[FEDERAL COURT OF AUSTRALIA INDUSTRIAL DIVISION]

Kanan v Australian Postal and Telecommunications Union

WILCOX J

31 July 1992

REGISTERED ORGANISATIONS — Union rules — Action for declaration and damages in respect of dismissal of applicant from an office within a registered organisation — Allegation of breach of rules — Applicant no longer a member of organisation — Act brought after expiration of four years from dismissal — Whether Court has jurisdiction to entertain the claim — Application of s 209 of Industrial Relations Act 1988 — Ambit of the exclusive jurisdiction granted by s 52 of the Act — Whether claim justiciable under s 258 — Effect of s 256 of Act — Industrial Relations Act 1988 (Cth), ss 50, 52, 209, 256, 257, 258.

PRACTICE AND PROCEDURE — Costs — Application for costs order — Whether proceedings instituted "without reasonable" cause — Industrial Relations Act 1988 (Cth), s 347.

WILCOX J. This is a motion for summary dismissal of a proceeding brought by Joseph Michael Kanan, a former employee and member of the respondent organisation, Australian Postal and Telecommunications Union. By his Points of Claim Mr Kanan alleges that the respondent was at all material times an organisation registered under the *Conciliation and Arbitration Act* 1904 (now, of course, repealed and replaced by the *Industrial Relations Act* 1988) and had registered rules pursuant to that Act. Mr Kanan further says that in October 1983 he was re-elected to a full-time office within the New South Wales Branch of the organisation — namely, Organiser — for a term of four years; and that, as a result of that re-election, the respondent agreed to employ him in that position for the duration of his term subject to the rules and the relevant award. Mr Kanan then refers to r 40 which was tendered in evidence for the purposes of the motion. That rule reads:

> "40 — EXTRAORDINARY VACANCIES
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> Where a Branch Officer or member of the State Executive has been certified by two medical doctors to be of unsound mind or subject to chronic illness to such an extent that they believe him incapable of carrying out his office, the State Executive shall request the Officer to resign. Failing receipt of his resignation within fourteen (14) days, the matter shall be referred back to the State Executive who may then declare the position vacant. The Officer concerned shall, subject to supporting medical evidence, have 28 days in which to lodge an appeal to Annual Conference, who may uphold or overrule the decision by the State Executive.
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> Where the decision is overruled by Annual Conference, the Officer shall be reinstated without loss. Where the decision is upheld and the

illness or injury is subject to compensation, the union shall assist the Officer in obtaining his entitlements.

And, in any case, the rules of natural justice shall apply."

It is, I think, common ground that, in his position of Organiser, Mr Kanan was a "Branch Officer" within the meaning of this rule.

Mr Kanan goes on to allege in his Points of Claim that, in breach of r 40 and in denial of natural justice, on 29 January 1986 the respondent terminated his term of office as Organiser and, consequently, his employment by the Branch. Particulars of the breaches are given but it is not necessary to set them out. I am not presently concerned with the merits of the claim.

The Points of Claim allege that, by reason of the termination of his employment, on a date after 29 January 1986 which is not known to him, the applicant became ineligible to be or remain a member of the organisation. The organisation does not concede that this is the reason why Mr Kanan ceased to be a member but it is common ground that, however the cessation occurred and since a date prior to the institution of the present proceeding which need not be specified, Mr Kanan has not been a member of the organisation. In consequence of this fact, and no doubt also because the four-year term for which he was elected has long since expired, Mr Kanan does not seek restoration to his elected office. He seeks a number of declarations regarding his entitlement to continue in office, after 29 January 1986, and the conduct of the respondent. He also seeks damages. It is not necessary at this stage to determine whether declaratory relief would be appropriate, if the applicant is entitled to succeed, or, if so, what form it should take. Nor is it necessary to consider questions inherent in the claim for damages.

For the avoidance of any misunderstanding, it is desirable that I emphasise that the present motion does not require me to form any opinion about the merits of Mr Kanan's claim that his office and employment were unlawfully terminated. On the one hand, Mr Kanan has filed a lengthy affidavit detailing the ill-treatment allegedly accorded him by the organisation; on the other hand, I am informed by Mr Rothman, counsel for the organisation, that his client denies both that it terminated Mr Kanan's employment and that its actions breached r 40. At this stage of the case I have no way of knowing where the truth lies. I am not concerned to make a judgment about that matter, nor do I. I have to approach the present application on the assumption that the facts are as alleged by Mr Kanan; asking myself whether, even so, I am affirmatively satisfied that the claim cannot succeed. If I am not so satisfied, I must reject the present motion and allow the matter to proceed to trial: see *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129.

The basis of the respondent's application for summary judgment is that the Court has no jurisdiction to entertain the claim. Mr Rothman rightly says that, this Court being a court of statutory jurisdiction, the applicant must point to some statutory basis for the proceeding.

Since the commencement of the *Industrial Relations Act* the usual vehicle for a complaint of rule breach is s 209 of that Act. But Mr Rothman says that Mr Kanan cannot bring his case within that section, for four reasons. First, s 209(1) provides that a "member of an organisation" may apply to the Court for an order under the section in relation to that organisation; only a

member has standing to invoke the section: see *Bielski v Oliver* (1958) 1 FLR 258 at 260. Mr Kanan is not now a member of the respondent organisation. Secondly, the application which may be made by the member under s 209 is an application "for an order under this section". That phrase is defined by s 209(9) as meaning "an order giving directions for the performance or observance of any of the rules of an organisation by any person who is under an obligation to perform or observe those rules". The order must relate to a continuing obligation to observe the rules: see *Darroch v Tanner* (1987) 16 FCR 368 at 374; 21 IR 284 at 289. But Mr Kanan does not seek an order giving directions for the performance or observance of the rules; there is no such order that could now benefit him. Thirdly, the only respondent is the organisation itself. An organisation itself is not under an obligation to perform or observe its rules. Finally, Mr Rothman points out that, by virtue of O 4 r 15 of the *Federal Court Rules*, an application under s 209 must be instituted by an order to show cause. He says that this is not a technical matter; the requirement of an order to show cause ensures that an organisation will not be put to the trouble and expense of answering a wholly unmeritorious claim. Before the organisation is called upon to answer the claim a Judge will have already reached the conclusion that the applicant's case has some substance: see *Williams v Ward* (1984) 8 IR 234 at 237 and *Roberts v Building Workers' Industrial Union of Australia* (1987) 18 IR 39 at 48.

Mr Rothman referred to s 21 of the *Federal Court of Australia Act* 1976 which, as he acknowledges, confers power on the Court to make declarations; but, as he points out, only in relation to a matter in which it otherwise has original jurisdiction. Section 21 is not itself a source of jurisdiction. Its function is to widen the powers of the Court in a case already within jurisdiction.

Mr Rothman also referred to s 32 of the *Federal Court Act*. But, as he says, that section applies only where the Court is already seized of a "matter" within its jurisdiction, operating to enable the Court to determine any other "matter" arising out of the same substratum of fact. That is not this case. Nor is there any question of the operation of the *Jurisdiction of Courts (Cross-vesting) Act* 1987.

In summary, according to Mr Rothman, there is no discernible jurisdiction for the Court to entertain Mr Kanan's claim.

When the above submissions were put, with one exception, they seemed plainly correct; as they seem to me now. The exception concerns Mr Rothman's third point, whether an organisation may be the subject of a s 209 order. As Toohey J said in *Allen v Sideris* (1984) 3 FCR 548 at 561; 9 IR 68 at 79, speaking of the equivalent s 141 of the *Conciliation and Arbitration Act*: "(t)hat is a question which has not been finally determined". His Honour cited *Krantz v Maynes* (1969) 10 FLR 134 at 144. Reference may also be made to *Australian Workers' Union v Bowen [No 2]* (1948) 77 CLR 601, noting the difference on the matter between Dixon J at 620 and Williams J at 634. See also per Woodward J in *Re Vehicle Builders' Employees Federation of Australia; Ex parte Allen* (1975) 24 FLR 483 at 486-487. But it does not matter whether this third point is correct. The others obviously are. Indeed, Mr Van Aalst, counsel for Mr Kanan, conceded that he could not support the claim under any of the heads of jurisdiction referred to by Mr Rothman. In particular, he said that this was not a

proceeding under s 209 to enforce the organisation's rules, but "effectively a common law claim". Nonetheless, he said that the Court had jurisdiction to entertain the claim. In saying that, he relied upon two other provisions of the *Industrial Relations Act*: ss 50 and 258. Mr Rothman was in a position immediately to deal with the s 50 argument but, having had no notice of the point, he sought and obtained leave to deal with s 258 by subsequent written submissions. I have now received and considered those submissions. I understand that Mr Van Aalst does not wish to reply to them.

Mr Van Aalst says that the applicant had an agreement with the organisation for it to employ him upon terms embodied in the rules. The agreement was terminated otherwise than in accordance with the rules. Therefore, the applicant has a good action for breach of contract. Although a contract case would not usually be brought in this Court Mr Van Aalst argued that the present claim must be so brought because s 52 of the *Industrial Relations Act* gives the Court exclusive jurisdiction in relation to such a matter.

Section 52 is side-noted "Exclusive jurisdiction". It reads:

> "(1) Subject to this Act, the jurisdiction of the Court in relation to an act or omission for which an organisation or member of an organisation is liable to be sued, or to be proceeded against for a pecuniary penalty, is exclusive of the jurisdiction of any other court created by the Parliament or any court of a State or Territory.
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> (2) The jurisdiction of the Court in relation to matters arising under section 208, 209 or 261 or Division 5 of Part IX is exclusive of the jurisdiction, or any similar jurisdiction, of a State industrial authority.
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> (3) The jurisdiction of the Court under section 56 is exclusive of the jurisdiction of any court of a State or Territory to hear and determine an appeal from a judgment from which an appeal may be brought to the Court under that section."

Mr Van Aalst relies on s 52(1), pointing out that the jurisdiction to which it refers is exclusive of the jurisdiction of any other court. That is true. But the argument fails to appreciate the significance of the words "the jurisdiction of the Court in relation to" etc. These words refer back to s 50, entitled "Jurisdiction of the Court". That section provides:

> "50(1) The Court has jurisdiction with respect to matters arising under this Act in relation to which:
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> (a) applications may be made to it under this Act;
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> (b) questions may be referred to it under this Act;
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> (c) appeals lie to it under section 56;
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> (d) penalties may be sued for and recovered under section 178; or
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> (e) prosecutions may be instituted for offences against this Act.
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> (2) The jurisdiction conferred on the Court by this Act, and the jurisdiction of the Court under section 24 of the *Federal Court of Australia Act* 1976 in relation to judgments in matters arising under this Act shall be exercised in the Industrial Division of the Court."

Only the matters embraced within s 50(1) are committed to the jurisdiction of the Court, and, therefore, its exclusive jurisdiction under s 52. The matters listed in s 50(1) are all matters "arising under this Act". A breach of contract claim arises at common law, not under the *Industrial Relations Act*. In any event, as Mr Van Aalst concedes, the present claim

does not fall within any of pars (a) to (e) of s 50(1). Only those particular types of matter are covered by ss 50 and 52.

The alternative provision relied on by Mr Van Aalst, s 258, is available only if one treats the claim as something more than a claim of breach of contract. I do not think that it has been so pleaded. But, as that position may be curable, it is better to consider whether s 258, in any event, offers any assistance to the applicant. Section 258 provides:

"258(1) An organisation, a member of an organisation or any other person having a sufficient interest in relation to an organisation may apply to the Court for a determination of the question whether an invalidity has occurred in:

(a) the management or administration of the organisation or a branch of the organisation;

(b) an election or appointment in the organisation or a branch of the organisation; or

(c) the making or alteration of the rules of the organisation or a branch of the organisation.

(2) On an application under subsection (1), the Court may make such declaration as it considers proper.

(3) Where, in a proceeding under subsection (1), the Court finds that an invalidity of the kind referred to in that subsection has occurred, the Court may make such order as it considers appropriate:

(a) to rectify the invalidity or cause it to be rectified;

(b) to negative, modify or cause to be modified the consequences in law of the invalidity; or

(c) to validate any act, matter or thing rendered invalid by or because of the invalidity.

(4) Where an order is made under subsection (3), the Court may give such ancillary or consequential directions as it considers appropriate.

(5) The Court shall not make an order under subsection (3) without satisfying itself that such an order would not do substantial injustice to:

(a) the organisation;

(b) any member or creditor of the organisation; or

(c) any person having dealings with the organisation.

(6) The Court may determine:

(a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under this section; and

(b) whether and how the notice, summons or rule should be given or served and whether it should be advertised in any newspaper.

(7) This section applies:

(a) to an invalidity whenever occurring (including an invalidity occurring before the commencement of this section); and

(b) to an invalidity occurring in relation to an association before it became an organisation."

It will be noted that, unlike s 209, s 258 is able to be invoked by a wider class of persons than members of the relevant organisation. Any person "having a sufficient interest in relation to an organisation" may apply for a determination under the section. Mr Rothman disputes that Mr Kanan is such a person, because he is now neither a member nor an employee of the

organisation. But, without deciding the point and for the purposes only of this motion, I will assume that he is such a person — at least in respect of the alleged invalidity in the organisation's management or administration giving rise to his dismissal. Upon that assumption, Mr Kanan would be entitled to approach the Court for a declaration of invalidity. That he would be entitled to damages is a more suspect proposition. Subsection (3) sets out an exhaustive list of the purposes for which an order may be made. It is not easy to see how the granting of money damages may effectuate any of the specified purposes. A damages award would not rectify, or cause to be rectified, the alleged invalidity (par (a)); the rule breach would continue, but damages would have been awarded for the breach. Similarly, damages would not validate an invalid dismissal (par (c)). Perhaps a damages award may be fitted into par (b), on the basis that it modifies the consequences in law of the invalid act, at least so far as Mr Kanan is concerned. But there are some textual problems about that course.

Apart from the above matters, Mr Rothman submits that s 258 was not designed to meet a case such as the present. As he points out, the comparable provision in the *Conciliation and Arbitration Act* (s 171c) was not treated as an enforcement mechanism similar to s 141: see *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194 at 214; *Jess v Scott* (1986) 14 IR 341 at 347; *Re Food Preservers' Union of Australia* (1988) 79 ALR 138 at 144.

The difficulties concerning s 258 have not been fully explored in argument and I do not decide this motion by reference to them. I express no concluded view about the possible application of par (b). Even with full argument, I doubt that it would be appropriate to dispose summarily of the case by reference to any of the submissions just mentioned. It would be preferable to address the problems inherent in the application of the section to the case in the light of fully ascertained facts, established by evidence.

However, Mr Rothman has an additional answer to the applicant's reliance on s 258; one which does not depend at all upon the contestable facts of the case. This is s 256 of the Act. Subject to qualifications, that section validates rule breaches, amongst other things, after the lapse of four years. More than four years has, of course, elapsed since the invalidity of which Mr Kanan complains. Section 256 reads:

> "256(1) Subject to this section and section 257, after the end of 4 years from:
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> (a) the doing of an act:
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> (i) by, or by persons purporting to act as, a collective body of an organisation or branch of an organisation and purporting to exercise power conferred by or under the rules of the organisation or branch; or
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> (ii) by a person holding or purporting to hold an office or position in an organisation or branch and purporting to exercise power conferred by or under the rules of the organisation or branch;
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> (b) the election or purported election, or the appointment or purported appointment of a person, to an office or position in an organisation or branch; or
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> (c) the making or purported making, or the alteration or purported alteration, of a rule of an organisation or branch;

> the act, election, purported election, appointment or purported appointment, or the making or purported making or alteration or purported alteration of the rule, shall be taken to have been done in compliance with the rules of the organisation or branch.
>
> (2) The operation of this section does not affect the validity or operation of an order, judgment, decree, declaration, direction, verdict, sentence, decision or similar judicial act of the Court or any other Court made before the end of the 4 years referred to in subsection (1).
>
> (3) This section extends to an act, election, purported election, appointment or purported appointment, and to the making or purported making or alteration or purported alteration of a rule:
>
> (a) done or occurring before the commencement of this section; or
>
> (b) done or occurring in relation to an association before it became an organisation."

The acts of which Mr Kanan complains plainly fall within par (a) of s 256(1).

Subsection (1) operates subject to s 256 itself and s 257. However there is no relevant qualification in s 256. So far as s 257 is concerned, subs (1) of that section provides that where, on an application for an order under the section, the Court is satisfied that the application of s 256 in relation to an act "would do substantial injustice, having regard to the interests of:

(a) the organisation;
(b) members or creditors of the organisation; or
(c) persons having dealings with the organisation;"

it shall, by order, so declare. Thereupon s 256 does not apply to the act specified in the declaration.

Mr Rothman puts several reasons why s 257 is not available in a case such as that of Mr Kanan, after the lapse of more than six years since the acts in issue. I prefer to express no view about those submissions. The fact is that no order has been made under s 257. Unless and until it is, s 256 applies to validate the acts complained of: see *Allen v Sideris* at 565, a decision concerning the equivalent s 171F of the *Conciliation and Arbitration Act*. As Mr Rothman says, s 256 operates of its own force. No order is necessary. Even the institution of an application under s 257 — none has been instituted — would not affect the operation of s 256. The operation of that section is affected only when an order is made under s 257. Until that time, the Court is obliged by s 256 to treat the relevant acts as valid. I respectfully adopt, as a statement applicable to s 256 and s 257, what was said by Gray J in *Pillar v McDonald* (1991) 37 IR 103 at 109 in relation to s 253ZD of the Act (which validates acts done in good faith for the purposes of an amalgamation) and s 253ZF (a provision corresponding to s 257):

> "It is also true that the Applicant might apply under s 253ZF, and, by showing substantial injustice, persuade the Court to undo the validating effect of s 253ZD. The possibility that such an application might be made in the future cannot constitute a ground for the granting of any restraining order under s 209(4).
>
> The alleged breach of the rules, on which the applicant relied in obtaining his rule to show cause, has therefore been cured both by the effect of s 240(2) and by the effect of s 253ZD."

It follows from the above that, even if s 258 is available in a case such as

this, at this point of time s 256 furnishes a complete answer to any claim under that section. As I have said, that answer does not depend upon any disputed question of fact. It arises from the agreed circumstances that a period exceeding four years has elapsed since the acts complained of and that no order under s 257 has been made. This is a case in which it is proper to take the extraordinary course of summarily dismissing the proceeding.

Mr Rothman submits that, if the proceeding is dismissed, the Court ought to take the extraordinary course of ordering that Mr Kanan pay the costs incurred by his client.

Section 347 of the *Industrial Relations Act* sets out the general rule that a party to a proceeding in a matter arising under the Act "shall not be ordered to pay costs incurred by any other party to the proceeding". But this rule is subject to a qualification: "unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause". Mr Rothman argues that the qualification applies to the present case because the proceeding was instituted without reasonable cause. Mr Van Aalst does not dispute that proposition, if his reliance on s 52 and s 258 should prove ill-founded. But he says that, as a matter of discretion, the Court ought not to order costs if it considers the proceedings not vexatious.

I do not doubt that, in instituting this proceeding, Mr Kanan was motivated to obtain relief to which he considered himself entitled. There is no reason to believe that he was actuated by a desire to harass the respondent. To the extent that the word "vexatious" imports considerations additional to the question whether there was a reasonable cause for the proceeding, I make no finding adverse to Mr Kanan. But, for the qualification of s 347 to operate, it is sufficient that the proceeding be instituted "without reasonable cause". A proceeding is not to be classed as being launched "without reasonable cause" simply because it fails. As Gibbs J said in *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470 at 473, speaking of the *Conciliation and Arbitration Act* equivalent of s 357 (s 197A):

> " ... a party cannot be said to have commenced a proceeding 'without reasonable cause', within the meaning of that section, simply because his argument proves unsuccessful. In the present case the argument presented on behalf of the prosecutor was not unworthy of consideration and it found some support in the two decisions of this court to which I have referred. The fact that those decisions have been distinguished, and that the argument has failed, is no justification for ordering costs in the face of the prohibition contained in s 197A."

In *Standish v University of Tasmania* (1989) 28 IR 129 at 139 Lockhart J applied the qualification in ordering costs against an applicant whose case he thought "misconceived", rather than simply unsuccessful. But, as the Full Court pointed out in *Thompson v Hodder* (1989) 29 IR 339 at 342, "there may be cases which could not be described properly as 'misconceived' but which would nevertheless be held to have been instituted without reasonable cause".

It seems to me that one way of testing whether a proceeding is instituted "without reasonable cause" is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceeding, there was no substantial prospect of success. If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise

the proceeding as being "without reasonable cause". But where, on the applicant's own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks a reasonable cause. That is the situation in the present case. The qualification of s 347 applies. The Court has power to order costs against the applicant.

I see no discretionary reason to withhold such an order. It is not a matter of the applicant's motives but, rather, that he has put the respondent to the expense of resisting a claim which was always doomed to failure. There is no question of punishing the applicant for his unreasonable course of action. The rationale for making a costs order is that a measure of indemnity should be conferred upon the respondent for the costs it has been obliged to incur in responding to the unreasonably instituted proceeding. I propose to order that the principal proceeding be dismissed with costs. The costs of the motion will be costs in the principal proceeding and so covered by that order.

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The principal proceeding instituted by the Application filed herein on 24 January 1992 be dismissed.
2. The costs of the motion for summary dismissal be costs in the principal proceeding.
3. The applicant in the principal proceeding, Joseph Michael Kanan, pay to the respondent in that proceeding, Australian Postal and Telecommunications Union, its costs of the principal proceeding.

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