

Privy Council Appeal No. 3 of 1965

Green Cab Service Pty. Limited and others - - - - *Appellants*
v.
John Edward Whitfield and another - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER 1965

Present at the Hearing:

LORD REID

LORD MORRIS OF BORTH-Y-GEST

LORD HODSON

LORD PEARCE

LORD WILBERFORCE

(Delivered by LORD HODSON)

Shortly stated the question raised by this appeal is whether the Transport Workers Union of Australia (New South Wales Branch), which will be referred to as "The Union", is entitled to amend its Rules so as to enlarge the category of persons eligible for membership by including persons not under contracts of employment but "deemed" to be employees by virtue of provisions of the Industrial Arbitration Act 1940-1964 (N.S.W.) which will be referred to as "the Arbitration Act".

The first appellant, the Green Cab Service Pty. Limited, is the owner of about 32 taxi cabs driven by some 85 different persons who are not in their employment but drive the cabs under contracts of bailment. This appellant is an Industrial Union of employers registered as such under the Arbitration Act.

It should be explained that since about 1930 a practice developed in New South Wales whereby persons formerly employed to drive taxi cabs became bailees of the cabs under contracts and were remunerated by deduction from the takings or being paid a proportion of the takings. Eventually there were no taxi cab drivers who were employees in the ordinary sense.

The second and third appellants, being members of the Union, oppose the Union spending its funds securing and protecting the interests of persons who are no more than "deemed" to be employees. The first respondent is the Industrial Registrar under the Arbitration Act. The second respondent is the Union which is a trade union of employees registered under the Trade Union Act 1881-1959 (N.S.W.), which will be referred to as the Trade Union Act, and is also registered as an industrial union of employees under the Arbitration Act.

The appellants sought the issue of a writ of prohibition to restrain the respondents from further proceeding with an application by the Union to the first respondent (the Registrar) for approval of the amendment to the Rules which the Union desired in order to include the "deemed" employees. On the 3rd November 1964 the Supreme Court of New South Wales discharged an order nisi for prohibition which the appellants had obtained and subsequently, on the 16th December 1964, granted leave to appeal to Her Majesty in Council.

The question turns first on the construction of section 5 of the Arbitration Act which, so far as is material to this appeal, reads:—"In this Act, unless the context otherwise indicates, . . . "employee" means person employed in any industry, whether on salary or wages or piece-work rates, or as member of a butty-gang, . . . and includes any person who is, pursuant to any provision of this Act, deemed to be an employee for the purposes of this Act." The words from "and includes" to the end of the section were added by amendment in 1964.

In order to ascertain who are deemed to be employees one turns to section 88E (added by the Industrial Arbitration Amendment Act of 1959) which provides:—

"(1) The following persons if not otherwise employees employed to do the work hereinafter referred to shall, for the purposes of this Act be deemed to be employees and for the purposes of the Annual Holidays Act, 1944, the Long Service Leave Act, 1955, and any Act amending or replacing any of those Acts be deemed to be workers:—

(a) Any person not being the person in whose name a taxicab, motor omnibus, private hire car or public motor vehicle respectively is registered who drives such taxi cab, motor omnibus, private hire car or public motor vehicle. In such case the employer shall be deemed to be the person in whose name such vehicle is registered."

Then follows a list of other persons such as cleaners, painters and bread deliverers who are deemed in certain circumstances to be employees and in sub-paragraph (h) there is added "any person" who is one of a prescribed class of persons. Section 88E sub-section (2) provides that the Governor may make regulations for the purposes of paragraph (h) supra.

The important words to be construed in sub-section (1) of section 88E are "for the purposes of this Act" and it is to be noted that there is no reference to the Trade Union Act, an omission relied upon by the appellants.

The dispute between the parties arose in this way:—

The Union made an application on the 18th September 1962 to the Industrial Commission for an award to cover persons deemed to be employees by virtue of section 88E of the Arbitration Act and in particular sought for payment of annual leave at the rate of a minimum of £25 a week for a period of three weeks per annum to each deemed employee. These would include the drivers who drive the appellants' cabs. The application failed for on the 12th November 1963 the Industrial Commission held by a majority that there was no jurisdiction under the rules of the Union to enrol among its members persons who were merely deemed to be employees by virtue of the provisions of section 88E of the Arbitration Act. The Union could not therefore, the Court held, apply for any award on behalf of "deemed" as opposed to "true" employees.

Rule 5 of the registered rules, which is the material rule, provides:—"The Union shall consist of an unlimited number of persons (males and females) who are working in or in connection with the industry or industries and/or occupations and/or avocations and/or industrial pursuits of (a) The transport . . . of persons . . . on vehicles . . .". The Union then applied to amend rule 5 by adding at the end of sub-paragraph (a) the words "Including persons who are by virtue of the Industrial Arbitration Act 1946-1960 deemed the employees in or in connection with the aforesaid industry or industries and/or occupations and/or avocations and/or industrial pursuits."

Before the Registrar had the opportunity of dealing with the application for amendment the appellants applied to the Supreme Court of New South Wales for a Rule Nisi of Prohibition calling upon the respondents to show cause why a writ should not issue to restrain them from proceeding further with the application.

The appellants' first contention is that an application by the Union for alteration of rules so as to include in its membership persons not held to be covered by the constitution should be dealt with in the same way as an

original application for registration as an industrial union of employees. This contention was supported by a number of decisions of the Industrial Commission of New South Wales and has been accepted as correct.

The appellants' second and main contention was founded on the language of the Arbitration Act section 8(1) which reads as follows:—"The registrar may, on application made as hereinafter provided, register under this Act any *trade union of employees*. On such registration the trade union shall be an industrial union until such registration is duly cancelled." The argument is that the phrase "trade union of employees" used in section 8 is a composite phrase and that the word "employees" there means employees in the common law sense so that a "trade union of employees" is restricted in its membership solely to employees in that sense.

McKeon J. in an unreported judgment given in the Industrial Commission of New South Wales in *Hire Car and Taxi Drivers (State) Conciliation Committee* has pointed out that under the Trade Union Act a trade union is registered as a trade union simpliciter and is not registered as a trade union of employees or as a trade union of both employees and employers or as a trade union composed in some other way. He went on to say: "Nevertheless, it is a historical fact that trade unions registered under the Act have always been divisible into two classes only, namely, trade unions which were in fact composed of employees and trade unions which were in fact composed of employers. An employee is a person (a servant) working under a contract of employment with another person (a master), and the latter is the employer of that employee. At common law a trade union of employees is, and always has been, a trade union composed of persons who work as employees in the employment of other persons who are the employers of those employees; a trade union of true employees. As I have just pointed out, it has always so happened that a trade union registered under the Trade Union Act, which was a trade union of employees as distinct from a trade union of employers, has been a trade union of employees in the common law sense, and never anything else. Ergo, whenever a trade union registered under that Act has come forward as a trade union of employees to be registered as an industrial union, it has been a trade union of true employees. So far as the Industrial Arbitration Act is concerned it is equally not open to doubt, I think, that up to 1943 at least a like situation existed."

The actual phrase "trade union of employees" first found its place in the Industrial Arbitration and Trade Union Acts in 1959 but the expression "deemed" employee had already appeared in the Industrial Arbitration (Amendment) Act (No. 25) 1943 when a new sub-section 5(2) was inserted which reads as follows:—

5.(2) "A person who is engaged in plying for hire or in the delivery of goods with any vehicle or vessel the use of which is obtained by that person under a contract of bailment (other than a hire purchase agreement) in consideration of the payment of a fixed sum or a share in the earnings or otherwise shall, where the work in which such person is so engaged is work for which, by an award or industrial agreement, a price or rate has been fixed for persons performing such work, be deemed, for the purposes of this Act, to be an employee employed by the person from whom the use of the vehicle or vessel is so obtained, and such last mentioned person shall, for the purposes of this Act, be deemed to be the employer of such employee unless such persons or either of them establishes to the satisfaction of the tribunal in which proceedings for a breach of the award or industrial agreement are instituted that the contract of bailment was a *bona fide* contract and was not entered into for the purpose of avoiding the operation of the award or industrial agreement."

It will be observed that this deeming provision is in different terms from that contained in section 88E which is now under consideration. It was held by the majority of the Commission that the purpose of the statutory fiction introduced by the 1943 amendment was clear: it was to entitle taxi drivers who were not true employees to the benefits prescribed by an award or industrial agreement made under the Arbitration Act for taxi cab

driver employees with the consequential right to enforce that entitlement by the processes of law available under the Act to real employees. It was held that there was no other purpose since the language of section 5(2) of the 1943 Act was only applicable to real employees in favour of whom a price or rate had been fixed by an award or industrial agreement. Furthermore an absurd situation would have arisen if this section 5(2) had any effect on section 8(1) for then a trade union composed of drivers of taxi cabs under contracts of bailment, who were not true employees, could have obtained registration as an industrial union if at the time a price or rate for the work of persons so engaged was fixed by an award or industrial agreement under the Act but could not have obtained such registration if such a price or rate was not so fixed. It would be absurd if qualification for registration were to depend on whether or not there was in existence an award or industrial agreement fixing a price or rate of wage for the work of driving taxi cabs.

This judgment was relied upon by the appellants, but the two reasons given in McKeon J.'s judgment, reasons which depend on the language of section 5(2) of the Act of 1943, have no application to the present situation. The purposes of this Act in section 88E are not limited by their context so as to exclude the making of awards which is one of the main purposes of the Act, and there is no compelling absurdity to drive the reader from the conclusion that the words "deemed to be employees" should be read at their face value. As there are no master and servant taxi cabs in Sydney it would be strange if there was no provision for the use of the award making machinery in the case of the drivers of taxi cabs.

Relying upon the history of trade unions which they contend is enshrined in the Trade Union Acts the appellants argue that the jurisdiction of the Registrar was limited to entertaining applications for approval to alteration of rules enlarging membership of unions to those providing for the admission of persons who could validly be members of a "trade union of employees". It is said that the phrase "trade union of employees" cannot be given the extended meaning provided for by the definition in section 5 of the Arbitration Act and that persons deemed to be employees by virtue of section 88E of the same Act cannot validly be members of a "trade union of employees".

The reason given is that the scheme of the Arbitration Act is to place employers and employees on different sides of the record in proceedings under the Act, in the constitution of conciliatory committees and in other matters provided for by the Act. The introduction of "deemed employees" who themselves may be employers of employees into this structure would it is argued produce results verging on the absurd for a deemed employee may simultaneously belong to the appropriate employers organisation while being a representative of the employees as a "deemed" employee.

Various other examples of results are given which are said to point against the admissibility of the employees as defined by the 1964 amendment in a trade union of employees, and attention is drawn to the fact that the class of notional employees is not closed for there is power to extend the class by regulation.

No doubt it is true that odd situations may arise but there is nothing so absurd in the result as to make it impossible to include "deemed employees" as employees for the purposes of the Act. The purposes of the Act are principally the purposes of "industrial arbitration" and the contention of the appellants would render the deeming provision ineffective in so far as taking part in industrial arbitration was concerned though no doubt leaving it open to the deemed employees to reap the benefits of the results of arbitration.

Furthermore their Lordships find nothing in the context to make it necessary to give to the deeming provision some meaning which makes it inapplicable to section 8(1) of the Arbitration Act. The purpose of this amendment must be to enable an award to be made in favour of deemed employees.

It was shown by the case of *Feldman v. Stewart* [1961] A.R. (N.S.W.) 402 another decision of the Industrial Commission of New South Wales that section 88E does not operate so as to apply an existing award obtained for real employees to deemed employees. The deemed employees require future awards of their own and in order to do this they must be able to obtain membership of a union. Unless the amendment has this effect it misfires.

A second submission by the appellants can be shortly stated. Before the new rule can become effective it must be registered by the Registrar of Trade Unions and it is said that the terms of the Trade Union Act would prevent this. Reliance is placed on section 14(7) which was added by amendment in 1959. It reads "An application to register the trade union may, where such trade union in the opinion of the Registrar holds itself out to be or purports to be a trade union of employees, be refused by the Registrar—(a) if he is of the opinion that such trade union is not a *bona fide* trade union of employees, . . .". Before considering its terms it is necessary to have in mind the previous position. There was nothing in the Act to prohibit the rules of a trade union from making any class of persons eligible for membership. It would have been perfectly lawful to have a trade union including both persons employed to drive taxi cabs and bailees to whom taxi cabs were let out. But before the 1959 amendment to the Arbitration Act such a trade union could not have been registered as an industrial union. Now it can be. It is true that there is nothing comparable to the amended section 5 or to section 88E of the Arbitration Act in the Trade Union Act and therefore as regards the Trade Union Act "employees" still has its old common law meaning. The question then is whether the new section 14(7) in any way prevents the registration under the Trade Union Act of a trade union whose rules make eligible for membership both employees and persons who are not employees. In their Lordships' opinion it does not. It has no application at all unless the union in the opinion of the Registrar holds itself out to be or purports to be a trade union of employees. But by tendering for registration a new rule making eligible persons who are not employees in the common law sense this union has made it quite clear that it is no longer holding itself out to be a trade union of employees in the sense in which the word employees is still used in the Trade Union Act. Accordingly there is nothing in the trade union to prevent registration of the new rule by the Registrar of Trade Unions.

Their Lordships are of opinion that the judgment of the Supreme Court of New South Wales is correct and that this appeal should be dismissed. They will humbly advise Her Majesty accordingly. The appellants must pay the costs of the appeal.

In the Privy Council

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OTHERS

v.

JOHN EDWARD WHITEFIELD AND ANOTHER

DELIVERED BY
LORD HODSON

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