[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN TIMBER WORKERS' UNION . . . . . APPELLANT;
INFORMANT,

AND

GEORGE HUDSON LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 13, 24.

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

Industrial Arbitration—Award—Breach—Payment of wages at less than minimum rate—Demand in writing by employee—Prosecution for breach within nine months—Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *sec.* 44.

By an award of the Commonwealth Court of Conciliation and Arbitration it was provided that wages at certain minimum rates should be paid to employees weekly, and that "where an employer bound by this award has made a payment to an employee bound by this award which payment purports to be a payment of the wages payable to the employee for any period such employer shall not be liable to pay to the employee any further sums prescribed by this award in respect of any services rendered to such employer during such period unless within a period of nine calendar months after the last day of such period a demand in writing of such further sum claimed has been given to the employer by the employee or some person on his behalf or by the local representative of the union."

An employer, who had in respect of one week paid an employee less wages than those to which he was entitled under the award was, within nine months after such underpayment, prosecuted under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 for a breach of the award.

Held, by *Knox* C.J., *Isaacs* and *Starke* JJ. (*Higgins* J. dissenting), that in the absence of a demand in writing by the employee a breach of the award was not proved.

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Per Higgins J.: The clause is merely a device to protect employers from stale demands—where the employee accepts the pay offered, says nothing, and long after worries the employer for further sums alleged to be due: it means that after nine months the employer shall not be liable to pay unless within the nine months there has been a demand in writing.

APPEAL from a Court of Petty Sessions of New South Wales.

At the Court of Petty Sessions at Glebe on 2nd April 1925, before a Stipendiary Magistrate, an information was heard whereby the Australian Timber Workers' Union, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1921, by its agent, John Culbert, charged that George Hudson Ltd., being an employer bound by an award of the Commonwealth Court of Conciliation and Arbitration made in a matter in which the organization was the claimant, did commit a breach of that award, in that the defendant company did for the week ending 18th September 1924 employ and work one Thomas Kenny, a member of the organization, in the work of a permanent stacker and did not pay to him the minimum rate of wage for the class of work performed by him provided by the award.

By clause 2 of the award in question it was provided that certain minimum rates of wages should be paid to employees. By clause 32 it was provided that "in respect of work done in cities and towns all wages shall be paid weekly in cash at the mill or place where the work is performed." By clause 40 it was provided that "(a) Where an employer bound by this award has made a payment to an employee bound by this award which payment purports to be a payment of the wages payable to the employee for any period such employer shall not be liable to pay to the employee any further sums prescribed by this award in respect of any services rendered to such employer during such period unless within a period of nine calendar months after the last day of such period a demand in writing of such further sum claimed has been given to the employer by the employee or some person on his behalf or by the local representative of the Union" (see *Australian Timber Workers' Union* v. *W. Angliss & Co. Pty. Ltd.* (1)).

After hearing evidence the Magistrate dismissed the information, and at the request of the informant stated a case for the opinion

(1) (1922-23) 18 C.A.R. 325, at pp. 385, 406, 407.

of the High Court, in which, after setting out the evidence, he stated that he found as facts all things necessary to enable him to convict the defendant of a breach of the award except that no demand in writing was given to the defendant as mentioned in clause 40 (a) of the award, it being admitted that no such demand was made, and that he therefore determined that, upon the evidence, the information could not be supported. The question asked by the case was whether the Magistrate's determination was erroneous in point of law.

Flannery K.C. (with him *F. L. Flannery*), for the appellant.

Sherwood (*Alec Thomson* K.C. with him), for the respondent.

Cur. adv. vult.

Aug. 24.

The following written judgments were delivered :—

KNOX C.J. This is an appeal by way of special case from the decision of a Stipendiary Magistrate dismissing an information which alleged that the respondent committed a breach of an award of the Commonwealth Court of Conciliation and Arbitration. The breach assigned was that the respondent did not pay to one Kenny, a member of the organization employed by him, the minimum rate of wage provided by the award. The Magistrate found as facts all things necessary to enable him to convict the respondent of a breach of the award except that no demand in writing was given to the employer as mentioned in clause 40 (a) of the award, it being admitted that no such demand was made. He considered that he was bound by the decision of *Campbell* J. in the case of *Culbert* v. *Dickson* (1), in which the same question arose as to the interpretation of the award. In that case the learned Judge said :—" I am unable to read clause 40 otherwise than as constituting a limitation of the liability of the employer in respect of the non-payment of wages prescribed by the award, where the circumstances of the non-payment bring him within the language of the clause. In other words, where the non-payment of wages is within the terms of clause 40, there

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is a qualification of the act of non-payment, so that it does not become a breach of the award, until there has been an omission to pay after demand in writing."

Agreeing, as I do, with the construction put on the award by *Campbell* J., I am of opinion that this appeal should be dismissed.

ISAACS J. The question we have to decide on this appeal may be thus formulated : Can an employer be made criminally responsible for not doing what, in the circumstances, an award expressly says he is not liable to do ? The appellant says he can ; the respondent says he cannot. On grounds both of law and common fairness, so long as the award stands as it is at present, I agree with the respondent. I say " so long as the award stands as it is at present." A Court is bound to accept the award as law and as definitely fixing the rights and obligations of the parties, and therefore is bound to decide on that basis. I am not to be understood as expressing any opinion that the crucial clause in this case, clause 40, is fair. It is not within my province to say anything on that. But, as Mr. *Flannery* rested part of his earnest argument on the contention that clause 40 might lead to injustice, I deal with that. I agree that the clause may operate so as to create injustice. It does so in this case, in so far as the employee Kenny, who has, according to the Magistrate's finding, fairly earned the further sum still unpaid, is unable to recover it by civil process. No just reason suggests itself to me why as between man and man Kenny should be disentitled to compel payment of the few shillings earned during the week in question and still unpaid, merely because he has already gone nine months without them. A demand in writing by an employee or at his instigation is a very awkward remedy if he wishes to keep his place. The position is, I suggest, worth reconsidering by the light of this case. But, forcible as are those considerations for the purpose of framing an award, they cannot alter the fact that at the present moment the award as it stands governs the position and forms the law for the purposes of this case. We have to consider whether on a proper interpretation of the award it can be legally held that the employer has committed a criminal offence. On that basis, the decision of the Magistrate and the

judgment of *Campbell* J., which he followed, seem to me plainly correct. Indeed, unless some confusion is introduced into the very elementary propositions that govern this case, the matter is not really capable of serious argument. One of those propositions is that an award, like every other document, must be read as a whole. You cannot take one clause and treat it as if it were the only clause in the award, and disregard subsequent clauses that qualify it in certain circumstances. In that respect it resembles a will or a contract or an Act of Parliament. Another proposition—and, in view of the argument addressed, a very important one—is that awards create obligations, and do not, because they cannot, create civil and criminal remedies. The arbitrator has jurisdiction to create new rights, that is, rights to better, or at all events different, conditions of industry. He may do many things incidental to that. But his jurisdiction does not and cannot extend to saying how those rights shall or shall not be enforced, either civilly or criminally. The enforcement of rights rests with the Courts, and in the manner provided by Parliament, not by the arbitrator. The only other proposition necessary to mention is that no criminal information can be validly launched against a man except for some offence which he has *already* committed. That is to say, if he has not already been an offender against the law the instant before the charge is laid, the mere laying of the charge will not make him a criminal.

With these considerations kept steadily in view, there is no real difficulty when once the facts are appreciated. Kenny was employed to stack timber. He was also employed sometimes to do other work. The question arose, was he what the award calls a "permanent stacker"? In September 1924 he was paid for a week's work but not as a permanent stacker. He took his wages and never demanded more. In or shortly before April 1925 the criminal summons was issued for an offence in not paying him more. At that time, about seven months after the short payment, all he had to do, according to the award, was to make a written demand on the employer for the balance, and the employer would have been bound to pay it. Or, if Kenny did not or could not make the demand, then any other person on his behalf could do it, or even

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the local representative of the Union. Had that been done, then, unless the money had been instantly paid, the employer would have been in default and open to either civil or criminal proceedings. But nothing of that kind was done. Without making any demand whatever, criminal proceedings were instituted; and the question is whether, according to the strict requirements of the award, the employer was in the circumstances narrated liable without demand in writing to pay the extra sum. The award provides for the wages of over two hundred different classes of employees. For each of these classes a separate wage is tabulated and the award in the first place directs those wages to be paid. Then clause 32 provides that in cities and towns all wages shall be paid weekly in cash at the mill or place where the work is performed. So far, and if the award stopped there, the company employer would, without any qualification whatever, have been bound at its peril to pay its employee Kenny the full amount provided by the award, according to the facts of the employment as they actually were. But the award did not leave the previous clauses unqualified. It proceeded to limit what they had said so as to provide for some special circumstances for which the arbitrator thought it proper to make special provision. For this purpose clause 40 was inserted. It is headed "Limitation of Employers' Liability." "Liability" does not mean liability to legal process, civil or criminal. The Deputy President had no jurisdiction to say anything whatever as to that. Legal process comes within the judicial power, and not within the arbitral power. "Liability" in clause 40 means "liability to pay wages"; it means the legal duty of the employer to the employee. If he omits to observe that duty, his omission may be met by such civil or criminal consequences as the law itself—not the arbitrator—declares appropriate. The arbitrator can neither create new legal process nor dispense with any that the law creates. Clause 40 does not pretend to do that: it merely declares that *in certain circumstances the prior general provision is pro tanto modified or qualified.* That is the universal effect of a special provision, added to a prior general provision. The clause itself says:—"Where an employer bound by this award has made a payment to an employee bound by this award which payment purports to be a payment of the wages

payable to the employee for any period "—and so that is precisely what happened here—then a certain consequence shall follow, stated in these words: "*such employer shall not be liable to pay to the employee any further sums prescribed by this award* in respect of any services rendered to such employer during such period *unless* within a period of nine calendar months after the last day of such period *a demand in writing* of such further sum claimed has been given to the employer by the employee or some person on his behalf or by the local representative of the Union." Now, it is because the employer did not pay the "further sum" that the criminal information has been laid; that is, although the award expressly says the employer in the circumstances of this case should "not be liable to pay" that further sum without a demand in writing. The "demand in writing" is the central point of clause 40. The nine months' limitation is a limitation not on the duty to pay but on the power to make the demand. That is the effect of the clause as framed. Its words admit of no other interpretation. The "nine months period" is not to provide against stale general demands for wages or stale actions to recover them. It is to provide a limit within which the "demands in writing" can be made, but the demand in writing is always essential in the stated circumstances to create the liability of the employer to pay the further sum. Clearly, then, when the award is read as a whole, the obligation to pay the further sum had not arisen up to the time the information was laid, and consequently no offence had been committed by not paying it. According to the award it has not arisen yet and never can arise. If Kenny in the first instance had refused to take less than the full wages of a permanent stacker, the unqualified obligation under clause 32 would have stood. I quite appreciate the practical difficulty in which an employee stands in such a case. But that is a reason to be considered in framing the award, and not for changing it by judicial construction.

It was argued for the appellant that, though clause 40 was intended to exclude civil process, it was not intended to exclude criminal process. I can only say as to that, that if the arbitrator meant to exclude only one class of process he would never, as a fair-minded man, have excluded civil process, so as to deprive the

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employee of his right to wages, and yet leave the employer open to a criminal prosecution for not paying them. However, as I have said, clause 40 has nothing to do with enforcement at all.

The appeal, in my opinion, should be dismissed.

Higgins J.

HIGGINS J. There are pictures of trees in which a cat is deftly concealed. The first impression given is that there is no cat; but when one once discerns the cat, it is obvious to him for ever. So with the meaning of clause 40 (a) of this award. I cannot look at the clause without seeing it as merely a device to protect employers from stale demands, where the employee accepts the pay offered, says nothing, and long after worries the employer for further sums alleged to be due.

Clause 40 (a) has been set out. It is assumed on both sides that the " further sums prescribed by this award " includes the " marginal differences " prescribed in the award. Under clause 2 of the award this employee was to be paid the basic wage for the Sydney district, £4 6s. 6d. per week; and under Table B, part 5, he was to get, if a " permanent stacker," a marginal difference of 9s. This would amount to £4 15s. 6d.; but on 16th September 1924 this employee was paid, for the week ending on that date, only £4 12s. 6d. The employer denied, but the Magistrate found, that the man was a " permanent stacker." The Union prosecuted the employer at a time which is not stated, but which certainly was within the nine months from 18th September. The Magistrate dismissed the information because of a decision of *Campbell* J. (of the Supreme Court of New South Wales) to the effect that under clause 40 every information must fail unless there has been a *previous* " demand in writing . . . given to the employer."

If such is the only possible meaning of the clause, we must accept it. But our function is not merely to consider the words as words, but to consider them in relation to the concrete things behind them, to " visualize " the facts; and if we find that such a meaning would deprive the words of all purpose, make the clause inept, absurd, inexplicable, we are bound to consider whether the words are not fairly capable of another meaning which has purpose and common sense, though personally we may not agree with that

purpose. The "employer shall not be liable to pay . . . unless within a period of nine calendar months after the last day of" the week in question "a demand in writing . . . has been given." What is the object of giving the demand? Is it to give the employer notice of action, so that he may look into the matter before he is hauled to Court? But whenever an Act or regulation requires notice of action to be given before the action, it fixes—always, so far as I know—a time *after* the notice, and before action, which will enable the defendant to consider the position. In this very clause, clause 40 (b), the Court of Conciliation has inserted such a provision —"shall not be entitled to the benefits of this award until the expiration of *seven days after notice* has been given to the employer." Under the interpretation put upon sub-clause (a) by *Campbell* J., the employee (or the Union) must serve on the employer not only the information, but also a demand in writing for the same thing; and the demand in writing and the summons may be served by the same hand on the same day, at the same minute; but the demand in writing must precede the summons. Moreover, on this interpretation, if the demand in writing be served within the nine months, there is nothing to prevent the employer from being prosecuted after 10, 20, 30, years—at *any time thereafter*. What, then, is the purpose of the clause if this interpretation is right?

Attention has been rightly called to the fact that the Deputy President attached the disputed condition to the liability to pay, not to the proceedings for the penalty—"shall not be liable to pay . . . unless within a period of nine months" &c. I should infer that he felt he had no power to create a statute of limitations, narrowing the right to proceed conferred by sec. 44—"may be imposed" (without limit of time)—but felt also that he had power to place any condition he thought fit to the obligation which he created. In my opinion, it is necessarily implied that the requirement of a demand in writing applies only where proceedings are not taken promptly—that is to say, within the nine months. In other words, *after the nine months* the employer "shall not be liable to pay unless within a period of nine months"—the right has been kept alive by a demand in writing. There are many cases in which the Courts have gone even further in finding implications.

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The cases are collected in chap. IX. of *Maxwell on the Interpretation of Statutes*, 3rd ed. In one case, before the Judicial Committee of the Privy Council, an ordinance of Natal, giving power to any subject of the Queen to dispose by will of his property according to English law "*as if such subject resided in England*," the words quoted were treated as if they were not in the section, because they would reduce the section to a nullity (*Salmon* v. *Duncombe* (1)).

It must be admitted, of course, that a summons or an information is not, accurately speaking, a demand in writing for money—a demand on the employer; it is rather a notice that on a certain day the employer will have to attend the Court on a stated charge. It would be doing no great violence, however, to the words of the claim if we were to treat "demand in writing" as including a summons or an information; but it is not necessary even to go so far—the words used, as applied to the circumstances to which they are addressed are sufficient to convey the implication; and they should be treated as conveying it, where no one can suggest any other sensible purpose for the clause—or suggest any reason why to each of these prosecutions, involving such petty amounts, the Court of Conciliation should attach a condition so obviously futile, a technicality so stupid, to say nothing of additional expense and risk.

I notice that the Deputy President, in his reasons for award, shows that his object in this clause 40 was that which I have inferred by the mere process of construction (2) :—"I did not think it right that claims should *accumulate* against an employer *because of some unknown breach of the award*. . . . I agree . . . that three months is too short a period *within which* to allow bush workers *to make their claims*." There is no indication of any intention to provide as for notice of action. I do not rely on this expression of the intention of the Deputy President as aiding my construction; for the intention must be ascertained, on ordinary principles of construction, from the words used in the formal award. But it is satisfactory to my own mind to feel that the actual intention was the same as the intention which I have gathered from mere construction of the clause and the award.

I give this dissenting opinion with much diffidence, because the

(1) (1886) 11 App. Cas. 627.

(2) (1922-23) 18 C.A.R., at p. 369.

dissent is from the opinion of my learned brothers. But it is my duty, if I do dissent, to express that dissent. I think that the appeal should be allowed; and that the question asked in the case stated should be answered: Yes—the determination was erroneous.

STARKE J. The information in this case was rightly dismissed. It is impossible to hold that an employer commits a breach of the award in not paying a sum of money, in respect of which clause 40 of the award prescribes in express terms that he "shall not be liable to pay unless" "a demand in writing" of the sum claimed be "given to" him, and for which no such written demand has been made.

Appeal dismissed with costs.

Solicitor for the appellant, *V. Ackerman.*

Solicitors for the respondent, *Norton, Smith & Co.*

B. L.