act 1904 (Cth) enables the arbitrator to prescribe completely the rights and obligations of the parties to a dispute.[22] This of course does not answer the question of whether in fact the arbitrator has so exercised his powers.

4. *The Application of Section 109 Tests of Inconsistency in Relation to Industrial Awards*

The earliest,[23] and possibly the clearest, test of inconsistency requires that it be impossible to obey both the Federal and State laws simultaneously. However, it is the so-called "cover-the-field" test, first propounded by Isaacs J. in *Clyde Engineering Co. Ltd* v. *Cowburn*,[24] which is most frequently applied. The development of subsidiary tests is said to be the inevitable consequence of the vagueness of "its crucial notions of 'completely', 'exhaustively' and 'exclusively' . . .".[25]

It has been suggested[26] that, despite the proliferation of alternative tests, there are two situations only in which inconsistency can arise: first, where it is impossible to obey both laws simultaneously; secondly, where it is the intention of the federal law to operate irrespective of the provisions of State legislation. Such tests as "Commonwealth confers, State qualifies", "Commonwealth permits, State prohibits" as well as the "cover-the-field" test are equally referable to the latter situation, each being dependent on an interpretation of the intention of the Commonwealth.[27] Ansett argued that Clause 6B conferred an absolute right to dismiss which the State Act purported to qualify, and that Clause 6B was intended to deal completely with the matter of dismissal. The view expressed by Aickin J. that

> [t]he two different aspects of inconsistency are no more than a reflection of different ways in which Parliament manifests its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct[28]

was shared by other members of the Court.[29]

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[21] *Id.*, 469.

[22] *Id.*, 478.

[23] *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1910) 10 C.L.R. 266.

[24] (1926) 37 C.L.R. 466.

[25] I. Tammelo, "The Tests of Inconsistency Between Commonwealth and State Laws" (1957) 30 *A.L.J.* 496.

[26] A. Murray-Jones, "The Tests for Inconsistency Under Section 109 of the Constitution" (1979) 10 *F.L Rev.* 25.

[27] *Id.*, 40.

[28] Note 2 *supra*, 479.

[29] *Id.*, 455 *per* Stephen J.; 464 *per* Mason J.

The application of the section 109 tests to awards has been criticised on the basis of both the theoretical weaknesses[30] and practical difficulties inherent in their use.[31] Such criticism has often been prompted by discontent with the results occasioned by this practice, namely the nullification of State regulation in areas not otherwise within the legislative power of the Commonwealth.[32] An award is not a "law" of the Commonwealth.[33] Nor does it render the inconsistent State law "invalid" since it is rendered "inoperative only as to a section of the community".[34] It has been established by a long line of cases that the relevant "law" for the purpose of section 109 is the Conciliation and Arbitration Act 1904 (Cth) which empowers the arbitrator to make an award which is an exhaustive determination on the subject of the dispute.[35] As a matter of practice[36] these tests are applied directly to awards as if they were acts of Parliament, subject to the important limitations imposed by the enabling act, and section 51(35) of the Constitution. This means that the power of the arbitrator is strictly defined by the ambit of the dispute. It is submitted that, particularly in the absence of evidence with respect to the contents of the log of claims, a court should be reluctant to go beyond the text of the award.

An additional practical constraint flows from the difficulty of applying tests which are dependent upon notions of "intention" to instruments for which the description "a scissors-and-paste job" may frequently be apt. The exigencies of the arbitrator's task requiring him to settle the dispute with which he is faced, usually with some degree of urgency, impede attempts to produce an award which is in fact an exhaustive determination on the subject with which it deals. An awareness of this should inhibit a court from drawing inferences beyond the text of the award.

5. *Conferring an Unfettered Right to Dismiss*

It was argued on behalf of Ansett[38] that *R.* v. *Industrial Court of South Australia; ex parte General Motors-Holden's Pty Ltd*[39] supported the view that Clause 6B conferred a substantive right of dismissal upon Ansett. It is of interest to note that this decision was relied upon by the Chairman of the Sex Discrimination Board of South Australia in the matter of *Cope* v. *Dalgety Australia Ltd T/A Bonaire Air Conditioning*[40]

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[30] H. Zelling, "Inconsistency Between Commonwealth and State Laws" (1948) 22 *A.L.J.* 45.

[31] *R.* v. *Industrial Court of South Australia; ex parte General Motors-Holden's Pty Ltd* (1975) 10 S.A.S.R. 582, 596.

[32] *Ex parte McLean* (1930) 43 C.L.R. 472, 481.

[33] *Id.*, 484.

[34] Note 30 *supra*, 50.

[35] *Clyde Engineering Co. Ltd* v. *Cowburn* (1926) 37 C.L.R. 466; *H.V. McKay Pty Ltd* v. *Hunt* (1926) 38 C.L.R. 308; *Ex parte McLean* (1930) 43 C.L.R. 472.

[36] P. Lane, *The Australian Federal System* (2nd ed. 1979) 867.

[37] Note 31 *supra*, 596.

[38] Note 2 *supra*, 466.

[39] Note 31 *supra*.

[40] Complaint No. 1, Sex Discrimination Board (South Australia) 1979.

in determining that the Sex Discrimination Act 1975 (S.A.) was inconsistent with the termination provisions of the federal award.

The General Motors-Holden ("G.M.H.") award appears to have been distinguished from the Ansett Agreement on the precise wording of the respective clauses. It is arguable that since the relevant G.M.H. provision appears to be the source of the right to dismiss without notice, it was also the source of the right to dismiss with notice. Since Clause 6B of the Ansett Agreement leaves untouched the matter of dismissal without notice, whether wrongful or otherwise, it is much easier to draw the inference that it did not purport to say anything at all about the substantive grounds of dismissal. This line of argument suggests that an award framed in the same way as the G.M.H. provision would effectively override section 18(2)(b). Mason J.[41] appears to accept this reasoning and Wilson J.[42] does not question the result in the *G.M.H.* case.

There are difficulties inherent in accepting the decision in the *G.M.H.* case. It is arguable that the right conferred was a right to terminate in accordance with the award which did not affect terminations not in accordance with the award. That is, the award did not deal with dismissals on grounds other than those enumerated in the award or wrongful summary dismissals, these remaining subject to regulation by the general law. Following this line of argument, only an award which explicitly purports to confer a right to dismiss either on the grounds of sex or on any ground whatsoever would override section 18(2)(b).

Does *Wardley* indicate the permissible ambit of a termination clause? For instance, could an award be validly framed so as to authorise dismissal on the grounds of sex? The alternative submission of the defendant Wardley relating to the ambit of section 88H of the Conciliation and Arbitration Act 1904 (Cth) appears to have been merged with the argument that inconsistency does not arise between "laws" which regulate separate and distinct subject matters.

It was suggested by Dixon J. in *Ex parte McLean* that

> . . . the laws of the State which do not regulate industry at all are not inconsistent with the exclusive authority which the Commonwealth Statute gives to the award merely because they deal with specific conduct which, as between the disputants, is dealt with by the award.[43]

Stephen J., having characterised the State Act as legislation to give effect to a "broad social policy", contrasted it with the limited purpose of the Agreement[44] and described their interaction as "no more than an intermeshing of laws".[45] Aickin J. adverted to this argument but denied that it had any application where the State law interferes with the operation of the award.[46]

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[41] Note 2 *supra*, 466.
[42] *Id.*, 488.
[43] Note 32 *supra*, 485.
[44] Note 2 *supra*, 455.
[45] *Id.*, 457.
[46] *Id.*, 479.

However, the validity of a clause which conferred a right to dismiss on the grounds of the sex, political beliefs or religion of an employee is a distinct issue. Ultimately, it raises the difficult question as to the meaning of "industrial disputes" in section 51(35) of the Constitution.

Mason J.[47] stated that an award could validly define and limit the employer's right of dismissal but did not specifically state that an award could be framed so as to authorise dismissal on the grounds of sex. It appears that an award can provide that an employer not dismiss on certain grounds if this claim formed part of the original dispute and the dispute contains the necessary element of interstateness.[48] Stephen J. stated:

> No doubt it may happen that in a particular dispute, apparently of an industrial character some question of discrimination of this sort may appear to be involved. The precise nature of its involvement may then determine whether or not the dispute is indeed an industrial dispute. However, in the present case the Agreement has all the hallmarks of being made in settlement of an entirely orthodox industrial dispute.[49]

Hence, subject to the possible limitation referred to by Murphy J.,[50] it seems that a valid award could be made which authorised sex discrimination by means of dismissal. Murphy J. queried whether the Constitution, by implication, prevented Parliament from authorising arbitrary discrimination between the sexes.

6. *Validity of the Enforcement Powers*

In the *G.M.H.*[51] case Bray C.J. was of the opinion that the power to make a declaration that the employer was subject to section 15(1)(e) of the Industrial Conciliation and Arbitration Act 1972-1978 (S.A.) would not be inconsistent with the award, since it was severable from the power to direct re-employment and to order payment of lost wages. Walters and Wells JJ.[52] did not believe that this could be severed from the power to order re-instatement or payment of lost wages.

In contrast to this the High Court in *Wardley's* case contemplated that the matter of inconsistency might depend on the nature of the order sought from the Equal Opportunity Board. Part VI of the Equal Opportunity Act 1977 (Vic.) deals with enforcement of the prohibition contained in Part III. Section 40(2) specifies the orders which the Board may make. As already noted, no question of inconsistency could arise between the orders of the Board requiring Ansett to employ Wardley and the Agreement. However, it is unclear whether the Board could order the re-employment of a dismissed employee. Wilson J.[53]

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[47] *Id.*, 463.

[48] See *e.g.*, *R.* v. *Gough; ex parte Meat and Allied Traders Federation of Australia* (1969) 122 C.L.R. 237; *R.* v. *Portus; ex parte City of Perth* (1973) 129 C.L.R. 312, 323.

[49] Note 2 *supra*, 486.

[50] *Id.*, 457.

[51] Note 31 *supra*, 591.

[52] *Id.*, 602.

[53] Note 2 *supra*, 487.

stated that the exercise of the power contained in section 40(2)(c) to order re-instatement of a former employee would be inconsistent with the provisions of the Agreement relating to seniority and other matters. Bray C.J.[54] commenting on a similar argument in the *G.M.H.* case suggested that inconsistency could be avoided by ordering re-employment with uninterrupted seniority.

The Ansett Agreement established a Grievance Board to hear appeals from dismissed pilots who had been employed by Ansett for more than twelve months. The majority of the Court did not consider that the mere existence of the grievance procedures affected the validity of Part III of the Act. The Act forming part of the general law the Board would have to exercise its discretion in accordance with its provisions. The possibility of conflicting determinations by the Grievance Board and the Equal Opportunity Board raised considerations other than section 109 such as the constitutionality of the Grievance Board having power to make a binding determination which may constitute the exercise of judicial power.[55] However, such issues aside Mason and Wilson JJ.[56] were prepared to state that the determination of the Grievance Board would override a contrary determination by the Equal Opportunity Board.

7. *Conclusion*

In view of legislation such as the Racial Discrimination Act 1975 (Cth) and section 5 of the Conciliation and Arbitration Act 1904 (Cth) an employer can never be said to possess an absolute power of dismissal, irrespective of the terms of the award. Anti-sex discrimination legislation is similarly founded upon considerations of social policy, and it appears that further measures should be taken to ensure that such legislation is given full effect and put beyond the reach of awards draftsmen.

The *Wardley* decision does not guarantee security of employment against the use of employer powers in a discriminatory manner. This is further argument in favour of measures such as the amendment of the Commonwealth Conciliation and Arbitration Act to provide that awards made under the Act shall not displace State anti-discrimination law. Alternatively, the effect of such legislation could be secured by a provision inserted into the award itself. It is likely that the New South Wales Act will be amended to outlaw the discrimination of handicapped persons. The Board has also recommended that the Act be amended to include discrimination in employment on political grounds,[57] making these issues of concern to an even wider section of the public.

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[54] Note 31 *supra*, 591.

[55] *R.* v. *Kirby; ex parte Boilermakers' Society* (1956) 94 C.L.R. 254 (H.C.); *Attorney-General of the Commonwealth* v. *The Queen; Kirby* v. *The Queen* (1957) 95 C.L.R. 529 (P.C.). But see *R.* v. *Joske; Australian Building Construction Employees' and Builders Labourers' Federation* (1973) 130 C.L.R. 87, 90.

[56] Note 2 *supra*, 467 *per* Mason J.; 487 *per* Wilson J.

[57] *The Sydney Morning Herald*, 4 August 1980, 3.