[HIGH COURT OF AUSTRALIA.]

# THE KING

AGAINST

# THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION.

## Ex parte THE NORTH MELBOURNE ELECTRIC TRAMWAYS AND LIGHTING COMPANY LIMITED.

H. C. of A. 1920.

Melbourne, *Nov.* 1.

Sydney, *Dec.* 9.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

*Industrial Arbitration—Commonwealth Court of Conciliation and Arbitration—Jurisdiction—Agreement in settlement of dispute—Retrospective variation—Commonwealth Conciliation and Arbitration Act* 1904-1918 (*No.* 13 *of* 1904—*No.* 39 *of* 1918), *secs.* 24, 38 (*o*).

Where an agreement has been arrived at between all or some of the parties to a dispute, and a memorandum of the terms of the agreement has been certified by the President of the Commonwealth Court of Conciliation and Arbitration and filed pursuant to sec. 24 of the *Commonwealth Conciliation and Arbitration Act* 1904-1918, that Court has, under that section and sec. 38 (*o*), power to vary the agreement as though it were an award of the Court; and, therefore, has power to vary the agreement as from a date antecedent to the making of the order to vary, provided that the variation is within the ambit of the original dispute.

Order *nisi* for prohibition.

In May 1919 a plaint in the Commonwealth Court of Conciliation and Arbitration was issued on behalf of the Australian Tramway Employees' Association against a number of respondents, including the North Melbourne Electric Tramways and Lighting Co. Ltd., and on 18th October 1919 an agreement was entered into between

the organization and the Company in settlement of the dispute, and on 31st October 1919 a memorandum of the terms of the agreement was certified by the President of the Commonwealth Court of Conciliation and Arbitration and filed in the office of the Registrar of that Court. The agreement (*inter alia*) fixed the rates of wages of employees, and was to continue in force until 1st May 1920.

On 17th February 1920 a summons was issued on behalf of the organization against the Company to vary the agreement by increasing the minimum rates of wages of employees, and on 18th May 1920 an order was made by the President varying the agreement by awarding increased minimum rates of wages to the members of the organization employed by the Company as from 1st January 1920.

The Company then obtained an order *nisi* calling upon the Commonwealth Court of Conciliation and Arbitration and the organization to show cause why a writ of prohibition should not issue prohibiting that Court and the organization from further proceeding in respect of the order or award of 18th May 1920, upon the ground that the President had no jurisdiction to make the order or award retrospectively operate from 1st January 1920.

*Owen Dixon*, for the prosecutor. Under sec. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1918 there is no power to vary an award retrospectively. Assuming that the power to vary an award given by that section is a power to make a substantially new order by reason of new facts but within the limits of the original claim (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1)), such an order is necessarily prospective, that is, it must be limited to duties to be performed. The effect of the decisions in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2) and *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (3) is that the words "shall continue in force" (sec. 28) were intended to give security that the provisions operating under an award are the only provisions which are to operate until a new award is made. The reasoning that led to that result leads also to

(1) 11 C.L.R., 1, at pp. 27, 55.
(2) 28 C.L.R., 209.
(3) 27 C.L.R., 72.

H. C. OF A. 1920.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE NORTH MELBOURNE ELECTRIC TRAMWAYS AND LIGHTING CO. LTD.

the conclusion that under the power to vary given by sec. 38 (o) no alteration in the conditions laid down by the award can be made in respect of the period before the variation is actually made. If that view is incorrect, there is no power to vary retrospectively an agreement made under sec. 24. The existence of that power depends on the effect of the words "shall have the same effect as, and be deemed to be, an award." The effect of such a power would be to give the Arbitration Court power at any time to revise the whole agreement upon the same material as existed when the agreement was made. If, however, the power to award is only prospective, it is a power to prevent the agreement operating in circumstances which were never contemplated. The words "deemed to be an award" are intended to enable the parties to enforce their rights under the agreement in the same way as under an award. That is shown by the words "as between the parties to the agreement." The parties are to have the same rights under the agreement as they would under an award, but that the Court should have power to vary is not one of those rights. The words "reopen any question" in sec. 38 (o) mean reopen any question which has been decided by the Court, and are not applicable to a matter upon which there has been an agreement between the parties.

*Latham*, for the respondent organization. The effect of sec. 24 is that when an agreement is certified and filed it is on the same footing as an award for all purposes. The words "as between the parties to the agreement" were inserted when the provision for making a common rule was in the Act, and probably the intention was to draw a distinction between an agreement and an award in that respect. There is power to vary an award retrospectively (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1)). Under sec. 38 (o) the Court may, upon an application to vary an award, make any order which the Court might originally have made; and that means that the order varying must be in relation to the dispute which was the subject matter of the award, and therefore must be within the limits

(1) 28 C.L.R., 1, at p. 10.

of the claim made in the plaint. So, in the case of a variation of an agreement, the order must be within the limits of the claim as to which the agreement was made. The power given to "reopen any question" shows that a retrospective variation may be made, for the question at the time the award or agreement was made was as to the wages payable for the future. If that question is reopened, the variation may be as to any part of that period whether before or after the variation.

*Owen Dixon*, in reply. Upon the proper construction of the context the power to vary does not include a power to prescribe some duty in respect of what is past. The giving of a lump sum in respect of past services or as compensation because the award did not fix a sufficient rate of wages cannot be described as a variation of an award. Such a thing could not be done by the original award. The power to reopen any question cannot extend the power to vary.

*Cur. adv. vult.*

Dec. 9.

The following written judgments were delivered:—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. By memorandum of agreement dated 18th October 1919 made between the Australian Tramway Employees' Association, an organization registered under the *Commonwealth Conciliation and Arbitration Act*, of the one part and the North Melbourne Electric Tramways and Lighting Co. Ltd. of the other part, certain rates of pay and conditions of employment were agreed on for members of the Association employed by the Company. It was an express term of the agreement that it should continue in force till 1st May 1920. This agreement was made in settlement of a dispute which was duly before the Commonwealth Court of Conciliation and Arbitration and was certified on 31st October 1919 under sec. 24 of the *Commonwealth Conciliation and Arbitration Act* 1904-1918, and filed in the office of the Registrar.

On 17th February 1920 a summons was issued out of the Commonwealth Arbitration Court on behalf of the Association calling on

H. C. OF A. 1920.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE NORTH MELBOURNE ELECTRIC TRAMWAYS AND LIGHTING CO. LTD.

Knox C.J., Gavan Duffy J. Starke J.

the Company to show cause why the agreement referred to above should not be varied by inserting therein increased rates of pay for certain classes of employees. It was not disputed that the increased rates sought in this proceeding were within the ambit of the original dispute. On 18th May 1920 the President of the Arbitration Court made an order on this summons that the agreement should be varied by substituting higher rates of wages for various classes of employees as from 1st January 1920. The Company obtained an order *nisi* for prohibition against further proceedings in respect of so much of the said order as prescribed higher rates of wages from 1st January to 31st March 1920 and from 1st April 1920 to the date of the order.

The question for decision is whether the President had jurisdiction to vary the provisions of the agreement as from a date antecedent to the making of the order to vary. Sec. 24 of the Act provides that an agreement when certified and filed shall, "as between the parties to the agreement, have the same effect as, and be deemed to be, an award." Sec. 38 (*o*) provides that the Court shall as regards every industrial dispute of which it has cognizance have power to vary its orders and awards and to reopen any question.

In support of the application Mr. *Dixon* put two main arguments, viz.: firstly, that under sec. 38 (*o*) there is no power to vary an award retrospectively—*i.e.*, to alter its provisions as from a date antecedent to the making of the order; and, secondly, that if such a power exists in relation to an award it does not extend to an agreement filed under sec. 24.

In our opinion neither contention can be sustained. As to the first, the power to vary is given by sec. 38 (*o*) in terms not restricted by any qualification or condition, and we can see nothing to justify the insertion, by way of construction, of a limitation to the effect that no such variation shall have any effect before the date of the order by which it is made. The *Gas Employees' Case* (1) and the *Waterside Workers' Case* (2) support, to some extent, the conclusion at which we have arrived. As to the second, we see no escape from the conclusion that the effect of the provision of sec. 24 that the agreement "shall have the same effect as, and be deemed to be, an award"

(1) 27 C.L.R., 72. (2) 28 C.L.R., 209.

is to attract to agreements filed under that section the power to vary awards contained in sec. 38 (*o*). The whole scheme of the Act is based on a disregard of agreements, and we can find in its provisions no indication that the Legislature intended to give an agreement filed under sec. 24 an effect in excess of that given to an award made by the Court.

On the whole, we are of opinion that the words of the Act construed in their natural meaning authorize the Court of Arbitration to vary as from an antecedent date an agreement filed under sec. 24, so long as the variation is within the ambit of the original dispute. The rule *nisi* for prohibition must therefore be discharged.

ISAACS AND RICH JJ. (delivered by ISAACS J.). The question we have to determine is whether under the *Commonwealth Conciliation and Arbitration Act* there is power to vary retrospectively an agreement made and filed as an award in pursuance of sec. 24 of the Act.

1. *The Power to so vary an Award.*—Sec. 38 provides that "the Court shall, as regards every industrial dispute of which it has cognizance, have power . . . (*o*) to vary its orders and awards and to reopen any question." Having regard to prior decisions and to the wide terms of this sub-section, the proper construction is that the power contended for does exist in the case of an ordinary "award," that is, where the Court arrives at the terms of the award upon its own view of the facts after contest between the parties. The Court may well consider at the time it makes the award that the provisions it makes are just and proper for the whole period fixed by it for the duration of the award. But the Act reserves by sub-sec. (*o*) of sec. 38, only conditionally, however, upon an application being made by a proper party under sec. 39, the power to the Court to correct any error that may appear, within the limits of the dispute; and as justice is the main consideration and the period of duration is fixed by the arbitrator, there appears to be no reason why the revision, if it takes place, upon the necessary application, may not extend to the full correction of a proved error.

2. *Does an Agreement stand in the same position as an Award?*—

H. C. OF A. 1920.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE NORTH MELBOURNE ELECTRIC TRAMWAYS AND LIGHTING CO. LTD.

Isaacs J. Rich J.

The agreements referred to in secs. 23 and 24 are agreements for the purpose of arriving at the just terms of an award. They are intended merely as a *consensus* with regard to what the arbitrator should award, and the process described by sec. 24 is in effect one by which the arbitrator adopts the view of the parties who have reached that stage of the dispute. He has some control over the terms, and the section says it shall have the same effect as, and "be deemed to be, an award." There is nothing in sec. 38 or in any other part of the Act to cut down the comprehensiveness of this provision, and there is nothing in the nature of the thing to call for different treatment. When the parties agree for the purpose of sec. 24, they know they do so for all the purposes of an award. And consequently they know that they agree subject to the powers of variation which attach to an award.

The prohibition should therefore be refused, and the order *nisi* discharged.

*Order nisi discharged with costs.*

Solicitors for the prosecutor, *Home & Wilkinson.*

Solicitors for the respondent, *Brennan & Rundle.*

B. L.