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new legal argument in support of a ground taken is, in my opinion, always admissible and quite as much as a new legal ground for an appellate decision of the Court.

The judgment should be affirmed and this appeal dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *E. R. Abigail.*

Solicitor for the respondent, *B. T. Heavener.*

B. L.

Dist *Aust Industrial Relations Commission, Re* 65 ALJR 58

Dist *Aust Industrial Relations Commission, Re* 96 ALR 513

Dist *Aust Industrial Relations Comm; Ex p. ATOF* (1990) 171 CLR 216

Refd to *North Western Health Care Network v Health Services Un* (1999) 164 ALR 147

[HIGH COURT OF AUSTRALIA.]

HILLMAN . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

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SYDNEY, *Aug.* 21, 22, 28.

Starke J.

Nov. 24, 25; *Dec.* 17.

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

Industrial Arbitration—Award—Award made binding on agency of Commonwealth—How far binding on Commonwealth—Transfer of activity to another agency—Successor—Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *sec.* 29.

By an award of the Commonwealth Court of Conciliation and Arbitration it was provided that the award should be binding on the Naval Board, the Minister for Navy and the Minister for Defence.

Held, that the award was not binding upon the Commonwealth, either as an original party to the award or by virtue of sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, in respect of employment in the same activities subsequently carried on by the Commonwealth through other representatives than those named.

Decision of *Starke* J. affirmed.

APPEAL from *Starke* J.

An action was brought in the High Court by Henry Hillman, on behalf of himself and all other members of the Amalgamated Engineering Union (Australian Section) employed at the Commonwealth dockyard, Cockatoo Island, affected by an award made by the Commonwealth Court of Conciliation and Arbitration on 14th June 1921 in a matter in which that Union (then the Amalgamated Society of Engineers) was the applicant and the Adelaide Steamship Co. Ltd. and others were respondents, against the Commonwealth, claiming in substance a declaration that the hours of duty of members of the Union employed at such dockyard should not, since 11th November 1922, without payment for overtime have exceeded 44 hours per week. The action was heard by *Starke* J., in whose judgment hereunder the material facts appear.

Piddington K.C. and *Collins*, for the appellant.

Bavin A.-G. for N.S.W. and *A. L. Campbell*, for the respondent.

Cur. adv. vult.

STARKE J. delivered the following written judgment :—

This is an action brought by Henry Hillman, on behalf of himself and all other members of the Amalgamated Engineering Union (Australian Section) employed at the Cockatoo dockyard, for a declaration that their ordinary hours of duty should not, since 11th November 1922, have exceeded 44 hours per week without payment of overtime. The Cockatoo dockyard has, since that date, worked a 48 hours' week, and the real object of the action is to establish a right to overtime in respect of the additional 4 hours.

The claim arises out of an award of the Commonwealth Court of Conciliation and Arbitration made in June 1921. Clause 3 of that award provided : " The ordinary hours of duty shall not (without payment of overtime) exceed 8 hours on each of the five days in the week between 7 a.m. and 5 p.m. and 4 hours on Saturday between 7 a.m. and noon." An admission was made in the case as follows : " 6. The said award at the date of the making thereof was made

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to bind a number of respondents including the Naval Board, the Minister for Navy and the Minister for Defence. The said award at the date of its making did not bind any Department of the Commonwealth or any Minister thereof except in so far as the said Commonwealth was bound by virtue of the said award being binding on the said Naval Board, the said Minister for Navy and the said Minister for Defence." I accept this admission, but the terms of the award have rather puzzled me. Clause 16 provides that the award is binding on the following respondents :—" F—As to items appearing in the said log " (that is, the general log of wages and conditions of employment prepared by the Union and annexed to the award) " numbered clause 1 ; items " (enumerated) " and with respect to each and every item in clauses 2 to 25 inclusive— . . . Naval Board, Minister for Navy, Minister for Defence . . ." This means, I suppose, that the award, and not the log, is binding in respect of the subjects mentioned in the log. But I take the admission as also based on sec. 29 of the Act. In September 1922 the award of June 1921 was varied as follows : " 3A. On and after midnight 23rd September 1922 clause 3 and sub-clause (*b*) of clause 4 shall not apply to any of the respondents bound by this award except to the following respondents . . . who have not applied for a variation of the award . . . Naval Board, Minister for Navy, Minister for Defence." And clause 3B, except as to the respondents already mentioned, prescribed, in lieu of clause 3, that the ordinary hours of duty should not (without payment for the overtime), exceed 8 hours 45 minutes on each of the five days in the week between 7 a.m. and 5 p.m. and 4 hours 15 minutes on Saturday between 7 a.m. and noon. In May 1923 a further variation was made as follows :— " That . . . the order of variation of hours made by this Court on 22nd September 1922 is hereby varied by striking out of new clause 3A of the said award the following names of further respondents who have since the 22nd day of September 1922 applied for variation of the original award, namely, Minister for Defence, Minister for Navy, Naval Board. Nothing in this variation shall in any way affect the position of any of the three last-named respondents or the Department of Defence so far as the employees at the Cockatoo or Williamstown docks are concerned."

The plaintiff contends, and I think rightly, that this proviso excepts the Cockatoo and Williamstown dockyards from the operation of the variation order of May 1923, and he next claims that work carried on at the Cockatoo dockyard must consequently be subject to the provisions of the award of June 1921. The opinion of the President of the Arbitration Court was apparently to the contrary, when in May 1923 he varied the award of June 1921. He said:—"The Union's representatives claimed that no application to vary the award should be entertained by the Court because the Department of Defence, the applicant, was committing breaches of the award by not observing the 44 hours at Cockatoo Island and Williamstown dockyards. It appears however that both these dockyards are under the Prime Minister's Department, and that a special tribunal has been appointed to deal with all the disputes in connection with the Cockatoo Island and Williamstown dockyards. Neither the Prime Minister's Department nor the Commonwealth nor the shipping tribunal are respondents bound by the award, although they agreed to adopt the recognized standard hours under the awards of this Court. Any variation the Court makes in this application cannot therefore legally alter the hours of work of an employer not bound by the award, namely, the employers of members working at the dockyards named . . . . It is clear on the admitted facts that the employers of men working at the docks named are not legally bound by the award the Department of Defence asks the Court to vary. No breach of the award so far as the docks in question are concerned has been committed." This opinion does not bind this Court, which must determine the matter for itself, giving due consideration, however, to, and deriving what assistance it can from, the opinion of the learned President.

The June award creates difficulties on its face. It does not purport to bind the King in right of the Commonwealth or the Commonwealth itself, who or which employed the plaintiff and those whom he represents until the establishment of the Australian Commonwealth Shipping Board. Naturally the Commonwealth relies on the form of the award as decisive in its favour. But the matter cannot, I think, be disposed of so easily. The award, according to the admission, binds the Ministers for Navy and for Defence, who were the King's

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responsible Ministers of State controlling the Departments of the Navy and Defence respectively, and also the Naval Board, which was a body constituted under the *Naval Defence Act* and Regulations, and charged, subject to the control of the Minister, with the administration of all matters relating to the naval forces. Now, the Cockatoo dockyard belonged at the time of the award to the King in right of the Commonwealth, and, though the supreme executive power is vested in the Sovereign, still in practice the King acts on the advice of his Ministers, and the executive business of the State is carried on by the various Government Departments in accordance with legislative provisions or the political policy of the day. The administration of the Cockatoo dockyard was in the hands of the Naval Board, subject to the control of the Minister for the Navy. So I take the award to mean that, so far as the Minister for the Navy or the Naval Board controlled or administered the activities carried on at Cockatoo dockyard as the executive officers of the King, they should observe the award. It is only as executive officers of the King that the Ministers or the Board are bound. They are bound, I take it, as the representatives of the King. The award fastens upon the officers who actually control the dockyard in the name of the King rather than upon the nominal controller—the King himself. But the award does not purport to, and does not in point of law, bind the King or the Commonwealth generally: it only binds them so far as an activity covered by the award is administered or controlled by the named executive body or officers—the Naval Board, the Minister for Navy or the Minister for Defence. If the activity passes from the administration and control of the named executive officers of State or the named administrative body to other officers of State or other administrative bodies, then, subject to any special provision of the Arbitration Act, the award ceases to operate or at all events does not bind those officers or bodies or the Commonwealth in their administration or control of the dockyard. This brings me to the history of the administration and control of the Cockatoo dockyard.

At the time of the award it was administered as part of the Department of the Navy by the Naval Board, subject to the control of His Majesty's Minister of State for the Navy. About June 1921 the

administration of the dockyard was transferred to the Prime Minister's Department and placed by Order in Council under the direction of a Board of Control. This was an administrative act, and not, so far as I know, based upon any statutory authority. The change in administration was due to a change of policy in connection with the dockyard. It was now to be carried on as a commercial undertaking in open competition with private firms, instead of being, as formerly, used substantially for naval purposes. The tradesmen, of course, performed the same functions as before—coppersmiths did work appropriate to coppersmiths, and blacksmiths that appropriate to blacksmiths. In September 1923 the *Commonwealth Shipping Act* (No. 3 of 1923) was proclaimed. This Act incorporated the Australian Commonwealth Shipping Board, and vested in it Cockatoo Island and the dockyard thereon, also the management of the works and establishments on the island. The Board is largely removed from political control, but it is nevertheless an organ of the Commonwealth for carrying on the operations specified in the Act. The administration and control of the Cockatoo dockyard therefore, in June 1921, passed from the Naval Board, the Minister for Navy, and the Minister for Defence so far as he administered naval and military matters, and became vested in the Prime Minister or the Board of Control which was constituted under the Order in Council of June 1921. Neither the Prime Minister nor the Board of Control was bound by the award. Later, the Cockatoo dockyard and the management of the works and establishments on Cockatoo Island were vested in the Australian Commonwealth Shipping Board, which is also not bound by the award, and which, I apprehend, is the present employer of the plaintiff.

So far as the award is concerned, the plaintiff fails, in my opinion, to establish his case.

But some reliance is placed, I suppose, upon the Arbitration Act 1904-1921, sec. 29: "The award of the Court shall be binding on . . (ba) in the case of employers, any successor, or any assignee or transmittee of the business of a party to the dispute or of a party bound by the award, including any corporation which has acquired or taken over the business of such a party." I see no reason to doubt the identity of the business. It was carried on in the same

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place, by the same staff, doing substantially the same kind of work. But there is, in my opinion, no successor, assignee or transmittee of the business of a party to the dispute or of a party bound by the award. Cockatoo dockyard and the business there carried on are and always have been, in substance, the property of the King in right of the Commonwealth, or else of the Commonwealth itself, under whatever control the business has been placed or in whatever body it has been vested. And the party to the dispute who is bound by the award is and has always been the King or the Commonwealth, in respect of the activities carried on by him or it under the administration and control of the Naval Board, the Minister for Navy, or the Minister for Defence. Consequently sec. 29 of the Arbitration Act does not, in my judgment, aid the plaintiff in this action.

The Commonwealth also relied upon an agreement of February 1921 as an answer to this action. But if the award of June 1921 covered the operations carried on at Cockatoo dockyard since 11th November 1922, then I cannot see how that agreement dispenses with, or could dispense with, the due observance of the award.

I am also unable to agree with another contention put forward by the Commonwealth: that this action is not maintainable because its subject matter has been referred to a Special Tribunal constituted under the *Industrial Peace Act* 1920. This Special Tribunal has not made any award or determination in the matter, and so long as the award of the Arbitration Court stands, I cannot see that a reference to a Special Tribunal can affect the rights of persons entitled to the benefit of the award. It may possibly afford ground for staying an action in some circumstances, but certainly not in the circumstances of this case, for the Special Tribunal apparently refuses to proceed unless the rights of the parties under the award are first determined.

The result is that I agree with the President of the Arbitration Court in thinking that the award of June 1921 did not bind His Majesty or the Commonwealth in respect of their operations at the Cockatoo dockyard after the administration and control of those operations had been transferred to the Prime Minister's Department in June 1921, and, *a fortiori*, after control had been transferred to the Australian Commonwealth Shipping Board.

An application was made to me to add the Australian Commonwealth Shipping Board as a party to this action, but I refused it, for the reasons already appearing and also as a matter of discretion. This is not an action in which any indulgence should be shown to the plaintiffs. They should be given their rights according to law on the pleadings as they stand, and no more. The dockyard has been, to a large extent, carried on to keep the workmen in employment. But, not satisfied with this generous treatment on the part of the Commonwealth, the plaintiffs insist upon a claim for overtime, which, if valid, can only be ascribed, in my opinion, to a misunderstanding by the Arbitration Court in May 1923, of the effect and operation of the award of June 1921. But, as I agree with the opinion of the learned President given in May 1923, this action will be dismissed with costs.

Action dismissed with costs.

From that decision the plaintiff now appealed to the Full Court. The nature of the arguments appear in the judgments hereunder.

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

Bavin A.-G. for N.S.W. (with him *A. L. Campbell*), for the respondent.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. In this case the plaintiff on behalf of himself and other members of the Amalgamated Engineering Union employed at the Commonwealth Dockyard, Cockatoo Island, seeks against the Commonwealth of Australia a declaration of this Court that, by virtue of an award of the Commonwealth Court of Conciliation and Arbitration No. 113 of 1920, the ordinary hours of duty for members of the Union employed at the dockyard should not (without payment for the overtime) since 11th November 1922 have exceeded nor continue to exceed, until such

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award is varied, 8 hours on each of five days in the week, &c. In that award the "Naval Board," "Minister for Navy" and "Minister for Defence" were named as respondents. The learned Judge who tried the case was of opinion that the real party to the award was the Commonwealth, but only in so far as it was administering or controlling the operations of its dockyard by the instrumentality of the executive body or officers named as respondents in the award, and that, this executive body and these officers having at all relevant times ceased to administer or control the business of the dockyard, the Commonwealth was no longer bound in respect of such business by the provisions of the award. If the Commonwealth is to be regarded as the real respondent, we think it must be so only when it is operating through the respondents actually named in the award. That being so, we agree with the learned Judge in thinking the plaintiff cannot succeed against the Commonwealth as an original respondent to the award, and we agree in the reasons which lead him to that conclusion. If, on the other hand, the Commonwealth is not the real respondent, the executive body and the officers named in the award as respondents must themselves be the real parties to the award. They are not parties to this action, and, if they were, no declaration could be made against them, because they have ceased to administer or control operations at the dockyard, and did not at any time relevant employ any member of the Union.

We do not think that the statement of claim makes any case against the Commonwealth as the successor or assignee or transmittee of the business of a party, under sec. 29 (*ba*) of the Act, nor do we think that such a claim could be supported on the facts. Nothing that has happened since the making of the award has altered the position of the Commonwealth so as to give it any greater interest in the business carried on at the Commonwealth dockyard than it had at the time the award was made.

Finally, it is said that the parties actually named in the award were merely acting as agents for the Commonwealth in carrying on the business of the dockyard; that the agents who subsequently carried on the business were their successors within the meaning of sec. 29 (*ba*); that the contracts of those successors, being made on behalf of the Commonwealth, bind the Commonwealth; and that,

as the contracts which they made with the members of the Union were subject to the provisions of the award, the provisions of the award bind the Commonwealth. The vice of this argument appears to us to be that it overlooks the fact that the *Commonwealth Conciliation and Arbitration Act*, and the award made under it, deal with actual employers, not with their agents. If the Union has been so unfortunate as to select for respondent, not an employer, but the agent of an employer, it cannot obtain an award to bind either principal, or agent, or agent's successor. The award does not affect the agent or the agent's successor because *ex hypothesi* they are not employing anyone; it does not affect the principal, who is the employer, because he is not a party to the award.

ISAACS J. Having to determine this appeal according to strict law, I have no option but to express the opinion that it must fail. I shall have to indicate where, as I view the matter, the strict insistence on the law parts company with fairness.

The action was brought by Henry Hillman, as representative of all those members of the Amalgamated Engineering Union (Australian Section) who have been during substantially the last two years employed by the Commonwealth at its dockyard at Cockatoo Island. By the action there is claimed a declaration which, avoiding technical phraseology, is that from 11th November 1922 onwards the maximum normal working week of the members of the Union at the Cockatoo dockyard was 44 hours, and that beyond that they were entitled to payment for overtime.

The claim is founded upon Federal award dated 14th June 1921, No. 113 of 1920, which prescribed 44 hours a week for a great number of employers, including "the Naval Board, the Minister for Navy and the Minister for Defence." Admittedly, the Commonwealth, as represented by the Naval Board, was then bound to a 44 hours maximum. Admittedly also, that provision as regards the Cockatoo dockyard has never been technically altered, so that, if at the present moment the dockyard were under the control of the Naval Board, there would be no answer to the claim. But two answers have been raised: one is that the Naval Board has not been in control since 29th June 1921; and the other is that, though the award provision

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for 44 hours has not technically been eliminated as to Cockatoo dockyard, yet it would have been eliminated in May 1923 but for some pending proceedings before another tribunal.

The facts are these :—By Order in Council of 16th June 1921 a new board of control, called the " Shipbuilding Yards Board of Control," and consisting of three named persons, was appointed to supervise and control the Cockatoo dockyards. This was not under any statute, but was a mere executive act. No specific Department of State was named by the Order in Council. In fact the new board was placed under the direction of the Prime Minister's Department. But the point to be observed is that, as *Starke* J. observes in his judgment, there is " no reason to doubt the identity of the business. It was carried on in the same place, by the same staff, doing substantially the same kind of work."

At the time of the transfer of control to the new Board, that is, 29th June 1921, the original award was in operation as from 29th May 1921 and was prescribed to " continue in force until the end of 1923 or such earlier date as the claimant is guilty of a strike." Notwithstanding the change of control, which really means nothing so far as fair working conditions to the men were concerned, the Commonwealth, represented by the new Board, for some time still observed the award in respect of the 44 hours—which, to my mind, was practically an admission that the appointment of a new manager did not alter the cardinal fact that it was the Commonwealth that was bound by the name of its Naval Board, and was a plain intimation to the men that the change of managers did not mean change of treatment. This recognition of its true responsibility continued until 11th November 1922.

By a variation of the award made on 22nd September 1922, and ordered to take effect next day, the maximum hours under the award were altered to 48. But this was in respect only of employers other than the Naval Board, the Minister of Navy and the Minister of Defence and some twelve others. In fact no application whatever was made by the Commonwealth at that time to vary the 44 hour maximum, although, as stated, the Commonwealth had not questioned the award of June 1921 by reason of the change of control. And, further, even after the variation, which applied from 23rd

September 1922, to other employers, the Commonwealth at first raised no objection as to any difference of responsibility by reason of the new Board of Control. The express exception of the Commonwealth from the variation to 48 hours by its names " the Navy Board, the Minister for Navy and the Minister for Defence " still stood, and whatever members of the Union were employed by it through those instrumentalities were entitled by law to a 44 hour maximum. That condition of the award continued until May 1923, when a new variation was made. At this date, an application had been made on behalf of the Naval Board, the Minister for Navy and the Minister for Defence, and another respondent, to vary the hours from 44 to 48. The application was granted, and ordered to operate as from 19th April 1923. As from that date, 19th April 1923, the Commonwealth was entitled by law to require of all its employees, members of the Union, in the three named branches of its service 48 hours a week instead of 44. But up to that date for those Departments the legal maximum was only 44 hours. In the meantime, that is, as from 11th November 1922, the Commonwealth, acting by the new Board of Control for the Cockatoo dockyard, had itself intimated that it raised the maximum to 48 hours a week. In January 1923, that is, two months before the latest application for variation, the men disputed the right of the Commonwealth so to raise the maximum while the award stood unaltered, and they claimed overtime payment. This claim was refused, and the claimants were invited to have the dispute determined by the Special Tribunal under the *Industrial Peace Act*. Briefly, that was declined on the ground that a dispute respecting the rights of parties under an award of the Commonwealth Court of Arbitration was not a dispute of the nature intended to be decided by the Special Tribunal referred to. On the other hand, the new Board of Control claimed that, by virtue of an agreement made between the Union and the Commonwealth in February 1921—that is, months before the original award —it was agreed to submit industrial disputes to a Special Tribunal. The reply of the employees to this—a reply which appears to me unanswerable—was that after that agreement the industrial rights of the parties had been determined by a Federal award, and that award governed, so far as it applied, and should be obeyed. The

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matter, however, was brought before the Special Tribunal, but no decision has been given, and, as the agreement between the parties under which the dispute was so referred was expressed to endure only till October 1923, the reference has been allowed to drop. The controverted period of overtime is divisible into three sections, namely, (1) 11th November 1922 to 19th April 1923, when the variation was made affecting the three Commonwealth organs; (2) 19th April 1923 to September 1923, when the Act No. 3 of 1923, creating the new Commonwealth Shipping Board, was proclaimed; and (3) since 1st September 1923.

Before this Court of appeal, the appellants have abandoned their claim in respect of the second and third sections. The second was the subject of some observations by my brother *Starke*. As to this, the abandonment has been on the ground that, whatever might be the legal rights of the appellants for that time, they deferred to the view expressed in this Court that *Powers* J. in May 1923 would, if then entirely free from circumstances he mentioned, have then included the Cockatoo dockyards in the reversion to 48 hours, thus placing the men working there in the same position as the men working under the Naval Board, the Minister for Navy and the Minister for Defence. As to the third, the abandonment was in recognition of the absence of the Commonwealth Shipping Board as a defendant and the inability to alter the refusal of *Starke* J. to add that board to the action. But there is left the first period, namely, 11th November 1922 to 19th April 1923.

The question therefore arises: Was the Commonwealth during that period legally liable to pay to the men at the Cockatoo dockyard overtime on the same basis as it was then bound to pay men doing precisely the same class of work under the Naval Board, the Minister for Navy and the Minister for Defence? That depends, as a matter of strict law, on the effect of sec. 29 of the *Commonwealth Conciliation and Arbitration Act* upon the award.

Starke J. has held that "the party to the dispute who is bound by the award is and has always been the King or the Commonwealth, in respect of the activities carried on by him or it under the administration and control of the Naval Board, the Minister for Navy or the Minister for Defence." And the learned Justice adds:

"Consequently sec. 29 of the Arbitration Act does not, in my judgment, aid the plaintiff in this action." I entirely agree with that view as to the Commonwealth being bound by the names referred to. It is not at all like a private individual employer whose manager, for instance, is named as respondent. In that case there is a distinct and separate individuality, the identification of principal and agent depending on the existence of extraneous facts not disclosed by the award. But in this it is the law, the Constitution itself, which without more identifies the Commonwealth as the employer and recognizes that the "Naval Board, the Minister for Navy or the Minister for Defence" cannot possibly, except as convenient names for the Commonwealth, be the employers. A moment's consideration of the consequences of the opposite doctrine will demonstrate that.

Reluctantly also, I feel bound to agree with the further view of *Starke* J. that this identification is limited to the activities of the Commonwealth carried on by the named representatives. As I put in argument, even though the original award remained unvaried, if members of the Union were employed in the Home and Territories Department, say, at Canberra, there would be no award obligation as to them.

I therefore think that the judgment appealed from rightly determined according to law that the Commonwealth plea for immunity—even before the express variation, that is, until 19th April 1923—must be sustained.

When the Prime Minister's Department by the new Board of Control superseded the Naval Board, the Commonwealth—though no alteration was made in actual working conditions and though other men under the Naval Board and the Minister for Navy and the Minister for Defence were still entitled to a maximum of 44 hours—was entitled by its own voluntary act to escape the obligation that its own Federal Court had declared to be a just and proper industrial condition for its workmen in the dockyard. At this point it is that I think law parts company with justice.

The appeal must be dismissed, I agree; but as to the first period it is, as I view the position, on technical grounds only.

It was admitted in argument on behalf of the Commonwealth that if the award, instead of using the words "the Naval Board," had

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used the words "the Commonwealth in respect of operations now carried on by the Naval Board," there would have been no legal answer to the claim for this period. It is difficult to believe that the Commonwealth is taking shelter behind such a technicality, because of an administrative Order in Council merely changing the place of control. However, as a Judge, I have to give effect to the point.

I would add that, if the main contention of the Commonwealth on this appeal were correct, I should be of opinion that the Commonwealth would fail altogether up to 1st September 1923. That contention is that the "Naval Board," and not the Commonwealth, must be recognized as originally the "employer." If that were so, then the Commonwealth, *ex hypothesi*, not being technically the employer at first, technically became so afterwards when the Naval Board was replaced by the Commonwealth's managing agents, called the Shipbuilding Yards Control Board, which took charge for the Commonwealth, and retained the position until 1st September 1923. It is only by rejecting the Commonwealth's primary legal contention that it succeeds at all as to the claim up to 1st September 1923, because, as in my view the Commonwealth was itself bound as the employer to begin with—though only to a limited extent,—it could not afterwards become its own successor.

Appeal dismissed with costs.

Solicitors for the appellant, *Sullivan Brothers.*

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

B. L.