[HIGH COURT OF AUSTRALIA.]

WADDELL AND OTHERS . . . . . APPLICANTS;

AND

THE AUSTRALIAN WORKERS' UNION AND OTHERS . . . . . RESPONDENTS.

H. C. OF A. 1922.

BRISBANE, *June* 19, 20, 23.

Knox C.J., Higgins and Starke JJ.

*Industrial Arbitration—Award—Organization advising and inciting members to refuse employment—"Strike"—"If the refusal is unreasonable"—Injunction against organization and officials thereof—Commonwealth Conciliation and Arbitration Act* 1904-1920 (*No.* 13 *of* 1904—*No.* 31 *of* 1920), *secs.* 4, 6, 8, 48, 87, 88.

*Award—Mistake—Rectification—Power of High Court.*

Sec. 8 of the *Commonwealth Conciliation and Arbitration Act* 1904-1920 enlarges the denotation of the word "strike" beyond that given in the definition clause of the Act (sec. 4): it is no defence on the part of an organization, charged with creating a strike by advising or inciting its members to refuse to accept employment, to prove that the refusal is reasonable.

The High Court has no right to review the work of the Court of Conciliation and Arbitration, and no power to correct its mistakes (if any).

An organization of employees published in a newspaper conducted by it and issued to its members a "fighting policy," whereby those members were encouraged, advised and incited to refuse to accept employment at the minimum rates of pay determined by an award relating to the pastoral industry made by the Commonwealth Court of Conciliation and Arbitration in proceedings to which the organization was a party. Certain officials of the organization individually disseminated, and advised the members to follow, that "fighting policy."

*Held*, that the organization was guilty of a "strike" within the meaning of sec. 8, and should be restrained by injunction from committing that offence, and that the officials, by name, should also be restrained from counselling, taking part in or encouraging the commission of that offence or anything in the nature of a strike.

The words "if the refusal is unreasonable," added to the definition of "strike" in sec. 4, do not apply to a strike within the meaning of sec. 8.

MOTION.



An award made by the President of the Commonwealth Court of Conciliation and Arbitration on 31st May 1922 determined (*inter alia*) the rates of wages to be paid to shearers and other employees in the pastoral industry. That award was binding on the Australian Workers' Union (an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1920, and controlled and managed by its Executive Council). Shortly before that date an award had been made by the Queensland Court of Industrial Arbitration whereby the wages payable to employees in the pastoral industry had been fixed at higher rates than those subsequently determined by the award of 31st May.

In a weekly newspaper called *The Australian Worker*, printed and published for and on behalf of the above-named Union and circulated amongst its members, an official statement was issued on 24th May 1922 by the President and Acting-General Secretary of the organization to all its members, notifying that a "full fighting policy" would be published in the next issue. In the issue of the newspaper dated 1st June 1922, under the heading "Fighting Policy for the Pastoral Industry," appeared the following "Notice to A.W.U. Members":—"The following official statement is issued by the General President and Acting-General Secretary of the A.W.U. to all members of the organization:—Your Executive Council has considered the unjust and inequitable award made by Mr. Justice Powers and has endeavoured to make some satisfactory arrangement whereby the pastoral industry may be carried on peacefully. We have exhausted every possible means to bring about an amicable agreement, but on each occasion we have been repulsed by both the Commonwealth Court and the Pastoralists' Associations. We endeavoured to get a conference with the Pastoralists' Associations, but this was curtly refused. We then again made representations to Mr. Justice Powers and proved that his award was based upon wrong premises, and could not stand any test that has been used in the customary processes of the Court. The Court refused our representations, and the award has been made. We cannot accept this award, and now ask that members will refuse to engage upon any other conditions than those laid down in the fighting policy. These

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are as follows:— " (Here were set out details of work and the rates of wages therefor—such wages being at the higher rates fixed by the Queensland Court).—" Arthur Blakeley, General President. —John Barnes, Acting-General Secretary." In the following issue of the newspaper members of the Union were urged to stand firm in refusing employment except upon the above conditions.

Upon motion on behalf of Charles Graham Waddell and four other employers in the pastoral industry bound by the award of 31st May, *Starke* J. on 7th June granted an order *nisi* calling upon the Australian Workers' Union, the said Arthur Blakeley and John Barnes, and other persons (named), being officials of the said organization, to show cause before the High Court sitting in Full Court in Brisbane why an order in the nature of an injunction should not be made restraining the respondents and each of them from directly or indirectly doing or attempting to do anything in the nature of a strike within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, and from being directly or indirectly concerned in doing or attempting to do anything in the nature of such a strike, and from counselling, taking part in or encouraging the doing of anything in the nature of such a strike, and restraining the said organization from ordering, encouraging, advising or inciting its members to refuse to offer for or to accept employment and from attempting so to do.

Other material facts sufficiently appear in the judgment of *Higgins* J. hereunder.

The motion that the order *nisi* be made absolute now came on for hearing.

*Feez* K.C. and *Macrossan*, for the applicants. The application is made under sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1920. Under sec. 8 the organization was guilty of a strike in encouraging, inciting and advising its members to refuse to accept employment except at higher wages than those fixed by the Commonwealth Court. The definition of the word " strike " in sec. 4 is not exhaustive, and does not apply to sec. 8. Consequently, there is no question here as to the reasonableness of refusal to accept work. Even if that question is material, a refusal to comply with an award

of the Commonwealth Court and, in defiance of it, insistence upon compliance with an award of a State Court constitute an unreasonable refusal. The organization, being deemed to be guilty of a strike within sec. 8, also contravenes secs. 6, 87 and 88. The joint effect of those sections empowers the Court to make an order in the nature of an injunction under sec. 48 both against the organization and against the individual respondents.

*Stumm* K.C. and *McGill*, for the respondents. As to the word "strike," sec. 8 of the Act must be construed as being subject to the qualification effected by the words "if the refusal is unreasonable" in the interpretation section (sec. 4): it is not "clearly intended" by sec. 8 to exclude therefrom the applicability of the definition of the word "strike" in sec. 4. Here the refusal requested in the notice was not unreasonable, because an error of calculation was made in the award.

[KNOX C.J. If a mistake was made, the proper course is to apply to the President under sec. 38 for a variation of the award: his powers of rectification are very extensive.]

The power to grant an injunction is discretionary, and the Court should not enjoin a registered organization on the application of individuals who could have, but have not, formed an organization under the Act. No order should be made against the respondent officials in Queensland, who are entitled to urge compliance with the Queensland Court's award.

*Feez* K.C., in reply. What the Queensland officials have done may have the effect of counselling and encouraging members of the Union in other States.

*Cur. adv. vult.*

June 23.

KNOX C.J. In my opinion the applicants are entitled to an order enjoining the respondents in the form to be announced presently. I have had the opportunity of reading and considering the reasons about to be published by *Higgins* J., and desire to express my entire concurrence in those reasons and in the conclusion at which he has arrived.

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HIGGINS J. delivered the following written judgment:—It is clearly established by the affidavits—indeed, it has not been contested—that the Union through its committee of management has encouraged, advised and incited its members to refuse to accept employment, for the purpose of enforcing compliance with the demands of the employees; and, according to sec. 8 of the Conciliation Act, the Union, as an organization under the Act, is, on these facts, to be deemed guilty of a strike and liable to a penalty. No question has been raised as to the constitutional validity of the section. It is also clear that under sec. 48 the High Court or a Justice thereof may, on the application of any party to the award, make an order in the nature of an injunction enjoining an organization or person from committing or continuing this contravention of the Act. My brother *Starke* has made an order that the Union show cause before this Full Court why such an injunction should not be granted. No objection is taken to the form of procedure adopted, an order *nisi* for injunction. The order *nisi* was made on the application of Mr. Waddell and four others, who are all parties to the award.

There is really no dispute as to the facts. The award having been made by the learned President of the Court of Conciliation on 31st May last, the "fighting policy" of the Union was announced by the Executive Council of the Union through its official organ on 1st June. The shearers (for instance) of the Union were told, in various bitter phrases, that they should not accept work from pastoralists unless they were to be paid 40s. per 100 sheep shorn, as prescribed by a recent Queensland award, instead of 35s. per 100, as prescribed by the award of the Court of Conciliation. The only objection of any substance that has been presented against the injunction is that based on the definition of "strike" in sec. 4. Until the amending Act of 1920 the words were "'strike' *includes* the total or partial *cessation of work* by employees, acting in combination, as a means of enforcing compliance with demands made by them or other employees or employers." But in 1920, by the amending Act, there was added to the definition the words "and the total or partial *refusal* of employees, acting in combination, to accept work, *if the refusal is unreasonable.*" The Principal Act had contained, in

sec. 8, a provision that an organization of employees which, for the purpose of enforcing compliance with demands, " orders " its members to refuse to accept employment, shall be deemed to be guilty of a strike; but by the amending Act of 1920, at the same moment as the change in the definition of " strike " came into effect, sec. 8 was enlarged so as to cover the case where the organization encourages advises or incites, as well as " orders "; and the organization itself was to be treated as having ordered, encouraged, &c., if the committee of management had ordered, encouraged, &c. It is argued by Mr. *Stumm* for the Union that sec. 8 as it now stands is to be read as subject to the qualification contained in the definition of " strike " as it now stands in sec. 4—that the refusal must be unreasonable; that the award of 35s. per 100 is the result of an obvious mistake in calculation made by the President as shown by his judgment; that the incitement to refuse to accept work under such circumstances is not unreasonable, and that the Union therefore has not committed any contravention of the Act within the meaning of sec. 48. I am unable to accept this view. The fact that a refusal on the part of the employees, acting in combination, to accept work when offered is not to be deemed a strike unless the refusal is unreasonable, does not involve as a result that the action of the Union, in ordering, encouraging, advising or inciting its members to refuse to accept employment, is not to be a strike unless the order, encouragement, advice or incitement is unreasonable. On the strict form of the words used in sec. 8, the order, encouragement, &c., is to be deemed to be a " strike " whatever the definition of " strike " in sec. 4 says; sec. 8 adds a new kind of strike, enlarges the denotation of " strike " beyond that in sec. 4. It has to be remembered that the definition of the word " strike " in sec. 4 is not exhaustive—the word *includes* what is there stated, not *means* what is there stated; and, as to all the definitions in sec. 4, they are not to apply " where otherwise clearly intended." Parliament, in effect, allows the individuals charged with strike to show as a defence that even if they acted in combination in refusing to accept work, the refusal was not unreasonable; but, when the organization is charged with " strike " by inciting the members to refuse to accept work, the reasonableness of the refusal is no defence. It is the duty of the Union, when it obtains an award which in some respects it thinks to be unjust to

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its members, not to forbid the members to accept work under the terms of the award. "There is the umpire's verdict; we do not agree with it in clause Z; but we cannot enjoy what is given by clauses A to Y, and at the same time tell our members not to submit to clause Z." The award must be accepted as a whole.

But even if Mr. *Stumm's* construction of the section is right, how can it be said that the incitement was not unreasonable under the circumstances? The Union, if it sees a clear mistake made to the prejudice of its members, can apply to the learned President to vary the award, so as to rectify the mistake (sec. 38 (*o*)); and if the mistake is so obvious as the Union thinks, it can be made obvious to the President. It is true that the President was informed, before he finally pronounced his award, of the objections of the Union to the rate which he proposed, and that he persisted in his course; but the President could not be expected to alter his proposed award because the members of the Union thought the award was wrong, or because another Court—the State Court of Queensland—had awarded a higher rate, or because of any apprehension that the members of the Union would not accept work under the rates which he thought just. Nothing, however, is easier to demonstrate than a slip made in arithmetical calculations; and if such a slip were shown to the President no one can entertain any doubt that he would readily rectify it. This Court, it must be fully understood, has no right to review the work of the Court of Conciliation, no power to correct its mistakes (if any). The responsibility for the award rests solely on that Court alone. We have not considered, we have no right to consider, whether there was any mistake in fact made by the President in his calculations. In face of this right to apply for a variation, how can this High Court say that the incitement to refuse employment is not unreasonable, when the Union has made no application whatever to vary the award in respect of that part which the Union declares to be an error?

The whole fabric of the system of conciliation and arbitration in industrial disputes rests on trust in the Court of Conciliation to do what is right to the best of its power and light. In the vast multitude of considerations to which the Court must apply its mind, there must be some mistakes made. If the mistakes be made to the prejudice of the employers, the employers must submit; if the

mistake be made to the prejudice of the employees, the employees must submit. The employees cannot take the benefits which the system confers without submitting to such burdens as it imposes; they cannot take what is pleasing and reject what is unpleasing. If what is unpleasing is due, in their opinion, to an error of the Court, Parliament has provided a means whereby the Court can rectify what is wrong; but the burden rests on the employees to demonstrate that what has been done is wrong.

So far as regards the individual respondents, secs. 87 and 88 of the Act, coupled with secs. 6 and 8, justify the grant of an injunction against them by name, as well as against the Union. They are all officials of the Union; it is alleged, and not denied, that they are disseminating the "fighting policy" of the Union among the members, and advising the members to follow it; and under these sections they are to be treated as principals in the offence.

I understand from my brothers, the Chief Justice and *Starke* J., that they concur with the reasons which I have just stated for making absolute the order for injunction. But I must now add something on my own personal responsibility. I confess that I concur in granting this injunction with deep regret. I cannot divorce from my mind what I learnt as President during fourteen years. This great Union, with more than 100,000 members, has, with the aid of the Court of Conciliation, maintained peace in the pastoral industry and many other country industries since the Court was constituted in 1904. It has submitted even to reduction of rates as well as to many refusals of the Court to grant demands which the Union pressed as being just and reasonable. It has secured for its members, through the Court, terms of employment which could have never been secured by strikes. Now, the leaders of the Union, under the injunction, will become liable to fine or imprisonment if they disobey its terms. It is our duty, however, in this High Court, to carry out the law, however we may regret the consequence. We have surely in this case another demonstration of the inexpediency—the inexpediency to which I have often and fruitlessly referred when I was President—of having separate and uncoordinated tribunals—State and Federal, special and general—dealing with the same subject matter of industrial relations.

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STARKE J. I have had the opportunity of reading the opinion of *Higgins* J., and of considering it with him and the Chief Justice. It so completely covers the ground that I do no more than express my entire concurrence in the reasons assigned by him for enjoining the respondents in these proceedings from a further contravention of the Act, in the terms proposed.

*Order enjoining the respondent organization, its agents and servants from ordering, encouraging, advising or inciting its members to refuse to accept employment for the purpose of enforcing compliance with any demands of the said organization or its members, employees in the pastoral industry, and from doing anything in furtherance of the "fighting policy" of the said organization as published in the "Australian Worker" newspaper dated 1st June 1922; and restraining the respondent Arthur Blakeley and each of the other individual respondents from counselling, taking part in or encouraging the commission of any such offence as aforesaid and from attempting to commit the same and from counselling, taking part in or encouraging anything in the nature of a strike on account of any industrial dispute in the pastoral industry and from attempting to commit any such offence. Costs of these proceedings, including costs of the ex parte application, to be taxed and paid by the respondent organization.*

Solicitors for the applicants, *A. J. McLachlan & Co.*, Sydney, by *Cannan & Peterson.*

Solicitor for the respondents, *A. C. Roberts*, Sydney, by *E. E. Quinlan.*

J. L. W.