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Konrad v Victoria Police & Ors [1999] FCA 988
Nos. VG 44 of 1998, VG 58 of 1998, VG 59 of 998, VG 60 of 1998
Constitutional Law - Industrial Law - Statutes
(1999) 91 FCR 95, (1999) 165 ALR 23
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Konrad v Victoria Police [1999] FCA 988

KONRAD V VICTORIA POLICE (STATE OF VICTORIA) and MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

NO. VG 44 OF 1998

ALLAN STUART GLASGOW V STATE OF VICTORIA and MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

NO. VG 58 OF 1998

DAVID JOHN ORCHARD V STATE OF VICTORIA and MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

NO. VG 59 OF 1998

PATRICK BERNHARD GEHRIG V STATE OF VICTORIA AND MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

NO. VG 60 OF 1998

JUDGES: RYAN, NORTH & FINKELSTEIN JJ

PLACE: MELBOURNE

DATE: 6 AUGUST 1999

CONSTITUTIONAL LAW - State as employer - whether immune from Division 3 of Part VIA of the *Industrial Relations Act 1988* (Cth) - extent of immunity - implied limitations on powers of Commonwealth Parliament

INDUSTRIAL LAW - unfair dismissal - whether a member of the police force is an employee - meaning of employee in Division 3 of Part VIA of the *Industrial Relations Act 1988* (Cth) - whether common law meaning

STATUTES - interpretation - statute enacted to adopt an international convention

WORDS & PHRASES - "employee" - "worker"

Industrial Relations Act 1988 (Cth) - Part VIA Division 3, ss 170DE, 170EE

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 applied

Attorney-General for New South Wales v Perpetual Trustee Company (Ltd) (1952) 85 CLR 237; on appeal (1955) 92 CLR 113 discussed

Autistic Association of New South Wales v Dodson [1999] FCA 439 distinguished

Commonwealth v Quince (1944) 68 CLR 227 cited

Enever v The King (1903) 3 CLR 969 discussed

Fisher v Oldham Corporation [1930] 2 KB 364 cited

Kaye v Attorney-General for Tasmania (1956) 94 CLR 193 cited

Koowarta v Bjelke-Petersen (1982) 153 CLR 168 applied

Melbourne Corporation v Commonwealth (1947) 74 CLR 31 applied

Menner v Falconer, Commissioner of Police (1997) 74 IR 472 disapproved

National Labour Relations Board v Hearst Publications 322 US 111 (1943) discussed

Queensland Electricity Commission v The Commonwealth (1985) 159 CLR 192 applied

R v Walker (1858) 27 LJMC 207 cited

Re Australian Education Union; Ex parte State of Victoria (1995) 184 CLR 188 applied

Re Cormier and Alberta Human Rights Commission (1984) 14 DLR (4th) 55 discussed

Re Pannu and Prestige Cab Limited (1986) 28 DLR (4th) 268 cited

Re Prue and City of Edmonton (1984) 15 DLR (4th) 700 cited

Robichaud v Canada (1987) 40 DLR (4th) 577

Rosin v Canada (1990) 131 NR 295 discussed

Secretary of Labour v Lauritzen 835 F 2d 1529 (1987) discussed

Short v J & W Henderson Ltd (1946) 62 TLR 427 discussed

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16 discussed

Stevenson Jordan and Harrison Ltd v MacDonald & Evans [1952] 1 TLR 101 discussed

Yewens v Noakes (1880) 6 QBD 530 cited

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

ON APPEAL FROM A JUDGMENT OF A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

VG 44 OF 1998

BETWEEN: KARL KONRAD

Appellant

AND: VICTORIA POLICE (STATE OF VICTORIA)

First Respondent

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

Second Respondent

VG 58 OF 1998

BETWEEN: ALLAN STUART GLASGOW

Appellant

AND: STATE OF VICTORIA

First Respondent

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

Second Respondent

VG 59 OF 1998

BETWEEN: DAVID JOHN ORCHARD

Appellant

AND: STATE OF VICTORIA

First Respondent

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF

POLICE FOR THE STATE OF VICTORIA

Second Respondent

VG 60 OF 1998

BETWEEN: PATRICK GEHRIG

Appellant

AND: STATE OF VICTORIA

First Respondent

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF

POLICE FOR THE STATE OF VICTORIA

Second Respondent

JUDGE: RYAN, NORTH AND FINKELSTEIN JJ
DATE OF ORDER: 6 AUGUST 1999
WHERE MADE: MELBOURNE

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. Each appeal be allowed.

2. Set aside the orders of the trial judge made on 22 January 1998 and 6 February 1998 and in lieu thereof order that the matters be remitted to a single judge of the Federal Court of Australia for rehearing in accordance with the judgment of this Court.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

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BETWEEN: PATRICK GEHRIG

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Second Respondent

JUDGE: RYAN, NORTH AND FINKELSTEIN JJ

DATE: 6 AUGUST 1999

PLACE: MELBOURNE

REASONS FOR JUDGMENT

RYAN J:

1 These appeals raise, in the first place, a relatively narrow question of construction of Division 3 of Part VIA of the *Industrial Relations Act 1988* ("the Act"). By s 170CA(1) of the Act it was provided:

> *"The object of this Division is to give effect, or give further effect, to:*
>
> (a) the Termination of Employment Convention; and
>
> (b) the Termination of Employment Recommendation, 1982, which the General Conference of the International>> <<Labour>> Organisation adopted on 22 June 1982 and is also known as Recommendation No. 166, and a copy of the English text of which is set out in Schedule 11."

2 The question is whether, on its proper construction, Division 3 of the Act has application to members of the police force of the State of Victoria constituted under the *Police Regulation Act 1958* (Vic). Section 13(3) of the *Police Regulation Act* provides:

> *"Every person who has taken and subscribed such oath shall be taken to have, from the day on which such oath has been taken and subscribed, thereby entered into a written agreement with, and shall be thereby bound to serve Her Majesty as a member of the force, and in whatsoever capacity he is hereinafter required to serve, and at the current rate of pay of any rank to which he is appointed or reduced until legally discharged; and such agreement shall not be set aside cancelled or annulled for want of reciprocity, but every such agreement shall be determined by the discharge dismissal or other*

removal from office of any such person, or by the acceptance of the resignation of the Chief Commissioner or of any Deputy or Assistant Commissioner by the Governor in Council, or by the acceptance of the resignation of any other member of the force by the Chief Commissioner."

3 Some light is cast on the interpretation of Division 3 of Part VIA of the Act by its second and third sections which provided:

"170CB An expression has the same meaning in this Division as in the Termination of Employment Convention.

170CC The regulations may exclude specified employees from the operation of specified provisions of this Division. An exclusion has effect only if:

(a) it is permitted by paragraph 2, 4 or 5 of Article 2 of the Termination of Employment Convention; and

(b) in respect of an exclusion permitted by paragraph 2 of that Article - it is limited in such a way as to provide adequate safeguards as mentioned in paragraph 3 of that Article."

4 The principal operative provision in Division 3 was s 170DE(1) which stipulated:

"An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service."

5 The English text of the Convention concerning Termination of Employment at the Initiative of the Employer ("the Convention") is reproduced as Schedule 10 of the Act. The wide reach of the Convention is indicated, in Part I, in these terms:

"Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1 This Convention applies to all branches of economic activity and to all employed persons.

2 A Member may exclude the following categories of employed

persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3 Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4 In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5 In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the <<International>> <<Labour>> Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer."

6 The Convention's central prescription which is reflected by s 170DE(1) of

the Act, can be found in Article 4:

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."*

7 A procedural protection against termination of employment is to be found in Article 7 of the Convention:

> *"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."*

8 The Convention then goes on to provide machinery for a worker to appeal against unjustifiable termination of employment by stipulating:

> *"Article 8*
>
> 1 A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
>
> 2 Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
>
> 3 A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination."

9 The learned primary Judge in his reasons for dismissing the application by the present appellant in VG 44 of 1998, Mr Konrad, noted that various "provisions of the Convention are redolent with references to `the employer' and `a worker'" and went on to conclude:

> *"In my view the availability of a remedy under the Division depends on the existence of an employment relationship. See* Capay Holdings Pty Ltd v Slattery *(Full Court, 11 December 1996, IRCA, unreported).*
>
> *An employment relationship will not exist where the putative employer of the worker is not, in law, the employer of the worker and the worker is not, in law, the employee of such person. Accepting that the Division, Convention and Recommendation must all be generously construed, in my view it would strain the language of each such instrument to hold that an employment relationship exists where in law the person who serves is not the employee of the person served."*

10 Earlier in the same reasons it was concluded that Mr Konrad had not been an employee, a conclusion which his Honour considered himself constrained to reach by *Attorney-General for New South Wales v Perpetual Trustee Company (Limited) (1952) 85 CLR 113* as affirmed by the Privy Council under the same name (1955) 92 CLR 113. After noting that the provisions of the *Police Regulation Act 1899-1947* (NSW) were not materially distinguishable from the current provisions of the Victorian *Police Regulation Act*, his Honour cited this observation from the opinion of the Privy Council in the *Perpetual Trustee* case, at 121:

> *"... neither changes in organization nor the imposition of ever-increasing statutory duties have altered the fundamental character of the constable's office. Today as in the past he is in common parlance described in terms which aptly define his legal position as `a police officer', `an officer of justice', `an officer of the peace'. If ever he is called a servant, it is in the same sense in which any holder of a public office may be called a servant of the Crown or of the State."*

11 The conclusion which the Privy Council reached was expressed in these terms, at 129:

> *"Their Lordships have made many references to* Quince's Case (1944) 68 CLR 227 *which was in the High Court regarded as indistinguishable in principle from the present case, and have freely borrowed from the judgments of Rich, Starke and McTiernan JJ, in that case. In their view its facts, at least as clearly as those of the present case, support the view that the master and servant relation, upon which the action* per quod servitium amisit *rests, is wholly different in kind from the relation of the Crown to a member of the armed forces, whether Field Marshal or private soldier, and that a rule of law which applies to one should not be applied to the other unless there is compelling authority to do so. The review of the case law on the subject has shown that is far from being the fact. Their Lordships share the opinion entertained by all the judges of the High Court that the case of the constable is not in principle distinguishable from that of the soldier. Certain differentiating features such as the right given to the police under the* Industrial Arbitration Act 1940-1948 *cannot affect the position.*
>
> *Their Lordships can now express their final opinion upon the case. They repeat that in their view there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original not delegated and is exercised at his own discretion by virtue of his office : he is a ministerial officer exercising statutory rights independently of contract. The essential difference is recognized in the fact that his relationship to the government is not in ordinary parlance described as that of servant and master. Nor, as would appear from quotations that have been made and others that might have been made from the dissentient judgments in* Quince's Case *and*

the present case, would a different view be taken upon this point by learned judges who have come ultimately to a different conclusion. It is rather upon what has been called the second aspect of the question that the difference arises. Their Lordships, differing with great respect upon this part of the case from the judgment of Latham CJ, in Quince's Case *and from Dixon CJ and Williams J, in the present case, think that this form of action should not be extended beyond the limits to which it has been carried by binding authority or at least by authority long recognized as stating the law. Their review of the relevant case law shows that, where in recent times it has been extended to cases of persons in the public service who (to repeat the now familiar words) are not servants of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties; the extension has been made without argument or deliberation. The form of action appears, as Lord Sumner said, to be a survival from the time when service was a status. That status lay in the realm of domestic relations. It would not in their Lordships' view be in accord with modern notions or with the realities of human relationships today to extend the action to the loss of service of one who, if he can be called a servant at all, is the holder of an office which has for centuries been regarded as a public office.*

12 The learned primary Judge's view of the conclusion reached by the Privy Council in *Perpetual Trustees* was that "it unambiguously provides that a member of a police force is not an employee of the Crown". In the same context it was said that in the High Court a majority of the six Justices who sat in *Perpetual Trustees* "expressed views inconsistent with the proposition that police constables are employees of the Crown or the State".

13 In my view the critical question for the resolution of the first issue raised by these appeals is not whether police officers are employees of the Crown or the State so as to attract to them the application of common law principles such as those required by the cause of action for loss of services or *per quod servitium amisit*. Rather, it is whether police officers are employees in the sense contemplated by Division 3 of Part VIA of the Act.

14 I gratefully adopt the history and analysis of Division 3 which has been set out in the reasons for judgment of Finkelstein J in the present appeals and by Moore J in *Ward v Commissioner of Police* (1998) 80 FCR 427. That history and analysis demonstrates that Division 3 was intended to apply to all workers whether or not in a relationship of employer and employee recognised by the common law. The express reference in Report VIII(2) of the ILO Secretariat to proposals by certain governments for "provision for the possible exclusion of, or special provision for, one or more categories of workers such as the armed forces, the police ..." followed by a recommendation which mirrored Article 2(5) of the Convention as adopted on 2 June 1982 makes it clear that the framers of the Convention intended it to apply to a very wide range of workers, including police, unless a country took measures to exclude from the application of the Convention "other limited categories of employed persons in respect o which special problems of a substantial nature arise in the light of the particular

conditions of employment of the workers concerned or the size or nature of the undertaking that employs them". One such limited category of employed persons obviously comprised members of a police force of a country.

15 Accordingly, Article 2(5) of the Convention, in the light of that history, must be taken as contemplating the exclusion of police officers by appropriate domestic prescription. That has not generally been done in Australia although the facility to do so by regulation was expressly preserved by s 170CC of the Act as amended by Act No 97 of 1994. That facility was availed of when Reg 30BB made by S R No 386 of 1994 as amended by S R No 434 of 1995 excluded, until 1 January 1997, "an employee who is appointed, employed or otherwise engaged under the *Australian Federal Police Act 1979"*. It follows that Division 3 of Part VIA of the Act, on its proper construction, applied to persons who were employed as police officers in the police force of one or other of the States.

16 The second question which arises for resolution in these appeals is whether s 170DE or s 170EE of the Act, on the assumption that they apply to the termination of employment of persons employed in the police force of a State, are invalid as destructive or restrictive "of the continued existence of the States or their capacity to function as governments"; see *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 per Mason J at 217, a passage adopted by six members of the High Court in *Re Australian Education Union Ex parte Victoria* (1995) 184 CLR 188 at 231. In the latter case, the question was expressly left open, at 234, whether a power reposed in the Commonwealth Industrial Relations Commission to regulate by award the termination of the employment of State employees on grounds other than redundancy had the requisite destructive or restrictive effect. In my view, neither the governmental functioning nor the continued existence of a State is imperilled by requiring it to have a valid reason for terminating the employment of a member of its police force. A prescription of that kind says nothing about the selection of the State's police officers. Nor does it impinge on the authority of the State by allowing a Commonwealth regulator of wages and conditions of employment to prescribe the numbers of persons whom that State should employ in its police force. All it does is say to the State that it must not terminate the employment of a member of its police force without his or her consent unless it has a valid reason or valid reasons connected with the employee's capacity or conduct or based on the operational requirements of the police force. It is to be remembered that "valid reason" in this context is to be understood in the manner indicated by Northrop J in *Selvachandran v Peteron Plastics Pty Ltd* (1996) 62 IR 371 where his Honour said at 373:

> *"Section 170DE(1) refers to `a valid reason, or valid reasons', but the Act does not give a meaning to those phrases or the adjective `valid'. A reference to dictionaries shows that the word `valid' has a number of different meanings depending on the context in which it is used. In the* Shorter Oxford Dictionary, *the relevant meaning given is: `2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value.' In the* Macquarie Dictionary *the relevant meaning is `sound, just, or*

well founded; a valid reason'.

In its context in s 170DE(1), the adjective `valid' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must `be applied in a practical, commonsense way to ensure that' the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd *(1995) 60 IR 1, when considering the construction and application of s 170DC."*

17 I do not consider that the need to have a valid reason of that kind before terminating the employment of a member of its police force is destructive or restrictive of the continued existence or governmental autonomy of a State. It is true that a corollary of the availability to a State police officer of relief under Division 3 of Part VIA of the Act is that the State cannot capriciously or maliciously terminate, with impunity, the employment of such an officer. However, I find it difficult to accept, as a necessary incident of the existence or functioning of a State as a polity, the reservation to it of an unfettered power to terminate the employment of a police officer on a whim or out of spite or otherwise without a valid reason.

18 That conclusion leads to an examination of whether the relief available under s 170EE, including as it did a power in the Court to order reinstatement of a member of a State police force, struck at the capacity of the State to function as a government. Section 170EE(1) and (2) provided:

"(1) In respect of a contravention of a provision of this Division (other than section 170DB or 170DD) constituted by the termination of employment of an employee, the Court may, if the Court considers it appropriate in all the circumstances of the case, make the following orders:

(a) an order requiring the employer to reinstate the employee by:

(i) reappointing the employee to the position in which the employee was employed immediately before the termination; or

(ii) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination; and

(b) if the Court makes an order under paragraph (a):

(i) any order that it thinks necessary to maintain the continuity of the employee's employment; and

(ii) an order requiring the employer to pay to the employee the remuneration lost by the employee because of the termination.

(2) If the Court thinks, in respect of a contravention of a provision of this Division (other than section 170DB or 170DD) constituted by the termination of employment of an employee, that the reinstatement of the employee is impracticable, the Court may, if the Court considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay to the employee compensation of such amount as the Court thinks appropriate."

19 The power conferred by sub-s (1) was not to be equated with a general power to direct the State which persons it should appoint to its police force. It was confined to requiring the State to reinstate the employment of a person whom the State, in the untrammelled exercise of one of its governmental functions, had selected for service in its police force, who had served any reasonable probationary period during which the application of the Act was excluded by Reg 30B and whose employment had presumptively been terminated otherwise than for a valid reason. When all those qualifications are taken into account, to subject the State to an order for reinstatement which the Court considers appropriate in all the circumstances and which the Court does not think impracticable would, I consider, impose a restriction on the State's functioning as a government which is so negligible as to be almost solely theoretical.

20 I agree with Finkelstein J that, for the reasons explained by him, this Court has jurisdiction to entertain these appeals.

21 For these reasons, I would allow the appeals, set aside the orders of the primary Judge and remit the matter of each appeal for rehearing.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Ryan.

Associate:

Dated: 6 August 1999

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY VG 44 OF 1998

VG 58 OF 1998

VG 59 OF 1998

VG 60 OF 1998

BETWEEN: KARL KONRAD

Appellant

AND: VICTORIA POLICE (STATE OF VICTORIA) and

MURRAY NEIL COMRIE (CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA)

Respondents

BETWEEN: ALLAN STUART GLASGOW

Appellant

AND: STATE OF VICTORIA and

MURRAY NEIL COMRIE (CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA)

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BETWEEN: DAVID JOHN ORCHARD

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AND: STATE OF VICTORIA and

MURRAY NEIL COMRIE (CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA)

Respondents

BETWEEN: PATRICK BERNARD GEHRIG

Appellant

AND: STATE OF VICTORIA and

MURRAY NEIL COMRIE (CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA)

Respondents

JUDGE: RYAN, NORTH AND FINKELSTEIN JJ
DATE: 6 AUGUST 1999
PLACE: MELBOURNE

REASONS FOR JUDGMENT

NORTH J:

22 I agree with Finkelstein J that the appeal should be allowed, the orders of the trial Judge should be set aside, and the matter should be remitted for re-

hearing. With one exception I agree with the reasons given by his Honour for these orders. The exception is that, in my view, to the extent that s 170EE of the *Industrial Relations Act 1988* (Cth) (the Act) gives the Court power to order an employer to reinstate an employee who is dismissed in breach of the Act, the section is valid.

23 The provision is invalid if it operates to destroy or curtail the capacity of a State to function as a government: *Re Australian Education Union: Ex Parte State of Victoria* (1995) 184 CLR 188 at 231 (*Re AEU*); *Victoria v The Commonwealth* (1996) 187 CLR 416 at 498.

24 Whether this is so will often be a question of broad impression. In *Re AEU* the High Court held that the Act was invalid insofar as it prevented a State from dismissing employees on grounds of redundancy. Several factors may explain this view. Redundancy arises when an employer has no further need for a job to be done. Large scale redundancies in the public service have occurred in recent years. They have followed fundamental restructuring of the work of the public service. The result has been that State governments no longer require many jobs to be done which had previously been done. To impede a State in a fundamental reorganisation of its workforce may be seen as intruding into its ability to implement a structure for government administration, and to compel it to retain employees which it does not need. In that sense it is quite distinguishable from, for example, the termination of an employee for disciplinary reasons. Such a termination does not relate to the structuring of the State workforce but rather relates to the composition of the workforce by persons conforming to appropriate behavioural standards. Thus, the reasoning that may have led the High Court to determine that the Act could not apply to terminations by the States on grounds of redundancy does not apply to terminations for other reasons.

25 The scope of the power to reinstate has been defined by the Court's interpretation of some of the provisions of the Act. Thus, the power arises only if the Court finds that there was no valid reason for the termination. In *Selvachandran v Peteron Plastics Pty Ltd* (1996) 62 IR 371 at 373 Northrop J said:

> *"In its context in s 170DE(1), the adjective `valid' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful, or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must `be applied in a practical, commonsense way to ensure that' the employer and employee are each treated fairly, see what was said by Wilcox CJ in* Gibson v Bosmac Pty Ltd *(1995) 60 IR 1, when considering the construction*

and application of s 170DC."

26 See also *Kerr v Jaroma Pty Ltd* (1996) 70 IR 469 at 476; *Cosco Holdings v Thu Thi Van Do* (1997) 77 IR 94 at 98-100; *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370 at 372; *Murdoch University v Mainsbridge* (1998) 84 IR 111 at 113-116; *Qantas Airways v Cornwall* [1998] FCA 865; *Department of Justice - Office of Corrections v Hepburn* [1994] FCA 114.

27 Further, the power to order reinstatement was governed by several limitations to be found in s 170EE in the form it took at the time of the dismissals in question. Reinstatement could not be ordered if it was impracticable and additionally, it could only be ordered if the Court considered it appropriate in all the circumstances. This latter provision was introduced by ss 9 and 10 of the *Industrial Relations and Other Legislation Amendment Act* (No 168 of 1995) with effect from 15 January 1996. It therefore applied to the four dismissals presently under consideration which occurred in about late 1996. The amendments considerably mitigated the effect of the previous form of the section. At the time of these dismissals s 170EE provided:

"(1) In respect of a contravention of a provision of this Division (other than section 170DB or 170DD) constituted by the termination of employment of an employee, the Court may, if the Court considers it appropriate in all the circumstances of the case, make the following orders:

(a) an order requiring the employer to reinstate the employee by:

(i) reappointing the employee to the position in which the employee was employed immediately before the termination; or

(ii) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination; and

(b) if the Court makes an order under paragraph (a):

(i) any order that it thinks necessary to maintain the continuity of the employee's employment; and

(ii) an order requiring the employer to pay to the employee the remuneration lost by the employee because of the termination.

(2) If the Court thinks, in respect of a contravention of a provision of this Division (other than section 170DB or 170DD) constituted by the termination of employment of an employee, that the reinstatement of the employee is impracticable, the Court may, if the Court considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay to the employee compensation of such amount as the Court thinks appropriate."

28 In *Perkins v Grace Worldwide Aust Pty Ltd* (1997) 72 IR 186 at 189-190 the Full Court of the Industrial Relations Court of Australia (Wilcox CJ, Marshall & North JJ) said:

> *(i) The meaning of "impracticable"*
>
> In Patterson v Newcrest Mining Ltd (1996) 68 IR 419 Wilcox CJ said at 420:
>
> "The word `impracticable' has caused difficulty in relation to unlawful termination claims. It appears in subs (2) and has led judges of the Court, including myself, to describe the scheme of s 170EE as one providing a primary remedy of reinstatement and a secondary remedy of compensation where reinstatement is impracticable. These comments must be read in the light of the amendments, where they apply, requiring the Court to reach a determination that it is `appropriate in all the circumstances of the case' to order reinstatement. Contrary to the submission put by counsel for the appellant, it is my opinion that the matter of appropriateness, where that concept applies, is not restricted to the form of a reinstatement but applies to the initial question whether reinstatement shall be ordered or not."
>
> Wilcox CJ said he was "content to adhere" to what he said in Nicholson v Heaven & Earth Gallery Pty Ltd (1994) 1 IRCR 199 at 210; 57 IR 50 at 60 regarding the meaning of `impracticable'. He added (at 421):
>
> "The requirement to consider the impracticability of reinstatement necessarily requires the Court to have regard to all the relevant circumstances of the case relating to the employer and the employee; as I said in Nicholson, to evaluate the practicability of reinstatement order in a common sense way."
>
> von Doussa J agreed with the Chief Justice's construction of the word "impracticable" in s 170EE of the Act. North J did not find it necessary to deal with that issue.
>
> In Nicholson, Wilcox CJ said at 210; 60-61:
>
> "It is important to note that Parliament stopped short of requiring that, for general compensation to be available, reinstatement be impossible. The word "impracticable" requires and permits the Court to take into account all the circumstances of the case, relating to both the employer and employee, and to evaluate the practicability of a reinstatement order in a commonsense way. If a reinstatement order is likely to impose unacceptable problems or embarrassments, or seriously affect productivity, or harmony within the employer's business, it may be `impracticable' to order reinstatement, notwithstanding that the job remains available."

In Liddell v Lembke (t/a Cheryl's Unisex Salon) (1994) 1 IRCR 466 at 487; 56 IR 447 at 466, Wilcox CJ and Keely J said:

"Plainly, it was Parliament's intention that the primary remedy for unlawful termination should be reinstatement and that compensation should be available only where this was impracticable.

The precise meaning of `impracticable' in this context should be left to another day; the question is one of general importance and it was not fully argued in this case. But, although `impracticable' does not mean `impossible', it means more than `inconvenient' or `difficult'. The imposition of such a stringent limitation on the Court's power to award compensation, rather than order reinstatement, is inconsistent with the notion that Parliament intended the Court to have an open discretion whether to intervene at all."

29 In my view the limitations in the legislation as interpreted by the Courts on the circumstances in which reinstatement may be ordered confine the remedy to a restricted type of case. To require a State to reinstate an employee who has been unjustifiably dismissed, in circumstances where it is not impracticable to reinstate the person and where it is otherwise appropriate to reinstate the person, is not an undue interference with the capacity of the State to function as a government.

30 Against this conclusion it is suggested that to require a State to reinstate a police officer in such circumstances is so destructive of the authority of management of a disciplined force that it amounts to an undue interference with the capacity of a State to function as a government. Without evidence to support such a conclusion, I am not persuaded by this approach. Indeed it is likely to be more destructive of the authority of the management of a disciplined force if that management is permitted, without correction, to make unjustified decisions which could be reversed without practical difficulty against members of the force. The administration of the force is more likely to retain the necessary respect if it is compelled by law to act properly and reverse the consequence of any previous failure to do so. Thereby serving police officers will be assured that the administration of the force will ultimately act justly and in accordance with the law. Police forces in Australia have at times been subject to judicial inquiries which have resulted in findings of serious unlawful conduct by senior officers. The Beach inquiry in Victoria and the Fitzgerald inquiry in Queensland are two examples. The inquiries made some recommendations which were implemented concerning the future administration of the forces and were directed to avoiding a repetition of the unlawful conduct. The findings, recommendations and their implementation did not reduce the authority of those forces to such a degree that their operation was significantly impaired. On the contrary, it may well have been that the process of purging corrupt elements enhanced the ability of the police forces to act effectively in the future.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate:

Date: 6 August 1999

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY VG 44 OF 1998

VG 58 OF 1998

VG 59 OF 1998

VG 60 OF 1998

On appeal from a single judge of the Federal Court of Australia

BETWEEN: KARL KONRAD

Appellant

AND: VICTORIA POLICE (STATE OF VICTORIA) and

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

Respondents

BETWEEN: ALLAN STUART GLASGOW

Appellant

AND: STATE OF VICTORIA and

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

Respondents

BETWEEN: DAVID JOHN ORCHARD

Appellant

AND: STATE OF VICTORIA and

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR THE STATE OF VICTORIA

Respondents

BETWEEN: PATRICK BERNHARD GEHRIG

Appellant

AND: STATE OF VICTORIA and

MURRAY NEIL COMRIE, CHIEF COMMISSIONER OF POLICE FOR

THE STATE OF VICTORIA

Respondents

JUDGES: RYAN, NORTH & FINKELSTEIN JJ
DATE: 6 AUGUST 1999
PLACE: MELBOURNE

REASONS FOR JUDGMENT

FINKELSTEIN J:

31 In 1995 there was an investigation into allegations that members of the police force of Victoria were accepting improper payments from certain glazing and shutter companies in exchange for those members allocating window repair work to the companies. Following the investigation the appellants, Glasgow, Orchard and Gehrig, who were members of the force, were charged with breaches of discipline contrary to s 69 of the *Police Regulation Act 1958* (Vic). An officer authorised by the Chief Commissioner of Police conducted inquiries into the charges and determined that a number of them had been proved. As a result, the appellants, Glasgow, Orchard and Gehrig, were dismissed from the police force.

32 The appellant, Konrad, a probationary member of the police force, had publicly exposed the fact that improper payments had been made to members of the force. He was also charged with breaches of discipline contrary to s 69 of the *Police Regulation Act.* Some of the charges related to Konrad speaking to the media despite a specific direction from senior members of the police force not to do so. Those charges were found to be proved and a fine of $1,000 was imposed. Thereafter Konrad was absent for work on sick leave. Nevertheless he was directed to attend at police headquarters to be interviewed by an Assistant Commissioner of Police to discuss his future with the force. Konrad did not attend the interview and, as a result, his appointment was terminated pursuant to s 8(5) of the *Police Regulation Act*. That subsection empowers the Chief Commissioner to terminate the appointment of a probationary member of the police force at any time during his period of probation.

33 The *Industrial Relations Act 1988* (Cth), as in force at the time the appellants were dismissed, imposed restrictions on the ability of an employer to terminate an employee's employment. The relevant provisions were to be found in Division 3 of Part VIA of the *Industrial Relations Act*. The principal provisions of Division 3 were as follows: s 170DB which provided that an employee was to be given a specified period of notice of termination, or compensation instead of notice, unless the employee had been guilty of serious misconduct that would render it unreasonable to require the employer to continue the employment; s 170DC which prohibited an employer from terminating an employee's employment for reasons related to conduct or performance unless the employee had been given an opportunity to defend himself or herself; s 170DE which provided that an employer could not terminate an employee's employment

unless there was a valid reason connected with the employee's capacity or conduct, or based on the operational requirements of the employer and that a reason was not valid if, having regard to all of the circumstances of the case, the termination was harsh, unjust or unreasonable; s 170DF which prohibited an employer from terminating an employee's employment for the reasons therein specified, none of which are presently relevant.

34 Each appellant lodged with the Australian Industrial Relations Commission (the Commission) an application for relief in respect of the termination of his employment. The applications were lodged pursuant to s 170EA of the *Industrial Relations Act*. Each application, other than that lodged by Glasgow, named the Victoria Police as respondent: Glasgow had named the State of Victoria as respondent. The Commission was required to treat those applications as requests to settle the matters by conciliation: see s 170EA(7). Conciliation did not result in the settlement of the matters. Accordingly, pursuant to s 170ED(1), the Commission referred the applications to the Industrial Relations Court of Australia.

35 Upon such a referral, the Industrial Relations Court was required to treat an application for relief as an application for a remedy in respect of the termination: s 170ED(3). The remedies that the Court could grant included an order requiring the employer to reinstate the employee (s 170EE(1)(a)), an order requiring the employer to pay to the employee compensation of such amount as the Court considered appropriate (s 170EE(2)) and, in certain circumstances, an order requiring the employer to pay the employee an amount of damages (s 170EE(5)).

36 The application by Konrad was first heard and determined by a judicial registrar of the Industrial Relations Court: see s 376 of the *Industrial Relations Act*. The judicial registrar dismissed the application. The reason for dismissal was that the application had been brought against the Victoria Police and there was no such juristic entity. Presumably, the judicial registrar held that the application was a nullity. Konrad then applied to the Industrial Relations Court to review the decision of the judicial registrar pursuant to s 377.

37 Directions were given that the applications of Glasgow, Orchard and Gehrig, and the application for review by Konrad be heard at the same time. The reason for those directions was that the respondent had given notice that certain questions were to be raised that were common to each application. Those questions were: (a) whether a constable in the police force was an "employee" for the purposes of s 170DE of the *Industrial Relations Act;* and (b) if the answer to question (a) was in the affirmative, whether the federal Parliament had power to enact legislation that included members of the police force of Victoria within the scope of Division 3 Part VIA of the *Industrial Relations Act*. In each application where the Victoria Police had been named as the respondent it was also to be argued that the application was a nullity for want of a respondent.

38 The four applications came on for hearing before Marshall J. The Chief Commissioner of Police for the State of Victoria and the State of Victoria sought

leave to appear to argue that the Court lacked "jurisdiction" to entertain the applications. Counsel was permitted to appear on their behalf. It has not been suggested that there was any error in that regard.

39 Then there was a discussion about the effect of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (the *Amendment Act*) which had come into operation after the reference of the applications to the Industrial Relations Court. One effect of the *Amendment Act* was to invest certain jurisdiction of the Industrial Relations Court in the Federal Court. The trial judge was asked to rule whether he was to determine the applications in his capacity as a judge of the Industrial Relations Court or the Federal Court. The trial judge held a commission as a judge of each court. He ruled that he would sit as a judge of the Federal Court.

40 The trial judge first delivered reasons for decision in the application by Konrad. The trial judge found that Konrad was not an employee of the State of Victoria. In arriving at this conclusion, his Honour relied on *Commonwealth v Quince* (1944) 68 CLR 227 where the High Court held that the Crown could not maintain an action *per quod servitium amisit* in respect of a member of the armed forces on the basis that he was not an employee of the Crown and *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)* (1955) 92 CLR 113 where the Privy Council reached the same conclusion in respect of a constable. Accordingly, the application was dismissed. Later the trial judge handed down his decision on the remaining three applications and, for the reasons he had given in *Konrad*, ordered that those applications also stand dismissed.

41 Separate appeals have been brought from the dismissal of each application. For convenience those appeals have been heard together.

42 The first question raised by the appeals is whether a constable is an employee for the purposes of, and thus entitled to the protection that was afforded by, Division 3 of Part VIA of the *Industrial Relations Act*.

43 The object of Division 3 was to give effect to the Termination of Employment Convention 1982 and the Termination of Employment Recommendation 1982 adopted by the General Conference of the International Labour Organisation (ILO) on 22 June 1982: see s 170CA(1). The Convention and Recommendation respectively were set out in Schedules 10 and 11 of the *Industrial Relations Act*. Logically, the first step in arriving at an answer to the question posed is to determine the scope of operation of the Convention and Recommendation. The second step is to decide whether Division 3 has the scope.

44 The ILO was established in 1919 by the Treaty of Versailles so that there would be regulation by international agreement of labour conditions. The allied powers were of the belief that a universal and lasting peace could be established only if it was based on social justice. Article 387 of Part XIII of the Treaty set out the objects of the new organisation:

"And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures."

This Article and other parts of the Treaty that dealt with the ILO became the original text of the Constitution of the ILO.

45 The ILO comprises three main organs, the <<International>> <<Labour>> Conference (or General Conference), the Governing Body and the <<International>> <<Labour>> Office: see Article 2 of the Constitution. The General Conference is the "legislative" body of the ILO. It formulates and adopts Conventions and Recommendations and is responsible for their application. The Governing Body has responsibility for coordinating all of the activities of the organisation. The <<International>> <<Labour>> Office is the permanent secretariat of the organisation.

46 Proposals that are adopted by the General Conference may take the form of a Convention or Recommendation: Article 19. Conventions are designed to create international obligations for member States that ratify them: Article 19.5. Recommendations do not create obligations but provide guidelines for government action: Article 19.6. It often happens that a Recommendation is considered appropriate when a subject is not yet ready for adoption as a Convention. Thus, in a number of cases a Recommendation has led to the adoption of a Convention on the same subject. Another function of a Recommendation is to supplement a Convention by laying down more detailed provisions for the application of a Convention which might furnish guidelines for governments without having binding force.

47 In 1927 the Governing Body established a Committee of Experts on the application of Conventions and Recommendations. One of the functions of the Committee of Experts is to investigate the extent to which member States act in conformity with Conventions and Recommendations. The Governing Body also established a Committee on Freedom of Association to hear complaints by governments or by employer or union organisations. These committees report to the Governing Body on the findings that they make on matters submitted to them and, where appropriate, they make recommendations to the governments concerned.

48 When the ILO was established there was doubt whether it could deal

with the conditions of work of public employees: N Valticos & G von Potobsky "<<International>> <<Labour>> Law" 2nd ed (1995) at para 575. But this doubt was soon dispelled and Conventions have been adopted that are applicable to both public and private employees and some Conventions have been adopted that relate solely to public employees. It will be helpful to consider a number of these Conventions. They cast some light on the intended scope of the Termination of Employment Convention.

49 In 1948 the General Conference adopted the Freedom of Association Protection of the Right to Organise Convention (No. 87). The operative provision of this Convention is Article 2 which provides: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." The language of this Article is sufficiently broad to include public employees. This is confirmed by Article 9 (1) which provides: "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations."

50 In 1949 the General Conference adopted the Right to Organise and Collective Bargaining Convention (No. 98). Article 1(1) of that Convention provides that: "Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment." Article 2(1) provides that: "Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration." The language of these Articles is apt to cover organisations representing public employees. However, Articles 5(1) and 6 provide:

> *"5(1) The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.*
>
> *6 This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way."*

51 It is interesting to observe how the Committee on Freedom of Association has construed these Conventions.

52 In 1974 the Committee heard a complaint presented by the European Organisation of the International Federation of Employees in Public Service against the Government of France (Case No. 770). The complaint concerned the dismissal by the French Minister of the Interior of a member of the police force who was a secretary of the Union of Inspectors and Detectives. The Government of France defended the complaint on the basis that Convention No. 87 did not apply to the police. In its 145th Report to the Governing Body, the Committee reported on the outcome of the complaint. It noted (at paras 18 and 19): "... that the case concerns the situation of the leader of a policeman's trade union organisation. The Committee is obliged to recall in this respect that

Article 9(1) of Convention No. 87 provides that `The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations'. Consequently it is clear that the <<International>> <<Labour>> Conference intended to leave it to each state to decide on the extent to which it was desirable to grant members of the armed forces and of the police the rights covered by the Convention. This means that States having ratified the Convention are not required to grant these rights to the said categories of persons."

53 In 1990 the Committee heard a complaint against the Government of Spain presented by the National Workers Force (Case No. 1536). The complainant alleged that there had been interference with the activities of trade unions with members within the municipal police. In its 278th report to the Governing Body the Committee reported on the outcome of this complaint. After referring to Article 9(1) of Convention No. 87, the report stated (at para 33): "Under this provision it is clear that the <<International>> <<Labour>> Conference intended to leave it to each State to decide on the extent to which it was desirable to grant members of the armed forces and of the police the rights covered by the Convention, which means that States having ratified the Convention are not required to grant these rights to the said categories of persons."

54 In 1993 the Committee heard a complaint against the Government of Peru presented by the National Federation of Workers of the Judiciary (Case No. 1706). The complainant alleged that members of the judiciary were prevented from exercising the right to organise or to strike. The outcome of the complaint appears in the 291st Report to the Governing Body. In that report the Committee noted (at paras 484 and 485):

> *"The Committee appreciates that a reduction in the number of qualified staff in the Judiciary might give rise to a fear that strike action could unduly hinder the normal administration of justice. However, as regards specifically the barring of workers of the Judiciary from the right to organise, the Committee would remind the Government that Article 2 of Convention No. 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Following on from this, all public employees (with the sole possible exception of the armed forces and the police, as indicated in Article 9 of the Convention) should, like workers in the private sector, be able to establish organisations of their own choosing to further and defend the interests of their members ...*
>
> *As regards the barring of workers in the Judiciary from the right to strike, the Committee would point out, in accordance with its principles, the right to strike may be subject to restrictions or prohibition in the public service, in the case of officials who act as agents of the public authority. In the Committee's view, officials working in the administration of justice are officials who act as agents*

of the public authority and whose right to strike could thus be subject to restrictions or even prohibition. However, the Committee reminds the Government that restrictions should be offset by adequate, impartial and speedy conciliation and arbitration procedures ..."

55 In 1994 the Committee considered a complaint against the Government of Pakistan presented by the National Labour Federation of Pakistan (Case No. 1771). The complaint alleged that the government had violated Conventions Nos. 87 and 98 with respect to workers employed by Pakistan Steel, Pakistan Railways and Pakistan International Airlines. The Committee reported the result of the complaint to the Governing Body in its 295th Report. The report stated (at para 499):

"The Committee would first recall that Article 2 of Convention No. 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and to join organisations of their own choosing. While Article 9 of the Convention does authorise exceptions to the scope of its provisions for police and armed forces, the Committee would recall that the members of the armed forces who can be excluded should be defined in a restrictive manner ... Furthermore, the Committee of Experts on the Application of Conventions and Recommendations has observed that since this Article of the Convention provides only for exceptions to the general principle, workers should be considered as civilians in cases of doubt ...Given that the Government circular would appear to affect almost all railway employees in the country and that these employees have always enjoyed trade union rights in the past and therefore would not appear to be members of the armed forces for the purposes of the Convention, the Committee would draw the Government's attention to the need to ensure, in its legislation as well as in any relevant ministerial circulars, the right for all workers who are not members of the armed forces to organise and to carry out trade union activities." (emphasis in the original)

56 One Convention that deals exclusively with public employees is the Labour Relations (Public Service) Convention 1978 (No. 151). The scope of the Convention is described in Article 1(1) as follows: "This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other <<international>> <<labour>> Conventions are not applicable to them." However, adopting States are given the right to exclude certain categories of public employees from the guarantees provided by the Convention. Thus, Article 1(2) provides: "The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations."

57 It will be noticed that Conventions No. 87 and No. 98 give a narrower scope for exclusion of categories of public employees than does Convention No. 151. The first two refer only to armed forces and police and the latter to "high

level employees whose functions are normally considered as policy making or managerial, or [those] whose duties are of a highly influential nature."

58 In its 1983 General Survey (at 28), the Committee of Experts noted that members of the armed forces and police "are in fact the category of public servants most frequently denied the right to organise." However, member States often exclude other categories of public servants from the right to organise, such as firemen, prison staff and public servants employed in higher levels of the administration: L Betten, "International Labour Law" (1993) at 88.

59 This brief summary of the activities of the ILO makes it possible to draw the following conclusions. First, in the language of the international community of nations the word "worker", when used without qualification, will usually mean a worker or employee in both the private and public sectors unless the context suggests a different meaning. Second, members of the armed forces and the police are regarded as public sector workers or employees. Third, it is accepted that certain public employees, including members of the armed forces and police as well as senior public servants may be excluded from the protection given by certain Conventions adopted by the ILO, but that such a decision will require express domestic provision.

60 I can now turn to consider the events that led to the adoption of the Convention on Termination of Employment and the related Recommendation. Before the adoption of those instruments there were in existence a number of Conventions and Recommendations that provided protection to workers to prevent unjustified termination of employment. Some established certain procedural guarantees relating to the grounds for, and the time of, termination. Others provided for appeal procedures including rules governing the burden of proof and remedies. The principal international standard on termination of employment was the Termination of Employment Recommendation 1963 (No. 119). This Recommendation laid down basic standards relating to the requirement of a valid reason for termination of employment by an employer, the right of a worker to appeal against a termination, to notice periods, to severance allowances and to other forms of income protection.

61 At its 211th (1979) Session the Governing Body decided to place on the agenda of the 67th (1981) Session of the General Conference an item entitled "Termination of employment at the initiative of the employer". The Committee of Experts had conducted a general review of reports on Recommendation 119 and had concluded that the question should again come before the General Conference.

62 The secretariat prepared a preliminary report (Report VIII(1)) that was circulated to member States before the 67th Session. The report was designed to provide information concerning the law and practice of member States regulating termination of employment. Chapter 1 of the report dealt with the scope of national legislation on the subject. It indicated that national legislation often made provision for specific exclusion from coverage. In particular, the report stated (at 9) that public servants were often excluded from the scope of labour codes although public servants were often covered by civil service rules

which provided them with some protection.

63 In accordance with the standing orders of the General Conference the secretariat sent a questionnaire to member States concerning the possible adoption of an international instrument on the termination of employment. The following questions on the scope of the proposed instrument were included:

7. Should the instrument(s) apply to all branches of activity and all employed persons other than those who may be excluded under questions 8 and 9?

8. Should the instrument(s) provide that the extent to which the guarantees provided for in the instrument(s) should apply to the following categories of workers should be determined by national laws or regulations:

(a) workers engaged for a specified period of time or a specified task who, owing to the nature of the work to be effected or the circumstances under which it is to be effected, cannot be employed under a contract of employment of indeterminate duration;

(b) workers serving a period of probation, or during a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period;

(d) public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of the instrument(s)?

9. Should the scope of the instrument(s) be limited in any other respect, for example, with respect to small undertakings (if so please indicate how such undertakings should be defined), family undertakings, managerial employees or workers who have reached the age of retirement and are entitled to an old-age pension?

64 In 1981 the secretariat provided a further report (Report VIII(2)) to member States summarising the observations by member States on the questions to which the States were asked to reply together with brief commentaries and proposed conclusions. In relation to question 7, the report noted (at 19) that:

> *"The majority of governments replied in the affirmative to this question. Most governments which made substantive comments accepted that the instrument(s) be general in coverage, but proposed exclusion of or special rules for one or more categories of workers. Several governments, on the other hand, expressed the view that the scope of application of the instruments should be left to the discretion of member States. As a large majority of governments appear in their replies to approve of the principle that the instruments should be general in coverage, subject to the possibility of excluding certain*

categories of workers, the Proposed Conclusions have been worded accordingly ... The proposed exclusions or special rules will be considered in connection with questions 8 and 9."

In relation to question 9 the report summarised the position as follows (at 27):

"A considerable number of governments, in their replies to this question or to questions 7 or 8, favoured provision for a possibility of excluding, or special rules for, one or more of the categories of undertakings or workers mentioned in this question ... Some countries opposed provision for exclusion of one or more of these categories. Certain governments proposed provision for the possible exclusion of, or special provision for, one or more other categories of workers, such as the armed forces, the police, defined categories of workers in essential services, workers subject by their activities to considerable mobility (such as port or construction workers), agricultural workers, seafarers, home workers, apprentices, commercial travellers, domestic employees and part-time workers.

...

With a view to providing some flexibility to governments in this matter, without including an unduly extensive list of possible exclusions, the Office has included in the Proposed Conclusions provisions patterned after those found in the Holidays with Pay Convention (Revised) 1970 ..., authorising, after consultation with the organisations of employers and workers concerned, where such exist, the exclusion, in so far as necessary, from the application of the instruments or certain provisions thereof of other limited categories of employed persons in respect of whose employment special problems of a substantial nature arise."

65 The Proposed Conclusions were prepared on the basis of the replies received. They were intended to serve as a basis for discussion by the General Conference. The scope of the proposed Convention was dealt with in point 6 which read (at 138-9):

"1. The Convention should apply to all branches of activity and all employed persons.

2. The extent to which the provisions of the Convention should apply to the following categories of employed persons may be determined by the methods of implementation referred to in Point 5:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, such as public servants, which as a whole provide protection which is at least equivalent to that afforded under the Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of whose employment special problems of a substantial nature arise."

66 At the 67th Session the General Conference resolved to include the proposal for a Convention concerning the termination of employment in the agenda at its next ordinary session for a second discussion with a view to the adoption of a Convention and Recommendation. By virtue of that resolution and in accordance with the standing orders of the General Conference the secretariat was required to prepare texts of a proposed Convention and Recommendation to be sent to member States for comment.

67 The text of the proposed Convention was based on the Conclusions adopted by the General Conference at its 67th Session. Article 2 of the text dealt with the scope of the proposed Convention. It followed point 6 of the Proposed Conclusions without significant change.

68 In its Report V(2) the secretariat summarised the essential points made by member States on the text of the proposed Convention and Recommendation and made comments on those observations. With regard to proposed Article 2 the secretariat made the following comments (at 15 - 16):

"As at present conceived, this Article provides for a Convention of general application (paragraph 1), with the possibility of excluding certain categories of workers subject to certain limits and conditions (paragraphs 2 - 5). Several Governments ... have approved of this general approach, although they have certain suggestions regarding the way in which the possible exclusions are drafted ...

Several other Governments ... call for the amendment of this Article to leave each member State the discretion to decide the scope of the instrument and the exclusions therefrom [of certain categories of which that were set out] ... *As the present conception of this Article seems to have been widely supported during the first discussion at*

the Conference, the Office has not given effect to these proposals."

With regard to Article 2, paragraph 3, the report noted (at 17) that:

"The Government of Switzerland considers that this paragraph should make explicit reference to the civil service, to which it relates, while the Government of Malaysia proposes that that the public sector should be excluded. It should be recalled in this connection that the text initially proposed by the Office contained a reference to public servants as an illustration of the kind of category of employed persons that might fall within this paragraph, but that this illustration was deleted by the competent Conference Committee by a large majority on the grounds that this provision was general and such illustration unnecessary. The discussions in that Committee did not suggest that there would be substantial support for a total exclusion of the public service, or the public sector, from protection."

69 The report also recorded comments that had been received in relation to Article 2, paragraph 4. Relevant for present purposes is the suggestion that had been received from Sweden. The report states (at 18):

"The Government of Sweden has suggested, with a view to ensuring the widest possible coverage, that the exceptions made under this Article should be specified and defined. This observation appears to relate more particularly to this paragraph. It should be recalled in this connection that, in their replies to the questionnaire contained in the law and practice report on the subject, governments had proposed the possibility of excluding a number of different categories of workers, including workers employed in small undertakings or in family undertakings, managerial employees, workers who have reached the normal age of retirement, the armed forces, the police, defined categories of workers in essential services, workers whose activities may entail considerable mobility (such as port or construction workers), agricultural workers, seafarers, home workers, apprentices, commercial travellers, domestic employees and part-time workers. While the Office had felt that coverage of certain of these categories might indeed present in a significant number of countries sufficient difficulties to warrant provision for their possible exclusion, there was not enough information to determine whether such difficulties applied in a significant number of countries to all those categories. Instead of seeking to determine the categories whose coverage presented sufficient difficulties in a sufficient number of countries for exclusion to be authorised, the Office considered it preferable to include a provision patterned after that found in the Holidays and Pay Convention (Revised), 1970 ... which would, in general terms, allow for the exclusion of limited categories of employed persons in respect of which special problems of a substantial nature arise."

70 The text of the proposed Convention and Recommendation were

considered at the 68th Session of the General Conference where they were adopted with some modification. Two changes were made to Article 2. The first was the inclusion of a new paragraph 3:

> *"Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention."*

This required the existing paragraphs 3, 4 and 5 to be renumbered so that paragraph 4 became paragraph 5 and so on. The second modification was to the paragraph renumbered 5 which was amended by the addition of the words, "in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them" at the end of the paragraph.

71 Division 3 was enacted to give effect to the Convention and the Recommendation. When a statute implements a treaty, it is an accepted canon of construction that Parliament intends a provision to have the same effect as the corresponding provision in the treaty: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265. This effect is expressly enshrined in the *Industrial Relations Act* by s 170CB which provides that "(a)n expression has the same meaning in this Division as in the Termination of Employment Convention." Accordingly, to determine whether a constable is an "employee" for the purposes of Division 3, it is appropriate, in the first instance, to consider whether, upon the proper construction of the Convention, a constable is an "employed person" to whom the Convention is intended to apply.

72 The general rule of interpretation of treaties is to be found in Article 31 of the Vienna Convention on the Law of Treaties, paragraph 1 of which provides:

> *"A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose."*

Thus, the interpretation must be in good faith, the ordinary meaning of the words used is presumed to represent the intention of the parties and the ordinary meaning of those words is not to be determined without regard to the context, object or purpose of the treaty. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 254 McHugh J described this as "an ordered yet holistic approach" where "[p]rimacy is to be given to the written text of the Convention but the context, object and purpose must also be considered."

73 Article 32 of the Vienna Convention also permits recourse to preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when an interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.

74 Whether it is intended that a member of the police force is to be afforded the protection given by the Convention, depends upon the resolution of two matters, viz (a) is the scope of the Convention sufficiently broad to include public employees and (b) is a member of the police force a public employee?

75 These issues must be considered against the following background. The regulation of working conditions is one of the important aspects of <<international>> <<labour>> law. Traditionally, the regulation of working conditions has concentrated on hours of work, wages and health and safety. The Conventions that have been adopted by the General Conference are usually of general application (see generally L Betten, "<<International>> <<Labour Law" (1993), ch 6) although there are many Conventions and Recommendations that have set special standards with regard to certain categories of workers. More recently, the General Conference has adopted a number of instruments that are concerned with the protection of workers in case of termination of employment. As with other Conventions and Recommendations they are of general application whilst permitting adopting States to exclude certain categories of workers.

76 There can be no doubt that the Convention applies to publicly employed as well as privately employed workers. Convention No. 87 (freedom of association) applies to "workers ... without distinction" (Article 1(1)) and that phrase is sufficiently broad to include public employees. Convention No. 98 (collective bargaining) applies to "workers" generally (Article 1(1)) and that word encompasses public employees. Turning to the text of the Convention, without recourse to any preparatory material, the language of Article 2(1) is also sufficiently general to include public employees: that is the expression "all employed persons" is apt to include publicly employed persons. This interpretation is confirmed by the context. The context includes the fact that provision is made for the exclusion of categories of workers in respect of whom there may be "special problems" (Article 2(4)) and the fact that the standards of general application (set out in Part II) are equally applicable to public employees and to private employees.

77 In the French text of the Convention, which is equally authoritative, Article 2(1) uses the expression "travailleurs salariés". According to the Nouveau Petit Robert Dictionarie De Langue Francaise, J Rey-Deboue & A Rey (ed) (1973) "travailleur" means "worker", that is, "a person who works", "a person who does physical work" or "a person employed in a profession, a trade". In the commentary to proposed Article 2 the secretariat said of the expression "travailleurs salariés" that "[i]t should be understood that these words are equivalent to `employed persons' in the English version and refer to all persons in an employment relationship; they are intended to cover also public servants who may, however, be excluded from the application of the instrument in accordance with paragraph 3.": see Report V(2) at 16.

78 Once it is established that the Convention covers public employees (unless excluded), it follows that it also covers members of the police force as one category of public employees. That is to say, there is nothing in the text of

the Convention, or in its purpose or object, that suggests that members of the police are to be excluded from the protection it provides. If any group of the public service is to be excluded from the scope of the Convention that will only result from action by a member State acting in conformity with Article 2, paragraph 4.

79 If there was any doubt that the Convention interpreted in accordance with Article 31(1) of the Vienna Convention was intended to cover public employees, including members of the police force, that doubt is dispelled when regard is had to the preparatory material to which reference has been made.

80 When the provisions of the Convention were given effect by Division 3, the Parliament made one potentially significant change to the language that it employed when compared with the text of the Convention. The word "employee" was substituted for the word "worker". Thus, for example, Article 4 of the Convention provides:

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."*

The corresponding provision in Division 3 is s 170DE(1) which provided:

> *"An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service."*

81 It is clear enough that, speaking generally, the Parliament did not intend to effect any change to the meaning of the Convention by the manner in which it has imported the Convention into municipal law. Reference has already been made to s 170CA(1) where the object of the Division was said to be to give effect to the Convention and s 170CB which provides that an expression in Division 3 has the same meaning as in the Convention. However, as a result of the change in language, the question that is raised is whether the expression "employee" when used in Division 3 is to be given its common law meaning or some other meaning, more particularly a meaning that is consistent with the scope of the Convention.

82 According to the common law of Australia a person engaged in the administration of an executive function of government may hold an office or may be employed as a servant. In *Attorney-General for New South Wales v The Perpetual Trustee Co Ltd* (1952) 85 CLR 237, Dixon J (who was in dissent) explained (at 248 - 249):

> *"No doubt, at all times there have been offices under the Crown whose occupants serve the Crown but do not stand in the relation of a servant to his master. ... In modern times there are many public offices existing under statute and under charter the occupants of*

which discharge functions belonging to them by law.

But there always have been employments under the Crown where the command and direction of the Crown given mediately or immediately is the sole measure of the duty of the servant. Where the right of control exists in the Crown and extends to the manner in which the employment is carried out, that is, to the doing of the work, the test of the relation of master and servant is satisfied."

83 For certain purposes common law courts have held that a police officer is not an employee of the State but the holder of an office. In *Enever v The King* (1903) 3 CLR 969, Griffith CJ said (at 975):

"At common law the office of constable or police officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown. The appointment to the office was made in various ways, and often by election. In later times the mode of appointment came to be regulated for the most part by Statute, and the power of appointment was vested in specified authorities, such as municipal authorities or justices. But it never seems to have been thought that a change in the mode of appointment made any difference in the nature or duties of the office, except so far as might be enacted by the particular Statute."

His Honour continued (at 977):

"A constable, therefore, when acting as a police officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application."

See also *Fisher v Oldham Corporation* [1930] 2 KB 364, a case that concerned the question whether police, who had been appointed by the watch committee, in effecting an unlawful arrest, were acting as the servants or agents of the corporation so as to render it liable to an action for false imprisonment. It was held that the corporation was not liable. In the course of his judgment McCardie J said (at 371):

"Prima facie ... a police constable is not the servant of the borrough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation."

Later in his judgment McCardie J said (at 377 - 378):

"The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown sworn to `preserve the peace by day and by night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace'. If the local authorities are held to be liable in such case as this

for the acts of the police with respect to felons and misdemeanours, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. To give any such control would, in my view, involve a grave and most dangerous constitutional change."

84 The decisions in *Enever* and *Fisher* were approved by the Privy Council in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* an action by the Crown to recover moneys paid by the Crown to a police officer injured by the negligence of a civilian. The Privy Council examined the policy reasons for characterising of a policeman as the holder of an office. Viscount Simonds, delivering the judgment of the Privy Council, said (92 CLR at 120):

"And he [a constable, watchman or like person] is to be regarded as a servant or minister of the King because ... the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of government and by the Constitution of this country these functions do of common right belong to the Crown. A constable then may be said in a certain context and sometimes with the appendage `or minister' to be a `servant of the Crown'."

85 The common law has yet to evolve a satisfactory test for determining whether one person is employed by, or is the servant of, another. Courts have identified a number of indicia as the essential attributes of employment, the most important being that of control. The indicia can be found conveniently stated in the speech of Lord Thankerton in *Short v J & W Henderson Ltd* (1946) 62 TLR 427, a workers compensation case. His Lordship identified those criteria (at 429) as:

"(a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal."

His Lordship went on to say (at 429):

"Modern industrial conditions have so much affected the freedom of the master in cases in which no-one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these indicia ... [t]he statement ... that selection, payment and control are inevitable in every contract of service, is clearly open to reconsideration."

86 The so-called "control test" has been traced back to a statement by Bramwell B in *R v Walker* (1858) 27 LJMC 207 at 208:

"It seems to me that the difference between the relations of master and servant and of principal and agent is this: a principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."

See also *Yewens v Noakes* (1880) 6 QBD 530 at 532 - 533 where Bramwell LJ said:

"A servant is a person subject to the command of his master as to the manner in which he shall do his work."

87 There are many cases where the application of the control test is clearly unsatisfactory. Examples include the case of skilled professionals or company directors. The jurist Otto Kahn-Freund, in an article entitled "Servants and Independent Contractors" (1951) 14 Mod L R 504 at 505 - 506, has argued that the control test:

"... was based upon the social conditions of an earlier age: it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the industrial revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanism) ... It reflects a state of society in which the ownership of the means of production coincided with the possession of technical knowledge and skill."

88 From time to time courts have proposed alternative tests. One is the "organisation test". In *Stevenson Jordan and Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101, Lord Denning explained (at 111):

"It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference it lies. A ship's master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it, but is only accessory to it."

89 In Australia the High Court has criticised the "organisation test": see *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 26 et seq per Mason J. On the other hand, Mason J said (at 24) that the existence of control, while significant is not the sole criterion by which to judge whether a relationship is one of employment. He said that it is merely one of a number of

indicia which must be considered. Others include the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays. That is to say, "it is the totality of the relationship between the parties which must be considered" (*Stevens* at 29).

90 The unsettled, and in some respects outdated, common law meaning of "employee" has caused some courts to refuse to apply it in a variety of circumstances. In the United States, during the 1930s, Congress enacted legislation to improve working conditions of employees. One important statute was the *National Labour Relations Act 1935* (US). The purpose of that Act was to promote the right of workers to organise and bargain collectively. Its policy was to redress the inequality of bargaining power between employer and employees. One question that arose under the legislation was whether the benefits were to be conferred only on persons who were "employees" according to the common law. This was considered by the Supreme Court in *National Labour Relations Board v Hearst Publications* 322 US 111 (1943). Hearst Publications had refused to bargain collectively with the union representing newsboys who distributed their papers. The reason for this refusal was that the newsboys were not employees, at least not according to the common law. The Supreme Court said that the common law test for determining whether a person was an employee, which had been developed in cases of vicarious liability, had no necessary application for determining that issue in other circumstances. Having regard to the object of the legislation under consideration the Supreme Court said that the term "employee", like any other provision, must be understood with reference to the purpose of the Act in which it is found and the facts involved in the economic relationship. In relation to the *National Labour Relations Act* the Supreme Court said (at 129) that the meaning of the word "employee" "... is to be determined broadly ... by underlying economic facts rather than technically and exclusively by previously established legal classifications."

91 The Supreme Court held that the newsboys were employees, because they worked continuously and regularly, relied upon their earnings for the support of themselves and their families, had their total wages influenced in large measure by the publishers who dictated their buying and selling prices, and fixed their markets and controlled their supply of papers. The Supreme Court reached that conclusion because "the economic facts of the relation make it more nearly one of employment than of independent business enterprise ... [and that] those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections." (*Hearst* at 128).

92 A similar approach has been adopted in relation to the *Fair Labour Standards Act 1938* (US). That Act deals with minimum wages, maximum working hours, conditions for overtime work and the keeping of records. The courts have not considered the common law meaning of "employee" as appropriate to define the limits of the operation of the *Fair Labour Standards Act*. Instead they have employed the "economic reality" test.

93 In *Secretary of Labour v Lauritzen* 835 F 2d 1529 (1987) a case that

concerned the status of migrant workers who harvested pickles, the United States Court of Appeal for the 7th Circuit held that in seeking to determine the economic reality of the pickle workers' relationship with the farmers a number of criteria were to be considered. They included: (a) the nature and degree of the alleged employer's control as to the manner in which the work was to be performed; (b) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (c) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (d) whether the service rendered required a special skill; (e) the degree of permanency and duration of the working relationship; (f) the extent to which the service rendered was an integral part of the alleged employer's business (*Lauritzen* at 1535 per Wood JR). Easterbrook J delivered a concurring opinion where he suggested that the courts would do well to abandon these "unfocussed" factors and "start again". He ventured that workers who sell nothing more than their labour, who have no physical capital and little human capital to vend, should all be regarded as employees (*Lauritzen* at 1543). See also *Walling v American Needlecrafts* 139 F 2d 60 (6th Cir 1943) (home workers); *Walling v Twyeffort Inc* 158 F 2d 944 (2nd Cir 1947) (tailors); *McComb v Home Workers' Handicraft Co-operative* 176 F 2d 633 (4th Cir 1949) (home workers); *Goldberg v Whitaker House Co-operative Inc* 366 US 28 (1961) (home workers).

94 Courts in Canada have displayed a similar disinclination to apply the common law meaning of the word "employer" when it is found in a statute governing labour relations. For example, in *Re Cormier and Alberta Human Rights Commission* (1984) 14 DLR (4th) 55 a black truck driver complained that he had been discriminated against on account of his colour by a trucking company that refused to hire him. He alleged that this conduct contravened s 7 (1) of the *Individual's Rights Protection Act, RSA 1980* which provided that no employer should refuse to employ or refuse to continue to employ any person or discriminate against any person with regard to employment or any term or condition of employment because of race, religious beliefs, colour, sex, physical characteristics, marital status, age, ancestry or place of origin of that person or of any other person. The question that arose was whether the respondent was an "employer" within the meaning of s 7(1). The company hired truckers who owned their own trucks and worked for an hourly rate. That in turn raised the question whether the section incorporated the common law meaning of "employer". In arriving at the conclusion that it did not, McDonald J said (at 70) that he based his conclusion on two premises:

> *"The first premise [being] that words used in stating a legal rule in one context may not mean the same where the words may be used to express a legal rule in another context. This is so whether the rule is one of statute or of common law ... The second premise is that the* Individual's Rights of Protection Act *should be given a remedial and liberal construction where the language of the statute is doubtful or ambiguous."*

95 McDonald J then went on to hold that a liberal interpretation of the verb "employ" justified application of the broader definition of the verb found in the Oxford English Dictionary: "to use the services of (a person) ... in the

transaction of some business". He referred to the definition in Webster's Third New International Dictionary which was to the same effect: "to use or engage the services of (e.g. a lawyer to straighten out a legal tangle)". He said (at 73-4):

> *"[t]hese dictionary definitions accurately reflect the common Canadian usage of `employ'. That verb is of course applied commonly to persons who work exclusively for, and are paid only by, one other individual (or firm or corporation). But the common usage of the verb `employ' is not restricted to that situation."*

Thus McDonald J concluded (at 74) that:

> *"So it is this broad sense of the verb `employ' which in my opinion is the sense in which it is used in s 7(1). Adapting that sense to the noun `employment', the meaning is in effect what the* UK Race Relations Act, 1976 *felt it desirable to spell out in so many words: `any contract in which one person agrees to execute any work or labour for another'.*
>
> *The fact that the person providing the services also furnishes his own tools or his own truck or some other instrumentality, with which he performs the services, does not entail any the less that he has agreed to execute some work of labour for another, or that he is, in common parlance, employed to do it."*

96 *Cormier* was followed by *Re Pannu and Prestige Cab Limited* (1986) 28 DLR (4th) 268 in relation to a taxi company that employed owner-drivers and rental drivers who paid a composite monthly fee to the company to cover the cost of despatching, painting of cabs in the company's colours, taxi stands, licences and other services. The relationship between the taxi company and the drivers was not one of employment according to the common law. But Bracco J held that it was for the purposes of the *Individual's Rights Protection Act.*

97 Reference might also be made to the somewhat analogous case of *Robichaud v Canada* (1987) 40 DLR (4th) 577 decided by the Supreme Court of Canada. In *Robichaud* the Supreme Court was required to consider whether an employer was responsible for sexual harassment by its employees contrary to the provisions of the *Human Rights Act, 1976* (Can). In its analysis the Supreme Court said that the question of the employer's liability should not be determined by reference to theories of employer liability based on vicarious liability developed under the law of tort.

98 Further, there are cases in Canada where a police officer and an army cadet have been found to be employees for the purposes of particular legislation although they would not have been employees under the common law. In *Re Prue and City of Edmonton* (1984) 15 DLR (4th) 700 Miller ACJ found that a board of commissioners of police and a police chief were employees for the purposes of human rights legislation (the *Individual's Rights Protection Act*) that made illegal various forms of discrimination. Miller ACJ said (at 713):

"I can see no public policy that would favour the narrow technical meaning that has been argued for these words. Counsel argue that if I find that the words apply to an `office holder' then a person might complain of wrongful discrimination in, say, the appointment of provincial court judges. I do not see the reason for fearing such an application, should it ever arise. Surely the halls of justice are not a place where wrongful discrimination should be accepted while the rest of Alberta society is to be conducted at a higher standard. The administration of justice must serve as an example of the operation of truth in the open forum of the courtroom. It should not shield behind fanciful emotions and place itself above the law. The argument applies a fortiori *to other servants of the administration of justice, including policemen. How can one say that wrongful discrimination might be acceptable in the administration of justice? Yet this would be the effect of looking to the narrow meaning of the words in the Act that have been suggested to me."*

99 In *Rosin v Canada* (1990) 131 NR 295 an army cadet was removed from a parachuting course when it was discovered he had one eye. He complained of discrimination under the *Human Rights Act, RSC 1985*. The Federal Court of Appeal held that although the cadet was not an employee in the traditional sense of master and servant, he was for the purposes of the legislation. The court said (per Linden JA at paras 27, 28 and 31):

" ... I find that the tribunal was correct in holding that ss 7 and 10 were applicable to Rosin. Although he may not have been an employee in the traditional sense of master and servant, he was in the sense meant to be covered by this legislation. There was a situation of control over him, there was some remuneration and there was clearly some benefit derived by the Armed Forces from his attendance. He was certainly being `utilised' by the Armed Forces.

Rosin was controlled in many ways: he was required to wear a cadet uniform; he had to obey all the rules and follow all the commands he received; he ate what he was fed and slept where he was told to sleep. In short, he was very closely controlled by the Armed Forces in all that he did.

...

I have no difficulty, therefore, in concluding, considering all of these matters - control, remuneration and benefit - that the Armed Forces employed Rosin, in the sense meant by the Canadian Human Rights Act during the summer of 1984."

100 Returning to the question whether the employee who is referred to in Division 3 is a common law employee it is necessary, in my view, to have regard to the following matters. First, provisions such as are to be found in Division 3 should not be given a narrow construction. Division 3 is in the nature of a human rights code and should be given an interpretation that will advance

its broad purposes. It is not appropriate to minimise the rights conferred by this type of legislation and so diminish its proper impact: compare *Canadian National Railway Co v Canada* [1987] 1 SCR 1114 at 1134 per Dickson CJ; *Ontario Human Rights Commission v Simpson Sears* [1985] 2 SCR 536 at 547 per McIntyre J.

101 Second, there has been much informed criticism of the common law notion of employee. I have already mentioned the article by Professor Kahn-Freund. Reference might also be made to P.S. Atiyah "Vicarious Liability" (1967), especially ch 5. Further, in 1985 Professor H W Arthurs wrote an influential article entitled "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965) 16(1) University of Toronto Law Journal 89, criticising the manner in which the common law distinguished an employee from an independent contractor. He argued that workers were being denied rights afforded by various labour relations and like legislation because they had been transformed from employees into independent contractors "by the magic of contractual language", but that their working environment remained unchanged. He proposed that those he classified as "dependent contractors" should be regarded as employees and entitled to the benefits of legislation designed to protect workmen. The terminology of the "dependent contractor" has now found its way into the labour legislation of a number of Canadian jurisdictions: see e.g. s 107 of the *Canada Labour Code, 1972* (Can).

102 Third, remembering that the purpose of Division 3 is to give effect to the Convention, in the absence of a clear indication to the contrary, the Division should not be construed more narrowly than the Convention. In that regard there can be no doubt that the expressions "employed person" and "worker" in the Convention do not bear their common law meaning. The overwhelming majority of States who adopted the Convention are not common law countries. There can also be no doubt that the Convention intended to include public employees within its scope. Further, it follows from the fact that all public employees are covered by the Convention, that the Convention is not concerned to distinguish between holders of public office on the one hand and public employees on the other.

103 In my view, bearing the foregoing factors in mind, I can see no reason why the word "employee" when used in Division 3 should be confined to its common law meaning. If it was so confined, it would bring about the following unintended consequences. In the first place, it would exclude from the operation of the Division persons who are just as vulnerable and in need of protection as common law employees. In the second place, adopting a narrow meaning of the word "employee" would place Australia in breach of its obligations under the Convention which it has ratified. In the third place, a narrow construction of the word "employee" would defeat the object of the Division which is to give effect to the Convention.

104 In the context of Division 3 it is my view that, speaking generally, an employee is a person who performs work or labour (personal services) for another; that is to say, a person who sells his labour and not the product of his labour. Further, once it is accepted that the common law meaning of the word

"employee" does not control Division 3, in my opinion it necessarily follows that a constable is an employee who is entitled to the protection of the Division. In almost all respects a member of the police force is in the same position as any other employee of the Crown. He is subject to the direction and control of the Crown, although he acts "independently" in the manner in which he carries out certain duties. He is paid a regular wage and makes no profit. He is provided with equipment needed to carry out his duties. His position, nowadays at least, is permanent. He is entitled to holidays, sick leave and other entitlements afforded generally to employees.

105 The second question raised by this appeal is whether the provisions of Division 3, in particular s 170DE and s 170EE, are invalid because they "unduly interfere" with the performance by the State of functions of government to the extent that they apply to constables and are therefore beyond the power of the Commonwealth Parliament. This implied limitation on Commonwealth legislative power arises because:

> *"The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities."*

Melbourne Corporation v Commonwealth (1947) 74 CLR 31 at 82 per Dixon J.

106 In *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217 Mason J, after an extensive review of the cases, said that the limitation consists of two elements "(1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments ... " See also *Re Australian Education Union; Ex parte State of Victoria* (1995) 184 CLR 188 at 231; *Victoria v The Commonwealth* (1996) 187 CLR 416 at 498.

107 The second limb of the implied limitation operates so as to prevent the exercise of Commonwealth power "to control the States" (*Queensland Electricity Commission* at 247 per Deane J), because that would constitute "an exercise of power inconsistent with the existence of the States as independent entities and their capacity to function as such" (*Australian Education Union* at 232).

108 The precise scope and content of the implied limitation is difficult to formulate with any precision, if indeed it will ever be possible to do so. Further, as was said by the High Court in *Australian Education Union* (at 228) the decided cases in which the implication has been invoked offer little guidance, except in cases of discrimination, on the scope of the limitation. Nevertheless, some guidance is to be found in the cases and for present purposes, the most relevant is the *Australian Education Union* case.

109 In 1992 the State of Victoria wished to reduce the number of its public

servants. It enacted legislation to abolish compulsory arbitration between employers and employees, to terminate all industrial awards and to establish a system that facilitated the freedom of employers and employees to regulate their own affairs. Voluntary separation packages were offered to school teachers and health workers. Unions who represented employees in the public sector sought to obtain coverage for their members under federal awards by invoking the jurisdiction of the Australian Industrial Relations Commission. The State of Victoria sought an order for the issue of a writ of prohibition to prohibit proceedings in the Commission. One ground upon which the State relied was that the *Industrial Relations Act* did not validly empower the Commission to make the awards sought by reason of the implied limitation on commonwealth power.

110 South Australia intervened in support of the prosecutor. During the course of the submissions made on its behalf, it was conceded that the Commission could regulate remuneration and disputes about remuneration and other payments to employees, but it was said that it could not prescribe employment qualifications and eligibility and termination procedures (*Australian Education Union* at 231). In relation to this submission Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, in their joint judgment, said (at 232-233):

> *"It seems to us that critical to that capacity of a State [to function as a government] is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation. On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question. There may be a question, in some areas of employment, whether an award regulating promotion and transfer would amount to an infringement. That is a question which need not be considered. As with other provisions in a comprehensive award, the answer would turn on matters of degree, including the character and responsibilities of the employee."*

And later (at 234) their Honours said:

> *"What impact the implied limitation would have on the power of the Commission to make an award prescribing particular minimum terms and conditions of employment for particular classes of employees, eg term of appointment, procedures and criteria for promotion and transfer, and termination on grounds other than redundancy, was a question which was not explored in detail in the arguments presented to this Court."*

111 For the purpose of disposing of this appeal it is only necessary to consider whether s 170DE (no valid reason for termination) and s 170EE (remedies) were invalid to the extent that they purported to apply to members of the police force in Victoria.

112 As regards s 170DE the restrictions that it established were: (a) that an employee's employment could only be terminated if there was a valid reason; and (b) that reason must have been connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service.

113 Is the government of Victoria impaired by these restrictions? In my view it is not. I can set out my reasons briefly.

114 At common law Crown servants could be dismissed at pleasure and without notice: *Kaye v Attorney-General (Tas)* (1956) 94 CLR 193 at 203. Even if the employment was for a definite period, the Crown could dismiss the servant at will. Now, however, the position of most public servants has changed. Public Service Acts and similar legislation have provided them with some security of tenure and protection against summary dismissal. In Victoria, in respect of members of the police force, the right of summary dismissal, which had existed since 1853, was removed by amendment to the *Police Regulation Act 1928* (Vic) (see Act No. 5126 of 1946), although the power of summary dismissal remains in the case of a constable during his two year period of probation: see s 8(5). Now a member of the force may only be dismissed if, after an inquiry, it is found that he has committed a breach of discipline (ss 69 to 76), or he has been convicted of certain criminal offences (ss 79 and 80) or if it is found that he is unfit for duty (ss 82 and 85).

115 It is against this background that the validity of s 170DE must be considered. In relation to members of the police force who are no longer on probation, the circumstances in which a right of dismissal exists would seem to constitute a valid reason for the purposes of s 170DE(1). It would not unduly impair the functions of the State if there was an added restriction on the dismissal of a member of the force, namely that the dismissal be for a valid reason. It must be remembered that the question whether a dismissal is for a valid reason must be determined by taking into account not only the member's conduct, but also the operational requirements of the police force. This suggests that there will be very few occasions where s 170DE would have operation. So few that no real impairment could be said to arise.

116 The position of a probationary constable creates greater difficulty. As already mentioned, his position is terminable at will. If *Menner v Falconer, Commissioner of Police* (1997) 74 IR 472 is correctly decided (which may be a matter of real doubt) a person whose office is terminable at will does not even have the right to be accorded procedural fairness before dismissal. Here s 170DE would have a greater impact on the ability to effect a lawful dismissal. However, on balance, I do not consider that the function of the State would be unduly impaired if the State could not lawfully dismiss a police officer for a reason that is not a valid reason. This is because, for reasons that I will explain,

the only consequence that would result from a contravention of s 170DE is an obligation to pay compensation.

117 This brings me to s 170EE. It provides that if there has been a contravention of s 170DE, the Court may, if it is appropriate, order that the employee be reinstated unless it is impracticable to make that order in which case an order might be made requiring the payment of compensation.

118 That part of s 170EE which empowers the Court to make an order for the payment of compensation creates no difficulty. But the power to order reinstatement does. In my opinion it would be extremely detrimental to the good order, discipline and morale of the police force if a member who has been dismissed is reinstated by order of the court. It is true that the power of reinstatement cannot be exercised if reinstatement is impracticable. That suggests that it is unlikely that the power would be exercised except in the most extraordinary of circumstances, at least in the case of a member of the police force. Nevertheless, any order of reinstatement carries with it the real possibility of undermining the authority of those who command the force and for that reason the power to order reinstatement should be considered beyond the legislative competence of the Commonwealth as an unacceptable interference with the State.

119 There is one final matter that should be mentioned. After submissions had concluded the respondents drew to the attention of the Court a recent decision of the Full Court in *Autistic Association of New South Wales v Dodson* [1999] FCA 439. Ms Dodson had lodged an application with the Commission alleging that her employment with the Association had been terminated in contravention of s 170DE. That application was transferred to the Industrial Relations Court and heard by a judicial registrar. Before the judicial registrar handed down his decision, in consequence of the *Amendment Act*, the jurisdiction of the Industrial Relations Court was vested in the Federal Court save for proceedings in respect of which a substantial hearing had commenced: see s 3, Sch 16, item 63. Thereafter the judicial registrar handed down a decision in favour of Ms Dodson and ordered that she be paid compensation. An application to review that decision was heard by a judge of the Federal Court. The Full Court held that the proceeding before the judicial registrar was a substantive hearing with the consequence that the Federal Court did not have jurisdiction to determine the review.

120 Nothing that was said in *Autistic Association* casts doubt on the correctness of the trial judge viz his ruling that he should hear the applications brought by the appellants as a judge of the Federal Court. With regard to the appellants Glasgow, Orchard and Gehrig, no hearing of their matters had begun before the date on which the jurisdiction of the Industrial Relations Court vested in the Federal Court. A judicial registrar did deal with Konrad's application before the vesting date. As I have mentioned previously, a judicial registrar dismissed that application because it had been brought against a non-existent person. However, that was not a "substantive hearing". The Full Court defined a substantive hearing as one in which "the rights of the parties are determined in respect of the substance of the controversy": *Autistic Association*

at [18]. The ruling by the judicial registrar that the proceeding was incompetent for want of a respondent is not a hearing of that character.

121 In the result, I would allow each appeal, set aside the orders of the trial judge and remit the matter for rehearing.

I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein.

Associate:

Dated: 6 August 1999

DATES OF HEARING: 15-16 February 1999

DATE OF DECISION: 6 August 1999

PLACE: MELBOURNE

#DATE 06:08:1999

Appearances

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Mr J Hammond

Solicitor for the First Respondent: Victorian Government Solicitor

Solicitor for the Second Respondent: Freehill Hollingdale & Page

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