REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1924-1925.

[HIGH COURT OF AUSTRALIA.]

PICKARD . . . . . APPELLANT;
INFORMANT,

AND

JOHN HEINE & SON LIMITED . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1924.

SYDNEY, *Mar.* 31; *July* 28; *Aug.* 14, 20.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Industrial Arbitration—Award—Interpretation—Employees on weekly wages—Deduction of payment for day on which employee cannot be usefully employed—Breach of award—Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *sec.* 38 (*o*).

By an award of the Commonwealth Court of Conciliation and Arbitration it was provided that employment could only be terminated by a week's notice on either side, but that this should not affect "the right of the management . . . to deduct payment for any day the employee cannot be usefully employed because of any strike by the union or any other union or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent."

Held, that a stoppage of work on a public holiday because the employer was unwilling to pay to certain of his employees double pay, to which they would have been entitled if they had worked on that day, and it would have been uneconomic to employ those of his employees who were bound by the award in the absence of the former employees, was not a "stoppage of work by any such cause which the employer cannot reasonably prevent."

H. C. OF A. 1924.

PICKARD v. JOHN HEINE & SON LTD.

APPEAL from a Deputy Stipendiary Magistrate of New South Wales.

An information was on 20th December 1923 heard by a Deputy Stipendiary Magistrate for the Metropolitan Police District of New South Wales, whereby Harry Pickard alleged that John Heine & Son Ltd. on 25th April 1923, being then bound by the provisions of an award of the Commonwealth Court of Conciliation and Arbitration, No. 113 of 1920, made in a matter in which the Amalgamated Engineering Union (Australian Section), then the Amalgamated Society of Engineers, was claimant and the Adelaide Steamship Co. and others, including the defendant, were respondents, did commit a breach or non-observance of the award, in that, William James Lees being then in the employment of the defendant and having been in such employment for more than fourteen days and not being a casual worker, the defendant did not pay to Lees the wages due to him for 25th April 1923, namely, nineteen shillings and twopence, contrary to the provisions of the *Commonwealth Conciliation and Arbitration Act* and the award.

By the award in question a minimum weekly rate of wages was prescribed. Clause 12 (h) of the award was as follows:— "Employment to be terminated only by a week's notice on either side, and such notice may be given at any time during any week. This shall not affect the right of the management to dismiss any employee without notice for malingering, inefficiency, neglect of duty or misconduct, and in such cases wages shall be paid up to the time of dismissal only, or to deduct payment for any day the employee cannot be usefully employed because of any strike by the Union or any other union or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent." On an application by the Amalgamated Society of Engineers for an interpretation of the words "for any such cause" in clause 12 (h), the President of the Commonwealth Court of Conciliation and Arbitration, in a judgment delivered on 12th October 1923, said: "I hold that the word 'such' was intended to and does refer to similar causes to that mentioned in the preceding words of the clause, and the clause cannot fairly be read as if the word 'such' had not been inserted." He also said that the interpretation was only given "in respect of the respondents summoned to appear to

show cause why the interpretations claimed should not be allowed by the Court and does not apply to John Heine & Son Ltd. prior to 19th September 1923, the said John Heine & Son having been prosecuted in the Glebe Police Court on 12th June last, prior to the filing of the application for an interpretation by this Court, by the claimant organization for a breach of the award in respect of a holiday on 25th April last, which prosecution was, on the facts before the Court, dismissed."

The Magistrate having dismissed the information, the informant appealed to the High Court by way of case stated. The Magistrate stated that he found that the engineers, of whom Lees was one, could not be usefully employed by the defendant on 25th April 1923, which was a public holiday, being Anzac Day, because of the absence on holiday of assistants and other workmen about the defendant's works and that it would be uneconomic to employ the engineers without assistance; that there was no evidence of any strike by the Union or any other union, or of any breakdown of machinery, or of any stoppage of work for any similar cause on 25th April 1923; that Lees attended the works of the defendant on 25th April 1923 and was ready and willing to work, and that there was no work available for him; and that the absence of assistants and other workmen from work on 25th April 1923 was due to the unwillingness of the defendant to pay extra holiday pay to them. The Magistrate also stated that he held as a matter of law that the defendant was entitled to deduct payment of Lees' wages for 25th April 1923 because he could not be usefully employed on account of a stoppage of work by a cause which the employer could not reasonably prevent within the meaning of clause 12 (h) of the award of the Commonwealth Court of Conciliation and Arbitration, No. 113 of 1920, namely, the absence of assistants and other workmen on a State public holiday; that clause 12 (h) should be interpreted prior to the interpretation by the President of the Commonwealth Court of Conciliation and Arbitration of 12th October 1923 as if the word "such" therein were omitted therefrom; and that the defendant, by reason of the interpretation of 12th October 1923, was not bound by any other interpretation than that clause 12 (h)

H. C. OF A. 1924.

PICKARD v. JOHN HEINE & SON LTD.

should be interpreted as if the word " such " were omitted therefrom till after 19th September 1923.

Piddington K.C. (with him *Sherwood*), for the appellant.

Street, for the respondent.

Cur. adv. vult.

Aug. 20.

The following written judgments were delivered :—

ISAACS A.C.J. This is an appeal in Federal jurisdiction from the decision of a Deputy Stipendiary Magistrate at Glebe, in New South Wales, on 20th December 1923, upon an information against the respondent for breach of a Commonwealth industrial award. The award, No. 113 of 1920, was made between the Amalgamated Society of Engineers, claimant, and the Adelaide Steamship Co. Ltd. and others—including John Heine & Son Ltd.—respondents. The claimant organization is now the Amalgamated Engineering Union (Australian Section), and the appellant is a member of the Council of the organization and was the informant. The information alleged a breach or non-observance of the award by the respondent in that William James Lees, engineer's tradesman, being then in the respondent's employ, and having been in such employment for more than fourteen days, and not being a casual worker, the respondent did not pay to him the wages due for 25th April 1923, namely, nineteen shillings and twopence, contrary to the provisions of the Commonwealth Act and the award. The respondent pleaded not guilty, and after hearing evidence and argument the Magistrate dismissed the information. The Magistrate stated a case by which the matter comes to this Court on appeal.

The real point of the case may be briefly stated. The award, as it stood after variation on application dated 14th June 1921, was, so far as concerns this case, as follows :—Clause 1 provided a minimum rate of wages to employees " per week," except as to certain casual employees for whom the minimum rates were to be per day. Sub-clause (h) provided : [The sub-clause was here set out]. The evidence showed that Lees was not a casual employee, that he

was employed for more than fourteen days, and it was conceded that, if entitled to be paid for 25th April 1923, the sum claimed was correct. The defence rested on the contention that the facts satisfied the provisions of sub-clause (h) inasmuch as they enabled the Magistrate to decide that Lees could not be usefully employed on the date mentioned by reason of a cause which the employer could not reasonably prevent. The circumstances relied on for this were that 25th April 1923 was observed as Anzac Day and was a State holiday in New South Wales, that employees working under State awards on that day would be entitled to double pay, and that it would have been unprofitable, in such circumstances, to have worked the respondent's engineering establishment on that day, since about 140 men were under State awards and 110 were affected by Federal awards.

In reply to requests from this Court the Magistrate informed us that he found "(1) that the engineers employed by the defendant of whom the said Walter James Lees was one could not be usefully employed by the defendant on the public holiday—Anzac Day—25th April 1923, because of the absence on holiday of assistants and other workmen about the defendant's works and that it would be uneconomic to employ the engineers without assistance; (2) that there was no evidence that (a) there was any strike on 25th April 1923 by the union in question or by any other union, (b) there was any breakdown in machinery on that day, (c) there was any stoppage of work for any similar cause; (3) that the said Walter James Lees on 25th April 1923 attended the works of defendant and was ready and willing to work and that there was no work available for him; (4) that the absence of assistants and other workmen from work on Anzac Day 1923 was due to the unwillingness of the employer to pay extra holiday pay to them."

The question of law which emerges is this: Upon the true construction of sub-clause (h) of clause 12 of award No. 113 of 1920 is the absence, on a State holiday, of assistants and other workmen which is caused by the employer's unwillingness to pay them the double holiday pay required by a State award, and which results in the employment during that day of a member of the organization on weekly hiring not being useful, because uneconomic, a "cause

H. C. OF A. 1924.

PICKARD v. JOHN HEINE & SON LTD.

Isaacs A.C.J.

which the employer cannot reasonably prevent," and therefore a cause entitling him to deduct a day's pay from the member's minimum weekly wage ?

The first point of law ruled by the Magistrate answers that question in the affirmative. But he came to that conclusion as is seen upon two other rulings, the second and the third. This is one of those cases of small direct pecuniary interest, but of immense general importance. The provision we are concerned with, not only immediately affects thousands of men all over the Commonwealth, but, as appears from the report of a case in the *Commonwealth Arbitration Reports* (1), a like provision is inserted in other awards. It is, therefore, desirable, not merely to define so far as we can the rights and obligations now in contest, but also to offer the only authoritative guide possible to the Arbitration Court which has to deal with similar cases. Both the second and third rulings of the Magistrate therefore require examination. I shall first deal with the third ruling, as that was very strenuously urged by Mr. *Street* in his courageous argument. The *Commonwealth Conciliation and Arbitration Act* 1904-1920, by sec. 38, enacts : " 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 and to give an interpretation of any term of an existing award." In the recent injunction case of *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2), this sub-section received considerable attention. It was there pointed out by my brother *Rich* and myself that the " interpretation " power was added by Parliament not as a judicial but as an arbitral power. As a judicial power it could not be validly conferred upon the arbitral tribunal. If it could, it would be exercisable, not merely by the learned President, who is a High Court Justice, but also by any one, even a lay arbitrator, with any tenure of office, if Parliament chose so to limit the tribunal. But, considered as an arbitral function, it is not only valid but may be extremely useful. In one sense, it is in the nature of a variation, because it implies that the " interpretative " determination is to be inserted in and made part of the award, which is, no doubt, thereby

(1) (1922) 16 C.A.R., at p. 1249. (2) (1924) 34 C.L.R. 482.

and to that extent altered. But in a substantial sense it differs from "variation." To illustrate what I mean, let me suppose a clause in an award providing that "employees of the respondents shall receive £5 per week." If circumstances altered, so as to make £5 10s. a week a proper wage, that would be a true variation of the award, because it would be something different from that originally intended to fit existing circumstances. But if, with no alteration of circumstances, a question arose whether "employees" included all employees or only such as were members of the organization, an "interpretative" addition could be made, stating that "employees" meant those who were members of the organization, because that was always so intended. It is the intention of the arbitrator, as manifested by the award, that is to be law; and to make any yet unexpressed intention effective it must be put into words and inserted so as to become part of the award. That is what I understand by "interpretation" as distinct from "variation." No doubt, when inserted the effect is the same in each case. But the practical and just ground for doing one may not be that for doing the other. The "interpretation" is meant to apply the award to circumstances as they existed when the award was made—the variation is meant to adapt the award to altered circumstances. Perhaps, as the subject is so important, a little may be added to clarify the position. The Constitution, in its first, second and third chapters, divides the whole power of the Commonwealth into the three great functions of legislative, executive and judicial. It is clear the arbitral power exercised by the Arbitration Court is neither executive nor judicial in the constitutional sense. *Ex necessitate* it falls within the legislative domain, being part of the mechanism required by sec. 51 (xxxv.) of the Constitution for making a binding regulative provision in connection with industrial disputes extending beyond the limits of any one State. (Compare the statutory determination of rates of miners' wages by district boards in England—see *Halsbury's Laws of England*, vol. xxviii., p. 874.)

For these reasons, and upon the authority of the decision of this Court, in the *Waterside Workers' Case* (1), the interpretation order of *Powers* J., relied on by the Magistrate in his third ruling, cannot,

(1) (1924) 34 C.L.R. 482.

H. C. OF A. 1924.

PICKARD v. JOHN HEINE & SON LTD.

Isaacs A.C.J.

when it is examined and classified, affect this matter. It is only just, however, to state that, in my opinion, the interpretation order was not intended by *Powers* J. to do more than state his Honor's opinion of the meaning of sub-clause (h) as it stood, and to add that nothing he then said was to make the present respondent's liability greater than it was without the interpretation.

Then, construing sub-clause (h) as it stands, I do not agree with the Magistrate's view that the word "such" must be judicially eliminated. Nor can I agree with the argument addressed to us that the word "which" should be read as "as" so as to leave the "cause" absolutely indeterminate in nature, and applicable as a valid reason for deducting a day's pay if only the employer can show it is one he could not "reasonably prevent." The latitude that would be attributable to "reasonably prevent" would not be measurable. No weekly employee would know where he stood in such a case. If outside circumstances, utterly unconnected with the immediate working operations, such as economic reasons, trade competition, quarrels with customers, and so on, can be introduced to test the reasonableness of prevention or non-prevention, there is little or nothing of security or definiteness left to the employee. Indeed, if the interpretation suggested be correct, the reference to "breakdown of machinery" is quite superfluous. Of course a breakdown of machinery is properly regarded in itself as a valid cause, for primarily it denotes that the working apparatus itself is incapable, by reason of its own inherent inefficiency, of enabling operations to be carried on. But, if the words "any such cause" are read as "any cause" and if the word "which" is read as "as," besides the cardinal sin of altering the language of a document there would be no necessity of inserting strikes or breakdown of machinery.

When the number and variety of respondents are regarded, including Government enterprises, shipping companies, engineering establishments, newspaper undertakings, and so on, the scope of the suggested clause would be so unmeasurably wide as to mean little but difficult litigation to employees if they wished to contest a deduction. First, I rely on the words themselves in their collocation. For clarity sake I segregate the provision thus:—

"This shall not affect the right of the management . . . to deduct payment for any day the employee cannot be usefully employed—(1) because of any strike by the union or any other union or (2) through (a) any breakdown of machinery or (b) any stoppage of work by any such cause which the employer cannot reasonably prevent." It is the composite expression "stoppage-of-work-by-any-such-cause" that is the antecedent of "which." The word "such" relates to breakdown of machinery. Any "such cause" means, in my opinion, any cause similar to or of the same nature as the breakdown of machinery. A cause is of that nature, in my opinion, if it is so connected with the working of the machinery as to prevent it operating in a manner that makes the employment of the men useful. One might imagine as "such" causes the deprivation of electric current or coal or water, or the desirability of replacing old machinery by new, or putting on protection guards, or overhauling a machine to prevent danger, where signs of possible danger were observed. If these, and others of a like nature which might be mentioned, caused a stoppage of work, because the machinery could not be properly operated, then the range of consideration as to whether the employer could "reasonably prevent" the stoppage would be reduced to understandable limits.

In interpreting documents, should there be any ambiguity, their history, as well as their subject matter, may be important. Personally I see no ambiguity. But as the interpretation I favour was disputed at the Bar, it must be because there is ambiguity. The history of the introduction of the word "such" is written openly in the records of the Arbitration Court. In the material before us we find it referred to. *Powers* J. in his interpretation order states it. Although I excise that order as an effective judicial determination, I accept the historical statement of facts, as part of the surrounding circumstances when the provision was made. Reading the reasons given by the learned President and reading the report of the case which he refers to, namely, *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Albany Bell Ltd.* (1), in order to ascertain the steps by which the present form of clause (h) was reached by amendment, and the industrial facts that then

(1) (1922) 16 C.A.R. 1248.

H. C. OF A. 1924.

PICKARD v. JOHN HEINE & SON LTD.

Isaacs A.C.J.

prevailed, so as to understand fully the subject matter, I am thereby able to place myself in the position of the Arbitration Court, just as a Court in construing a will endeavours to place itself in the testator's arm-chair, in order to understand what he said, so I endeavour to place myself notionally amid the surroundings of the Arbitration Court. When that is done the literal meaning I have given to the word is confirmed.

On this construction the appeal should clearly be allowed.

On the question of when and how far economic considerations enter into the determination of whether, in an appropriate case, the employer could "reasonably prevent" the stoppage from the given cause, I express no opinion at present.

My opinion is that the decision was erroneous, and the appeal should be allowed.

GAVAN DUFFY J. I concur in thinking that the appeal should be allowed. The respondent deducted certain wages which an employee claimed to have earned during a stoppage of work in the respondent's engineering business, and submitted that such deduction was properly made under clause 12 (h) of an award of the Commonwealth Court of Conciliation and Arbitration, which is as follows: [Clause 12 (h) was here set out]. The question we have to determine is whether the stoppage which actually occurred is such a stoppage as is contemplated by the words "any stoppage of work by any such cause which the employer cannot reasonably prevent." The suggested difficulty in interpreting this language arises from the various meanings which have been attached to the word "such" and to the word "reasonably." If we apply to the words in dispute the meaning primarily attached to them in ordinary use and by the lexicographers, we may paraphrase the language thus: "Any stoppage of work arising from any cause *of the kind already mentioned* which the employer cannot prevent *by any means which a reasonable man might be expected to employ in the circumstances.*" When the language is thus paraphrased, two things become tolerably clear:—(1) That the stoppage contemplated by the sub-section must be the effect of a cause of the same or a like kind with something already mentioned in the same clause. Whether this "something"

includes only a breakdown in machinery or extends also to a strike, it is not necessary for our purpose to determine. (2) That either the stoppage or the cause of the stoppage (it matters not which) could not have been prevented by the employer using any of the means which a reasonable man might be expected to employ in such circumstances. In order that the respondent might avail itself of the provisions of the clause it was necessary that it should bring its case within both these propositions; and, in my opinion, it has brought it within neither of them. It is admitted that the stoppage which occurred had no relation either to a strike or to a breakdown in machinery, and the respondent has not satisfied me that it would not have been a reasonable course to pay to those of its employees who are serving under the State award the wages prescribed by that award for holiday work, rather than close its works during the holiday.

STARKE J. This was an information laid by Pickard against John Heine & Son Ltd. for breach or non-observance of an award of the Commonwealth Court of Conciliation and Arbitration. By that award the employment of certain workmen, members of the Amalgamated Engineering Union, could only be terminated by a week's notice of either side, but the employer was permitted "to deduct payment for any day the employee cannot be usefully employed because of any strike by the Union or any other union or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent." One Lees was a weekly employee of the defendant, and on 25th April 1923 he was informed that no work was available for him and other engineers on that date. It was, in fact, a public holiday (Anzac Day) in the State of New South Wales, and certain assistants and other workmen employed by the defendant would be entitled, under State industrial awards, to extra pay (double rate) if they worked on that day. These assistants and other workmen did not work on 25th April, and the defendant concluded that it would be uneconomic to employ, in their absence, Lees and other engineers on that day. The defendant therefore informed them that no work would be available. Subsequently the defendant deducted

H. C. OF A. 1924.

PICKARD v. JOHN HEINE & SON LTD.

Starke J.

from the weekly wage of Lees a day's pay, claiming, pursuant to the award, that he could not be usefully employed on account of a cause, namely, the absence of the assistants and other workmen, which the defendant could not reasonably prevent.

The Magistrate has found that the absence of these assistants and other workmen from work on 25th April "was due to the unwillingness of the employer to pay extra holiday pay to them" and not to the unwillingness of the assistants and other workmen to work on that day if they were paid the holiday rate.

On the part of the informant it was urged that "any such cause" in the clause in the award above set out refers to a "cause," already mentioned, such as breakdown of machinery. But, in my opinion, the better interpretation of this obscure and ungrammatical provision is not to attach it to causes already provided for, but to read it thus: "any stoppage of work by any cause such as the employer cannot reasonably prevent." The antecedent of the word "which," without the word "such" before the word "cause," is the word "cause," and the insertion of the word "such" has not made the words "stoppage of work," "breakdown of machinery," or "any strike," the antecedents of "which." But this does not exhaust the difficulty of the clause, for it was suggested that the sentence means any cause, identical with or similar to a strike or a breakdown of machinery, which the employer cannot reasonably prevent. I confess that I cannot grasp what is meant by something similar to a strike that is not a strike, or something similar to a breakdown of machinery that is not a breakdown of machinery. In any case, the adoption of the interpretation suggested would, in my opinion, result in a conflict between the provision as to "stoppage of work" and the earlier provision as to a "strike" and a "breakdown of machinery." The earlier words would authorize a deduction if employment could not be usefully given owing to a strike or a breakdown of machinery, whereas the later provision would only authorize the deduction if the employer could not reasonably prevent the strike, or the breakdown of machinery, as the case might be. Some construction should be adopted, to avoid this conflict, and the best I can suggest is that already mentioned. No one can say with any certainty what the clause

means, and it might be redrafted with advantage to the parties to the award. Even on the interpretation I have adopted, I cannot think that the defendant has brought itself within its terms. The stoppage of work was brought about simply because the employer did not choose to pay holiday rates to other workmen. It could not work these men profitably if it had to pay them double-time rates. That is a misfortune, and no doubt hard upon the defendant. But the stoppage of work was brought about by its own action and was wholly within its own volition. The provision in the award for deducting pay has no application to such a case.

Lastly, we were told that the Arbitration Court had given a decision, or made a sort of supplementary award or determination, which concluded the matter. So far as the present respondent is concerned, I am satisfied that that Court gave no such decision.

The Magistrate's decision that the respondent was entitled to deduct a day's pay from Lees' weekly wage is, therefore, erroneous in point of law.

Appeal allowed and penalty imposed.

Solicitors for the appellant, *Sullivan Bros.*

Solicitors for the respondent, *Dawson, Waldron, Edwards & Nichols.*

B. L.