

I order that judgment be entered for the plaintiff for £375 1s. 7d., with costs of the action except as aforesaid. Costs to be taxed.

H. C. OF A.  
1921.

CAREY  
v.  
THE COM-  
MONWEALTH.

*Judgment accordingly.*

Solicitor for the plaintiff, *A. R. Mills.*

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE FEDERATED CARTERS AND DRIVERS' }  
INDUSTRIAL UNION OF AUSTRALIA . } APPELLANT ;  
INFORMANT,

AND

McKAY . . . . . RESPONDENT.  
DEFENDANT,

APPEAL FROM A COURT OF PETTY SESSIONS OF  
VICTORIA.

*Industrial Arbitration—Award—Breach—Information—Evidence—Production of time-book—Demand for production—Authority to demand—Condition precedent—Suspicion of breach of award.*

H. C. OF A.  
1922.

MELBOURNE,  
Mar. 24.

Higgins and  
Starke JJ.

By an award of the Commonwealth Court of Conciliation and Arbitration it was provided that each employer bound by the award should keep a time-book, and that such time-book should on demand be produced to an official of the organization of employees duly authorized by the President and Secretary of the organization at the place where the time-book was kept between the hours of 10 a.m. and noon on certain days of the month ; that no authority to inspect should be given by the organization “unless the President and Secretary have good reason to suspect a breach of the award has been committed by the employer whose time-sheets are to be inspected” ; that no demand for production need be complied with until after the expiration of

H. C. OF A.  
1922.

~  
FEDERATED  
CARTERS  
AND  
DRIVERS'  
INDUSTRIAL  
UNION OF  
AUSTRALIA  
v.  
McKAY.  
—

seven days from the time when a list of members employed by the employer had been submitted to him; and that one day's notice should be given to the employer of any intended inspection.

*Held*, that the refusal of the official demanding inspection of the time-book to state to the employer the nature of the breach of the award which the employer was suspected of having committed did not justify the employer in refusing to produce the time-book for inspection.

*Held*, also, that, on a prosecution of an employer for a breach of the award in having refused to produce a time-book after demand made by an official authorized by the organization, it was not necessary to prove that the President and Secretary had, when they gave the authority, good reason to suspect a breach of the award by the employer.

#### APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Sunshine, before a Police Magistrate, an information was heard whereby the Federated Carters and Drivers' Industrial Union of Australia charged that H. V. McKay, being a respondent bound by a certain award of the Commonwealth Court of Conciliation and Arbitration, did, after a demand by one John Elliott, an organizer of the Union duly authorized in that behalf, refuse to produce to the said John Elliott the record or time-book prescribed to be kept by the said award.

By the award it was provided in clause 14 as follows:—“(a) Each respondent shall keep a record or time-book at his depot or yard or at an office convenient thereto showing the name of each employee who is a member of the claimant organization working for him (if the names of the members employed by him are supplied by the claimant organization) in which shall be entered the time of starting and finishing work on each day, and the amount of over-time worked and the wages and overtime paid to each employee. (b) Such record or time-book shall on demand be produced by the employer for inspection to an official of the claimant organization duly authorized in writing by the President and Secretary of the local branch or sub-branch of the Federated Carters and Drivers' Industrial Union of Australia at the place where the record or time-book is kept between the hours of 10 a.m. and noon on any one day between the 1st to the 27th inclusive of each calendar month except on pay day or the day before. No authority to inspect shall be given by the claimant organization unless the President and Secretary have



good reason to suspect a breach of the award has been committed by the employer whose time-sheets are to be inspected, and no demand for production need be complied with until after the expiration of seven days from the time a list of members employed by a respondent has once been submitted. One day's notice to be given to the employer of any intended inspection."

Evidence was given on behalf of the informant that authority was given by the President and Secretary of the Union to Elliott to inspect the defendant's time-book; that Elliott asked the defendant's manager to allow him to inspect the time-book, and that the defendant's manager refused to produce the time-book for inspection on the ground that Elliott refused to inform him of the nature of the breach of the award which the defendant was suspected of having committed. No evidence was given of the reasons for the President and Secretary of the Union suspecting that the defendant had committed a breach of the award. The defence raised was that the defendant's manager was justified in refusing to produce the time-book on the ground that Elliott had refused to state the nature of the breach of the award which the defendant was suspected of having committed. The Police Magistrate upheld this view, and dismissed the information.

From that decision the informant now appealed, by way of order to review, on the grounds that the decision of the Police Magistrate was based on an erroneous interpretation of clause 14 of the award and that on the evidence he should have convicted the defendant of the offence charged.

*O'Bryan*, for the appellant. It was not a condition precedent to the obligation to produce the time-book that Elliott should state the nature of the breach of the award which was suspected. [Counsel was stopped.]

*Lowe*, for the respondent. Although that was not a ground upon which the information could properly be dismissed, the dismissal was right on two grounds. First, the fact that the refusal to produce takes place between 10 a.m. and noon is a material part of the offence

H. C. OF A.  
1922.

FEDERATED  
CARTERS  
AND  
DRIVERS'  
INDUSTRIAL  
UNION OF  
AUSTRALIA  
v.  
McKAY.



H. C. OF A.  
1922.

FEDERATED  
CARTERS  
AND  
DRIVERS'  
INDUSTRIAL  
UNION OF  
AUSTRALIA  
v.  
McKAY.

and should have been proved by the informant. It was not necessary for the defendant to call attention to the absence of evidence on the point, and if he had done so there was no reason why the Police Magistrate should have allowed the informant to reopen his case. Secondly, under clause 14 (b) of the award the existence of a good reason in the minds of the President and Secretary of the Union to suspect a breach of the award was a condition precedent to the giving of authority to inspect, and the informant was bound to give evidence of the existence of such a reason. He was bound to prove the existence of facts which would reasonably arouse suspicion that a breach of the award had been committed. (See *McDonald v. Webster* (1).)

HIGGINS J. We are of opinion that the appeal should be allowed. It appears that the defendant's manager, on his own reading of the award, refused to produce the time-book for inspection until the Union told him what was the breach suspected of the award. But it was not by the award made a condition precedent to the right to inspect that the Union or its officer should state the breach suspected. The words of clause 14 (b) of the award are, so far as is material :—[His Honor read the clause and continued :—] There are two conditions precedent to the right of inspection. They are set out in that clause and almost in the same sentence. For no demand for production "need be complied with" until after the expiration of seven days from the time when a list of members employed by the respondent has been submitted. This list was duly submitted by the Union. Again, one day's notice has to be given to the employer of any intended inspection ; and this notice was given. But it is not made a condition precedent that the suspected breach should be stated to the employer. Indeed, in some cases such a statement might spoil the very object of the inspection. So far as to the reason given by the Police Magistrate for his order ; and Mr. *Lowe* admits that he cannot support the order on the ground stated by the Police Magistrate. But Mr. *Lowe* has taken, as he is entitled to take, two other points in support of this order dismissing the information. One is that



there is no evidence on the notes disclosing a refusal to produce the time-book between the hours of 10 a.m. and noon as prescribed by the award; and the second is that no proof was given at the hearing in the Police Court that there was good reason to suspect a breach of the award. With regard to that first point the Police Magistrate has said that "he found all the facts as deposed by the witnesses for the informant were correct, and that there was evidence on which he could convict if the informant's view of the law was correct." Looking at the Police Magistrate's statement and at the conduct of the case at the trial in the Police Court, it would be a hideous injustice if the mere absence from the notes of evidence that the refusal to produce took place between 10 a.m. and noon were to be decisive of the fate of this information. If the case be remitted, the point can be settled at the rehearing. With regard to the second point there is nothing in the award which, in my opinion, makes it necessary to prove that there was good reason to suspect. As my brother *Starke* has said, that is a matter which precedes the giving of the authority and is not a matter for proof at the trial. It may well be that the Union may be guilty of a breach of the award if it were to issue an authority without having good reason to suspect a breach. These two objections must, in my opinion, fail, as well as the reason given by the Police Magistrate.

We think that the proper order to make is:—Appeal allowed. Order appealed from set aside. Case remitted to the Court of Petty Sessions for rehearing. Respondent to pay the costs of the appeal, to be taxed. Costs of the first hearing to abide the result of the rehearing.

*Starke* J. I agree.

*Order accordingly.*

Solicitor for the appellant, *H. H. Hoare*.

Solicitors for the respondent, *Derham, Robertson & Derham*.

B. L.

H. C. OF A.  
1922.

FEDERATED  
CARTERS  
AND  
DRIVERS'  
INDUSTRIAL  
UNION OF  
AUSTRALIA  
v.  
MCKAY.

Higgins J