[HIGH COURT OF AUSTRALIA.]

BISHOP . . . . . APPELLANT;
INFORMANT,

AND

FORD & PETRIE . . . . . RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1925.

MELBOURNE, *May* 18; *June* 16.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Employer and Employee—Rate of wages—Person "employed on time wages for a number of hours less than the number of hours of an ordinary week's work"—When week begins—Day when wages paid—Factories and Shops Act 1915 (*Vict.*) (*No.* 2650), *secs.* 3*, 141*, 199—*Factories and Shops Act* 1922 (*Vict.*) (*No.* 3252), *sec.* 18*.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that under sec. 141 (3) of the *Factories and Shops Act* 1915 (Vict.), as altered by sec. 18 of the *Factories and Shops Act* 1922, an employee employed in a factory on time wages, who, beginning work on a Monday, worked on that and each succeeding day until the following Saturday and completed in that period the full number of hours of an ordinary week's work, was not entitled

* Sub-sec. 3 of sec. 141 of the *Factories and Shops Act* 1915 (substituted for the original sub-section by sec. 18 of the *Factories and Shops Act* 1922) provides that "For any person employed on time wages for a number of hours less than the number of hours of an ordinary week's work—(*a*) in any trade usually carried on in a factory or shop the wages rate payable shall be as follows, and shall be calculated *pro rata* according to the number of hours worked:—(i.) For each hour worked up to one-half the number of hours fixed for an ordinary week's work the rate of wages payable shall be the ordinary wages rate with an addition to be fixed by the wages board for the particular trade of not less than thirty-three per centum and not exceeding fifty per centum of such rate: (ii.) For each hour worked beyond the one-half aforesaid the rate of wages payable shall be the ordinary wages rate up to but not exceeding ordinary wages rates for an ordinary week's work: Provided that any person who is not engaged for a week who earns a sum in wages equal to the wages of an ordinary week's work may be required by the employer to complete the week's work without further pay, and if such person refuses to do so he shall forfeit his right to any payment for that week unless his refusal is caused by his illness inability or some other sufficient cause beyond his control;" &c. By sec. 3 a "week" is defined as meaning, unless inconsistent with the context or subject matter, "the period between midnight on Saturday night and midnight on the succeeding Saturday night."

on the Thursday in that week (Thursday being the usual day for payment by the employer of his employees), in respect of the four days for which she had worked, to the extra payment provided by that section.

Per Isaacs and *Rich* JJ.: The employee was entitled to be paid for a broken week on the Thursday because her contractual week always ended on that day, and she had admittedly worked continuously ten weeks and four days at the time of her dismissal.

Decision of the Full Court of Victoria (Full Court): *Bishop* v. *Ford*, (1925) V.L.R. 12; 46 A.L.T. 138, affirmed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Melbourne an information was heard whereby Albert A. Bishop, an inspector of factories and shops, charged that Ford & Petrie, paper-rulers and bookbinders, "after the coming into operation of a certain determination of the Printers' Board being a wages board appointed by the Governor in Council under the powers in that behalf conferred upon him by the Factories and Shops Acts duly made under the said Acts whereby rates of payment to classes of persons were determined were guilty of a contravention of the provisions of the said Acts in that in respect of the period between 23rd May 1924 and 29th May 1924 both inclusive they did employ at work within the meaning of the said determination one Christinia McNiven being a person employed in a factory on time wages for a number of hours less than the number of hours of an ordinary week's work and did not pay her the rates of wages payable under and by reason of the said determination."

On the hearing of the information the informant in his evidence stated that he visited the factory of the defendants on 23rd July 1924 and examined the work-book; that Miss McNiven worked 35 hours and was paid 30s. for the week ending 29th May 1924, and was paid on a Thursday night; that she should have received 36s. 8d.; and that the defendant Ford admitted that the firm made up their employees' hours to Thursday night in each week and paid them on that night, and that the factory week ended on that night. Miss McNiven in her evidence said that she was a bookbinder and had been employed by the defendants for three and one-half years; that she received an increase in April and was entitled to £2 1s. per week of 48 hours; that she met with an accident

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

at the factory on 9th May 1924 and was away from work from 10th May to 26th May, except for three hours worked by her on 14th May; that she resumed work on Monday 26th May and was paid on Thursday night, 29th May, for $8\frac{3}{4}$ hours' work on each of the days from 26th to 29th May inclusive; and that she received £3 4s., made up of 34s. for workers' compensation insurance and 30s. for her work. In cross-examination she said that she worked the whole of the calendar week—Monday to Saturday—48 hours; that she was paid for the four days worked up to Thursday on Thursday and later received payment for the Friday and Saturday at ordinary rate, but not at the loaded rate for either period; that she did not remember the defendant Ford saying that the week was from Monday to Saturday and that the employees were being paid on Thursday for their own convenience; that she had always been paid on a Thursday. The defendant Ford stated that he told the foremistress to tell the girls that their week was from Monday to Saturday and that they would be paid on a Thursday for their convenience; and that if they had not been paid on a Thursday they would have asked to be paid on that day. In cross-examination he said that the firm's week was from Monday to Saturday and the employees were paid on Thursday night; that the hours and pay were made up to Saturday and payment made to the employees on Thursday, the employees being really paid in advance for Friday and Saturday; that he could not explain why Miss McNiven was not paid in accordance with this custom but only for the 35 hours up to Thursday night; that for calculation of hours worked and wages due the factory week was from Friday to Thursday; and that for the week ending 29th May Miss McNiven worked a broken week, not a full week. In re-examination he said that Miss McNiven worked and was paid for a calendar week starting on 26th May; that she was paid on two separate days; that in the preceding calendar week, from 19th to 24th May, she did not work and was not paid wages, but only workers' compensation; and that Miss McNiven's employment terminated on Thursday 7th August 1924.

By the determination referred to in the information it was provided that a person in Miss McNiven's position was entitled to wages at the rate of 41s. per week of 48 hours, and that any person employed

on time wages for less than the number of hours fixed for an ordinary week's work should for each hour worked up to one-half the number of hours be paid at the ordinary wages rate with an addition of 33 per cent.

The Police Magistrate who heard the information held that the employment of Miss McNiven for the week which was the subject of the proceedings terminated on 29th May, and, therefore, that the defendants had not paid Miss McNiven the amount to which she was entitled. He accordingly convicted the defendants and fined them 20s.

On an order nisi to review that decision, taken out by the defendants, the Full Court of the Supreme Court (*Schutt* and *Mann* JJ., *Weigall* A.J. dissenting) made the order absolute, set aside the conviction and dismissed the information with costs: *Bishop* v. *Ford* (1).

In stating his reasons *Schutt* J. said (2):—"To succeed in this contention" (that Miss McNiven was entitled to be paid for the Monday to the Thursday at the loaded rate prescribed by sub-sec. 3 (*a*) (i.) of sec. 141 of the *Factories and Shops Act* 1915) "it was, of course, necessary to show that Miss McNiven was a person employed on time wages for a number of hours less than the number of hours of an ordinary week's work, which is 48 hours. In my opinion she was not so employed, and the provision in sub-sec. 3 (*a*) (i.) has no application. The word 'employed' in the sub-section must be read as referring to the work actually done by the employee, and has no reference to the terms of her contract of employment, whether that was a contract to employ her from Monday to Saturday or from Thursday to Thursday (see *Bishop* v. *Concrete Constructions Pty. Ltd.* (3)). That being so, it appears to me that the sub-section was intended to provide for cases where a person has been working for another on time wages, and there has been a cessation of the work or employment before the employee has worked the number of hours of an ordinary week's work, and that where there has been no break in the work during that period the provisions of the sub-section cannot be invoked. Although Miss McNiven was paid

(1) (1925) V.L.R. 12; 46 A.L.T. 138.
(2) (1925) V.L.R., at p. 15; 46 A.L.T., at p. 139.
(3) (1923) V.L.R. 638; 45 A.L.T. 73.

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

on the Thursday night for four days' work, she did not then cease to work, but continued in her employment, and so was not a person who merely worked for a portion of a statutory week, and the fact that she was paid for the four days before she had worked the full week cannot, in my opinion, alter the fact that she worked for a whole week—i.e., from Monday to Saturday—and not merely for the four days."

Mann J. said (1):—" I think that the purpose of this sub-section was to provide for what is often spoken of as ' broken time,' and to ensure that employees should receive the minimum weekly wage prescribed in the industry, notwithstanding that they may not have been able to work the full number of hours constituting the week's work. Now, ' broken time,' as I have used that expression, means working time, broken by periods of idle time, and not time broken by the fact of the payment of money. The employee in this case had no broken time, but worked continuously for the full number of hours of an ordinary week's work. The fact that the employment in this case began on Monday the 26th has not been disputed, and to my mind that fact is the crux of the whole matter. It has been suggested that this view of the sub-section may give rise to a difficulty in the event of the employment ceasing after such a payment has been made as was made in this case, inasmuch as the employee would then be entitled to receive some additional sum, representing the difference between the wage actually paid and what has been called the loaded rate payable in respect of broken time. I see no real difficulty whatever arising out of these circumstances. Take the present case as an illustration. If the employee here had been told on the Friday morning that her services would no longer be required, there would, so far as I can see, have been no difficulty whatever in recognizing the fact that she would thereupon have become entitled to some further payment by reason of the fact that the money paid to her the night before was not at the loaded rate; and I see nothing in such circumstances which would give rise to any practical difficulty. In fact, in this case the employee, though paid on the Thursday night, was not paid off, and that is the whole difference. It has been admitted that, had the payment

(1) (1925) V.L.R., at p. 16; 46 A.L.T., at p. 139.

for the four days in question been withheld until the following Thursday, and the employee had then been paid for ten days, no loaded rate could have been demanded. Such a statement as that seems to me to illustrate the unsoundness of the proposition upon which the informant here rested his case. The Legislature, in my view, has not sought in any way to hamper employers in their discretion as to when they should pay their employees. The sub-section seems to me to pay no regard whatever to pay days, and the employer is still at liberty to pay his employees for any short period of service he likes—every two, every three, or every four days—without thereupon becoming penalized by having to pay the loaded rate with respect to the work done."

From the decision of the Full Court the informant now, by special leave, appealed to the High Court.

Robert Menzies, for the appellant. In sec. 141 of the *Factories and Shops Act* 1915 (substituted by sec. 18 of the *Factories and Shops Act* 1922) the word "employed" refers to the actual work done by the employee, and not to the contract between him and the employer (*Bishop* v. *Concrete Constructions Pty. Ltd.* (1)). The word "week" in that section does not mean a calendar week from Monday to Saturday, for the context is inconsistent with such a meaning. The ordinary working week is determined by the practice of the particular factory, and in this case the evidence supports the Magistrate's finding that the week was from Thursday to Thursday. That being so, it is immaterial whether the time of work came at the beginning or the middle or the end of the week. Here the employment began in the middle of the week and continued to the end, and sub-sec. 3 applied.

Owen Dixon K.C. (with him *A. H. Davis*), for the respondents. If any one of the three following views of the meaning of sec. 141 is correct, the respondents are entitled to succeed:—(1) The section is dealing with casual employment as distinct from permanent employment and seeking to discourage it, and the meaning is that

(1) (1923) V.L.R. 638; 45 A.L.T. 73.

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

when a man is engaged to work for less than a week he must be paid the loaded rate of wages. If that view is correct *Bishop* v. *Concrete Constructions Pty. Ltd.* (1) was wrongly decided. (2) The section was not contemplating the division of time into successive weeks, but provided that in respect of any period of seven days beginning when a man started work he must be paid the loaded rate if he did not do an ordinary week's work. In that case the break in employment must take place after his work was started. (3) "Week" in the section means calendar week from Monday to Saturday according to the definition in sec. 3. If that is the true view Miss McNiven was employed for the whole of the calendar week and sub-sec. 3 of sec. 141 does not apply. An employer is required to pay his employees at least once a fortnight (sec. 199), so that the employer's selection of the time when he pays his employees cannot affect the rights of the employees. As long as the employer complies with sec. 199, he may make any contract he chooses with his employees as to how often he shall pay them.

Cur. adv. vult.

June 16.

The following written judgments were delivered:—

KNOX C.J. In my opinion the decision of the majority of the Supreme Court was correct. I agree with the reasons given by *Mann* J. in support of that conclusion.

ISAACS J. I trust I shall not be thought disrespectful to anyone if I say that I am unable to see any real difficulty in this case. The facts are, substantially, not in dispute; all that they require is an irresistible inference. The law is remarkably clear to my mind. If any interpretation is needed beyond the self-interpretation of the words themselves the principle is found in Lord *Shaw's* judgment in *Butler* v. *Fife Coal Co.* (2). The passage, which I have quoted before, is as follows: "The construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be

(1) (1923) V.L.R. 638; 45 A.L.T. 73. (2) (1912) A.C. 149, at pp. 178-179.

interpreted in the sense favourable to making the remedy effective and the protection secure." The particular evils dealt with in sec. 141 of the *Factories and Shops Act* 1915 are overworking and underpaying factory and shop employees. If even the words of the enactment were less self-explanatory than they are, the principle referred to would sufficiently apply to determine the question in hand.

The Police Magistrate thought that in the circumstances proved the law had not been observed. The Supreme Court, by a majority, *Weigall* A.J. dissenting, reversed the decision. I am of opinion that the Police Magistrate and *Weigall* A.J. arrived at the right conclusion.

The one fact that governs the matter, as will presently appear from a consideration of the Act, is that Christinia McNiven's *contractual period of service always ended on Thursday.* That is the governing fact for this reason: McNiven admittedly worked every working day from Monday 26th May to Thursday 7th August 1924. On that day she was discharged finally. It was a few days after the date of the summons in this case, which makes the date of the discharge all the more significant. She therefore worked ten weeks and four days. Is she to be paid for those four days as a broken period or not? I think the law very distinctly says she is. There is no pretence that she ever was so paid—and, if she had been, that would have been the very first thing said to the Inspector on 23rd July or to the Police Magistrate on 25th August. If she is so entitled, then, unless she receives the added rate for four broken days time at one end or the other of her period of service, she is defrauded of part of her statutory living wage. *Mann* J. does not think she is so entitled, and his judgment seems to rest on the ground that unbroken time means merely continuous working from day to day. He is of opinion that, if the payment for the four days in question had been withheld until the following Thursday and the employee had then been paid for ten days, no loaded rate could have been demanded. His judgment rests on the fact that on the Thursday, though she was paid, she was not "paid off," that is, finally discharged. I think *Schutt* J. really takes the same view. That is most serious, and, as both learned counsel said, very much depends upon it. It need hardly be said that no one would fight such a

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

Isaacs J.

case through three Courts merely to settle whether the extra payment should be made at one end or the other of the time. It is whether it should be made at all. If not, there is an end of the matter. But "broken time" is not a statutory expression and does not depend solely on the fact that, beginning with one date, there was actual working every day up to a later date any more than it depends solely on payment. "Broken time," for this purpose, means a "broken week." To work ten days continuously does not guarantee a living wage unless the extra rate is paid for three of those days at one end or the other. Which end it is to be is left to the parties to determine. Again, if at the end of four days the employee is definitely discharged and paid off, but early next morning is sent for and re-engaged for a new full week, the first "week" is broken just as much as if the employee had never been re-engaged. Now apply that to this case. If, as I think, McNiven is in respect of four days of her service, either at the beginning or the end—and the same could be said on any Thursday night of that service—entitled to added rate, the governing fact to ascertain is, at which end? It is not doubtful that, when the inspector, as he says in his evidence, visited the factory on 23rd July 1924 and examined the work-book, he found that she had received only 30s. for her week ending 29th May, instead of 36s. 8d. The inspector says: "Ford admitted *that they made up their employees' hours to Thursday night in each week*, and paid them on that night and that *the factory week ended* on that night." Ford, in his evidence, did not contradict a word of this. In cross-examination, "he also admitted that for calculation of hours worked and *wages due* their factory week was from Friday to Thursday; and that for the week ending 29th May Miss McNiven worked a *broken week*, not a full week." In the face of that sworn admission it appears to me impossible to hold that it was not a broken week.

The actual contract between the parties, as gathered independently from the facts of the case, is as Ford stated. McNiven had, indeed, been employed by the respondents in their factory for three years. She had been absent for some days through an accident and resumed her occupation on 26th May. The factory week for everybody had always been from Friday to Thursday, and she and all other employees had always been paid on a Thursday. Obviously this

was for the purpose of standardizing the week and of knowing exactly when a broken week occurred.

There is, in the result, simply the one governing fact to be ascertained, and, that being found, everything else follows almost automatically. The charge is, in effect, that the respondents, who are printers, contravened the *Factories and Shops Acts* because an employee named Christinia McNiven was employed at work by them between 23rd May and 29th May 1924 on time wages for a number of hours less than 48 as determined by the Wages Board and did not pay her the proper rates of wages for the time she worked. The sum of 30s., definitely paid on Thursday as full wages up to that time, is arrived at by a *pro rata* calculation based simply on a weekly wage of £2 1s. for 48 hours. The question of law is: Was she then entitled to an addition of 33 per cent for 24 hours of the 35 hours worked in pursuance of the Wages Board determination of 11th February 1924? That involves the reading of sec. 141 of the Act. The section, as I have said, seems to me to require practically no interpretation because its words are so plain that it speaks for itself. It requires, by sub-sec. 1, every wages board in relation to a relevant trade to do several things. By par. (*a*) the board is to "determine the number of hours which shall constitute an ordinary week's work." By par. (*b*) the board is further to fix "the lowest rates per hour or per week to be paid for an ordinary week's work." Par. (*c*) is confined to overtime: higher rates for work beyond the "ordinary week's work." But for that purpose only it may fix (*inter alia*) the hour of beginning and the hour of ending work each day. Par. (*d*) refers to piece-work, and par. (*e*) to special rates for Sunday and holidays and travelling time. Sub-sec. 2 enumerates certain matters which must be taken into the board's consideration, but none of these assist in determining this question. So far the section has, in what I regard as very clear terms, provided, first, for the establishment of a standard number of hours as "an ordinary week's work" in a given trade. That affords considerable protection against over-working. Next, it protects against underpayment by providing for lowest rates on alternative bases of payment: if a rate "per hour" is fixed, then naturally, as one hour or twenty hours may

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

Isaacs J.

be worked, a higher rate per hour would be expected than if a certainty of a maximum number of hours is required; if, however, a rate "per week" is adopted, adequacy of remuneration may be secured at a lower hourly rate. In this case the latter system was adopted, namely, "per week of 48 hours." But there is one observation necessary to be made in view of the argument. The expression "an ordinary week's work" has no reference to any fixed period of seven days. It is immaterial whether the operative begins on Monday or on Thursday: the "ordinary week's work" is of the same duration and the same effect in either case. The Legislature has not said anything to coerce employers or employees into commencing their mutual contractual relations on any particular day. True, for certain purposes "week" has been defined as "the period between midnight on Saturday night and midnight on the succeeding Saturday night." But this is all subject to not being "inconsistent with the context or subject matter." There are many sections in the Act where uniformity of treatment is necessary and is enacted, such as closing shops (secs. 86, 87, 88, 97, 98), half-holidays (sec. 117), carting goods (sec. 127), and so on. But no such coercive uniformity appears as compelling every factory owner and every worker to restrict their mutual contracts of employment, say, to begin at midnight on Saturday and to include the Sunday and every holiday up to the hour of midnight on the succeeding Saturday. Such midsummer madness does not appear on the face of the legislation, and I am not prepared to impute it. So far, however, apart from overtime, &c., provision is made only for two things, namely, for the rate of remuneration for actual time worked either under a contract which does not, or under a contract which does, import a week's work, and for a limitation as to the number of hours which shall constitute an ordinary week's work. Assuming the contractual week beginning on any day to be actually worked up to the number of hours fixed by the Board as an ordinary week's work, the full standard rate, whichever it is, is payable. Assuming, further, that overtime has been worked, that is provided for and may be calculated. And so as to Sundays and public holidays. But there remained one glaring evil unprovided for, namely, the danger of insufficient employment to maintain a decent standard

of living if the ordinary rates were adhered to in all cases. Men and women were, it must be assumed, decently provided for if they were in fact employed for " an ordinary week's work " and received the full pay for that work under either system. But suppose they were not kept employed for the full time and received merely the *pro rata* wage, could they maintain a proper and befitting existence ? If they were in fact engaged for a full week, they were provided for. But if they were not engaged for a full week all through, they had still to be provided for. And this is the humane function of sub-sec. 3, which is the effort of the Victorian Parliament to cope with a serious evil affecting this and every other civilized community industrially and socially.

The opening words of sub-sec. 3 are all important. They are: " For any person employed on time wages for a number of hours less than the number of hours of an ordinary week's work." It has been contended that " employed " there means " engaged " in the sense of " contracted for." As I have said, the word read with the rest of the section seems to me to expound itself. The matter, however, has formed the subject of decision by the Supreme Court of Victoria in *Bishop* v. *Concrete Constructions Pty. Ltd.* (1). The Court held that employed meant " actually working." I entirely agree with that decision.

Besides the affirmative reasons I have mentioned for so holding, there are some negative ones, which, as the matter is so important, I may take the trouble to mention. If " employing " were used in the sense of " engaging " a hand for a number of hours less than the number of hours of an ordinary week's work, it would connote that the sub-section could not possibly apply to any case where there was an engagement for a whole week. It would also connote that there would never be a contractual obligation on the employee to work a whole week or to work for the full number of hours constituting an ordinary week's work. But if that be so, and if the opening words be restricted to cases where there is an express contract for a stipulated number of hours less than " an ordinary week's work " —thereby deliberately excluding the " ordinary week's work "— then the proviso to par. (*a*) (ii.) in sub-sec. 3 is sheer nonsense.

(1) (1923) V.L.R. 638 ; 45 A.L.T. 73.

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

ISAACS J.

That proviso expressly takes up, as a possible alternative under the sub-section, the case of a person who is "not engaged for a week" and makes a special provision for him. The suggestion of "engaged" for "employed" makes the merely possible case a universal case. "Employed" in the governing words of the sub-section must be taken to mean "actually working," whether the person is engaged by the week or otherwise. The sub-section then proceeds elaborately, but very clearly, to differentiate according to practical considerations. First, it divides into two distinct classes trades usually and trades not usually carried on in a factory or shop. With the latter we have here no concern. The former, which is the present case, is dealt with in this way: Every worker, whether engaged for a whole week or for less and for some reason actually working less than the fixed number of hours, is to be paid for each hour worked up to one-half the ordinary week's work an increased wages rate consisting of an addition fixed by the Board within the limits of 33 and 50 per centum of the ordinary rate, and for every subsequent hour worked the ordinary wages rate, whichever it is, but in no case more than the full weekly wage for "an ordinary week's work." Then come two provisions to protect the employer. The first is in a proviso to sub-sec. 3 (*a*) (ii.). It is there enacted that an employee *not engaged for a week* if under this arrangement he earns wages equal to a full week's working wages must complete the week's work, otherwise he forfeits all payment for that week, unless his refusal is caused by illness or is otherwise beyond his control. The other is in sub-sec. 4, and is the converse case. If an employee *is engaged for a week* and refuses to complete the full ordinary number of hours he forfeits all payment for that week, unless his refusal is caused by illness or is otherwise beyond his control. Two conclusions of law relevant to this case emerge, namely: (1) the opening words of sub-sec. 3 apply to both the cases—where there is a contract for a week and where there is not; and (2) where the contract is for less than a week, there is no obligation to actually employ or to be actually employed beyond the lesser period contracted for, unless the situation falls within the proviso to sub-sec. 3. The controlling fact already mentioned is that Christinia McNiven was on Monday 26th May 1924 engaged for less than a week, namely,

up to Thursday 29th May in accordance with the usual factory system of always beginning a new week on the Friday morning. She was, in accordance with that contract, employed in fact for a number of hours less than " an ordinary week's work " and, therefore, came under sub-sec. 3 and was entitled to the additional rate, but the facts did not bring her under the proviso to the sub-section.

The appeal should, therefore, be allowed.

HIGGINS J. The question is, must an employer, under the Victorian Factories Act, pay an employee at a higher rate whom he takes into his employment on Monday morning, his pay-day being Thursday ?

Assuming that one is free to consider this sec. 141 without regard to previous decisions, I think that the Full Court of Victoria is right in the result. Sub-sec. 1 enables the Board to determine the hours which shall constitute " an ordinary week's work " ; to fix the lowest rates per hour or *per week* [not per day] to be paid for " an ordinary week's work " ; to fix higher wages and rates to be paid for overtime. Sub-sec. 2 states the matters which the Board shall take into consideration in fixing the lowest prices (piece work) or rates (time work). Sub-sec. 3 deals, first, with a trade usually carried on in a factory, and prescribes that for any person employed on time wages for a number of hours less than " an ordinary week's work," a certain additional wage shall be paid. Sub-sec. 4 deals with an employee (in such a trade) who is engaged for a week and refuses to complete an ordinary week's work. Sub-sec. 5 explains the words " casual work " and " casual labour."

Sub-sec. 3 creates the doubt. It is easier to consider it as applied to concrete facts. In this case the trade is usually carried on in a factory ; the employee was employed on time wages, 41s. per week ; the " ordinary week's work " was 48 hours ; she was employed in the calendar week from midnight on Saturday 24th May 1924, to midnight on Saturday 31st May, for the full ordinary week's work, 48 hours. But she was paid on Thursday evening, 29th May, as for the four days only, 35s. ; and the remaining days of the week, Friday and Saturday, were included in her next Thursday's pay.

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

Higgins J.

Now, I can find nothing in the Act or in the determination which prescribes the day or the time for payment of wages. Under sec. 19 of the Act No. 3252, the Board may determine the day and the hour when payment of wages is to be made; but the Board has not done so. So far as sub-sec. 3 of sec. 141 is concerned, the employer may pay every day or every hour; but if he fail to employ for 48 hours in the week he must pay an extra rate for 24 hours.

But what is the week in which we are to find the 48 hours of work? Is it from Thursday to Thursday? The employer's practice is to pay on Thursday; but that fact does not affect his duty under sub-sec. 3. The sub-section was obviously meant to secure for the employee higher wages if she do not get full time of work. That object is fully attained in this case if we simply apply the definition of "week" in sec. 3: "In the construction of this Act unless inconsistent with the context or subject matter . . . 'week' means the period between midnight on Saturday night and midnight on the succeeding Saturday night." There is nothing in this definition inconsistent with the context or subject matter; and the appeal ought to be dismissed.

Perhaps I should draw attention to the fact that the information applies only to the period between 23rd May and 29th May (inclusive) —not to the broken week in August.

RICH J. The finding of the Magistrate (and on the evidence I cannot see how he could have found any other way) compels me to the conclusion that he and *Weigall* A.J. rightly decided this case.

The informant stated that the respondent Ford admitted that "they made up their employees' hours to Thursday night in each week and paid them on that night and that the factory week ended on that night." In cross-examination Ford gave evidence that, "for calculation of hours worked and wages due, their factory week was from Friday to Thursday. He also admitted that for the week ending 29th May Miss McNiven worked a broken week not a full week." According to the evidence and the Magistrate's finding, which cannot be disturbed, the understanding between the respondents and the employee when she resumed work was to work out the

unexpired portion of the current factory week as a broken week and settle for that, and then rule it off as usual and start a full week's work on the Friday, and so on in each successive week afterwards. The respondents, to succeed in this appeal, have to show compliance with the Board's determination with regard to the broken week at the commencement.

Now, the Board, pursuant to sec. 141 of the *Factories and Shops Act* 1915, determined that 48 hours shall constitute an ordinary week's work in the trade in question. Under sub-sec. 3 of this section it is in effect provided that, whether a person is hired for a week or less than a week, but is actually occupied for less than 48 hours during the relevant week, he or she is entitled to be paid the loaded wage prescribed. The provisoes in par. (*a*) of sub-sec. 3 and in sub-sec. 4, which are not material in this case, are inserted to prevent any victimization of the employer. The statutory definition of "week" in sec. 3 is, in my opinion, inconsistent with the context of sec. 141.

Upon this interpretation of the statute it follows from the facts that, as Miss McNiven was paid on the Thursday only 30s. for the four days ending on that day, she has not received for the relevant week the loaded wage calculated in accordance with par. 1 of sub-sec. 3 of sec. 141.

The appeal should be allowed.

STARKE J. Ford and Petrie were charged with contravention of the *Factories and Shops Act* in that, in respect of the period between Monday 23rd May 1924 and Thursday 29th May, both inclusive, they in their factory did employ at work Christinia McNiven on time wages for a number of hours less than the number of hours of an ordinary week's work, and did not pay her the rate of wages payable under and by reason of a determination of the Printers' Board made pursuant to the said Act. Miss McNiven had been in fact employed by the defendants for some three and a half years, but she met with an accident on 9th May 1924, and did not resume work until Monday the 26th. She was paid on Thursday the 29th for 8¾ hours' work on each of the four days, namely, Monday, Tuesday, Wednesday and Thursday, and she later received payment for

H. C. OF A. 1925.

BISHOP v. FORD & PETRIE.

Starke J.

Friday and Saturday 30th and 31st May. But it was contended that she should have been paid an additional sum of 6s. 8d. for the four days already mentioned, by reason of the provisions of sec. 141 (3) of the *Factories and Shops Act*, and this was the contravention of the Act relied upon. The section enacts that "for any person employed on time wages for a number of hours less than the number of hours of an ordinary week's work" (in this case 48 hours according to the determination) "(*a*) in any trade usually carried on in a factory . . . the wages rate shall be as follows, and shall be calculated *pro rata* according to the number of hours worked :—(i.) For each hour worked up to one-half the number of hours fixed for an ordinary week's work the rate of wages payable shall be the ordinary wages rate with an addition to be fixed by the wages board" within certain limits. This rate was fixed by the Wages Board at ordinary wages rate with an addition of 33 per cent. The Board had determined an ordinary wages rate for employees in Miss McNiven's position at per week of 48 hours, and she was paid that rate for the whole period from Monday 26th May to Saturday 31st May, both inclusive, but received no additional sum in respect of the first four days.

The question is, as my brother *Higgins* has said, "What is the week in which we are to find the 48 hours of work ?" Is it the calendar week, or the conventional week fixed by the parties, or the week beginning with the commencement of work ?

The answer to this question does not seem to me simple or clear or free from any real difficulty. The definition of "week" in sec. 3 of the Act is not, to my mind, decisive, for the week must be considered with reference to the Wages Board determination, which fixes a rate of wages for 48 hours. The definition in sec. 3 could not be applied, in many cases, to the week contemplated by the determination. Again, the conventional period fixed by the parties is an artificial method of determining the week for the purposes of sec. 141 (3), and departs from reality, as this case well illustrates. Miss McNiven worked her full period of 48 hours within seven consecutive days, and yet it is said that she was employed on time wages for a number of hours less than the number of hours of an ordinary week's work, namely, 48. Consequently, I agree with what I think was the view of the majority of the Supreme Court—that you

take the period just as it happens in fact. Miss McNiven began her work on Monday the 26th, and actually worked the full number of hours of an ordinary week's work within seven days, or the period of a week.

It may be that Miss McNiven is entitled to the additional rate in respect of the last four days of her employment in August 1924, if she has not been so paid. But that is not the charge here. *Mann* J. says nothing, as I read his judgment, to the contrary. The observations he made were addressed to an admission made, somewhat incautiously perhaps, on the part of counsel. "It has been admitted," he said, "that had the payment for the four days in question been withheld until the following Thursday, and the employee had then been paid for ten days, no loaded rate could have been demanded. Such a statement as that seems to me to illustrate the unsoundness of the proposition upon which the informant here rested his case."

The appeal ought in my opinion to be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

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

B. L.