[HIGH COURT OF AUSTRALIA.]

PEARSON . . . . . APPELLANT;

AND

THE FREMANTLE HARBOUR TRUST . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1929.

PERTH, *Sept.* 6, 10.

Knox C.J., Rich and Dixon JJ.

Workers' Compensation—Accident—Worker injured on his way to get hot water for tea for himself and fellow-workers—Injury arising "in the course of the employment"—Workers' Compensation Act 1912-1924 (*W.A.*) (*No.* 69 *of* 1912—*No.* 40 *of* 1924), *sec.* 6*—*Fremantle Harbour Trust Act* 1902-1913 (*W.A.*) (*No.* 17 *of* 1912—*No.* 4 *of* 1913), *secs.* 22, 26.

The words "arising . . . in the course of the employment" in sec. 6 of the *Workers' Compensation Act* 1912-1924 (W.A.) describe a condition which is satisfied if the accident happens while the worker is doing something in the exercise of his functions although it is no more than an adjunct to or an incident of his service.

Following a practice or custom known to his employer, a worker left the job upon which he was working to go from one part of his employer's premises to another during his employer's time, in order to procure hot water for tea for the midday meal of himself and his fellow-workers; he was doing this for the purpose of more conveniently supplying them with the hot water which the employer habitually provided, generally as a matter of statutory obligation, sometimes without that compulsion but in like case. Whilst on the way to the employer's boiler containing the hot water, he was injured by a motor-car on a road on the employer's premises; and he claimed compensation from his employer under the *Workers' Compensation Act* 1912-1924 (W.A.) in respect of the injuries sustained by him.

* The *Workers' Compensation Act* 1912-1924 (W.A.), sec. 6 (1), provides that "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under his employer's instructions, is caused to a worker, his employer shall . . . be liable to pay compensation" &c.

Held, that the accident arose in the course of his employment, and that he was entitled to compensation under the Act.

St. Helens Colliery Co. v. *Hewitson*, (1924) A.C. 59, explained.

Howells v. *Great Western Railway*, (1928) 138 L.T. 544, followed.

Decision of the Supreme Court of Western Australia (Full Court) reversed.

APPEAL from the Supreme Court of Western Australia.

The appellant, Robert Pearson, was a lumper in the employment of the respondent, the Fremantle Harbour Trust. By an award of the Commonwealth Court of Conciliation and Arbitration under which the appellant worked, it was provided that " when employees are on duty on a vessel before or after a meal hour the employer shall, when practicable, cause hot water to be provided for them " ; and it was the practice of the respondent to supply its employees with hot water to make tea for their midday meal. To obtain the water it was necessary at fifteen or twenty minutes before the meal hour for one of the gang with which he was working to leave his job and go and fetch the hot water for the gang. The hot water was in a boiler some quarter of a mile away. On 8th February 1928 the respondent, who was on his way to get hot water for the tea for his fellow-workers and himself, was, after vainly attempting to get a ride down as far as the boiler, knocked down by a motor-car whilst crossing a road in front of the shed where he was at work, and he was badly injured. This occurred on the premises belonging to the respondent. The appellant on that particular day had been engaged by the respondent to attend to some electric cables which supplied power to a travelling crane. The appellant claimed compensation from the respondent, in the Local Court at Fremantle, under the *Workers' Compensation Act* 1912-1924, in respect of the injuries sustained by him, as being the result of an accident arising out of and in the course of his employment. The magistrate who heard the application, after hearing evidence, found that the accident which caused the personal injuries complained of arose out of and in the course of appellant's employment with respondent, and that he was entitled to compensation under the Act.

H. C. OF A. 1929.

PEARSON v. FREMANTLE HARBOUR TRUST.

From this decision the Fremantle Harbour Trust appealed to the Full Court of the Supreme Court, which reversed the decision of the magistrate.

From the decision of the Supreme Court Pearson now appealed to the High Court.

Sir Walter James K.C. and *Boylson*, for the appellant. The injury sustained by the appellant either arose out of or in the course of his employment, or both: As was the custom in similar circumstances the appellant left the respondent's shed, where he was working in the course of his employment, at about 11.45 o'clock and went along the road, which was also on the employer's premises, to obtain the hot water required for the midday meal for himself and his fellow-workers. The respondent knew of the existence of the custom: it supplied the hot water, and the time taken in obtaining the hot water was not deducted from the time of labour (see *Hewitson* v. *St. Helens Colliery Co.* (1)). Employment is not measured by acts of exertion restricted to the employee's particular job, but by the nexus and the incidents of service (*Blovelt* v. *Sawyer* (2)). In this case the employment had begun and had not ended, and it was obvious that it was to the interest of the employer to keep the gang on the place of employment during the dinner-hour, and therefore it acquiesced in the practice (*Brice* v. *Edward Lloyd Ltd.* (3); *Martin* v. *J. Lovibond & Sons Ltd.* (4)). In *Gane* v. *Norton Hill Colliery Co.* (5) the Court held that on the facts the employee was allowed to cross the line and this was known to the employer. In *Lancashire and Yorkshire Railway Co.* v. *Highley* (6) the route taken by the employee was not known to the company. As the getting of the hot water was known by the respondent and it supplied the hot water and it acquiesced in the practice as to obtaining it, the act was covered by the men's employment. (See *Howells* v. *Powell Duffryn Steam Coal Co.* (7); *Howells* v. *Great Western Railway* (8); *Hewitson* v. *St. Helens Colliery Co.*) The appellant was

(1) (1923) 16 B.W.C.C. 230; (1924) A.C. 59.
(2) (1904) 1 K.B. 271.
(3) (1909) 2 K.B. 804.
(4) (1914) 2 K.B. 227.
(5) (1909) 2 K.B. 539.
(6) (1917) 10 B.W.C.C. 241.
(7) (1926) 1 K.B. 472.
(8) (1928) 138 L.T. 544.

doing something necessary under an award of the Commonwealth Conciliation and Arbitration Court, and under that award it was an implied duty upon employees to get the hot water; on that particular day it was the appellant's duty to get the hot water for himself and the others, and thus it came within the scope of his employment under the contract. The custom of going for the hot water had been in continuous operation for ten years up to the present time. [Counsel also referred to the following: *Reed* v. *Great Western Railway Co.* (1); *Federal Gold Mine Ltd.* v. *Ennor* (2); *Bell* v. *Armstrong, Whitworth & Co.* (3); *Armstrong, Whitworth & Co.* v. *Redford* (4); *Fitzgerald* v. *Clarke & Son* (5); *Beattie* v. *Tough & Sons* (6); *Lane* v. *W. Lusty & Son* (7); *Elliott* on *Workmen's Compensation*, 9th ed., p. 99.]

J. L. Walker, for the respondent. When a worker left his work and proceeded to the copper and obtained hot water for himself and his fellow-workers, he was not performing any duty to his employer but was availing himself of a privilege granted by his employer; the appellant was, therefore, not acting "in the course of his employment." The procuring of the hot water was not incidental to the appellant's employment because he could please himself whether he used the hot water or not, and the use of the hot water was not in any manner incidental to his employment (*St. Helens Colliery Co.* v. *Hewitson* (8)). Further, the award only applied when the men were working at a vessel. When the worker, whilst proceeding along the road towards the copper for the hot water, crossed the road in order to obtain a ride on a lorry, he was then engaged on his own business, there was an interruption of his employment and he also incurred an "added risk" which took him entirely outside the scope of his employment and also entirely outside the *Workers' Compensation Act* (*Lancashire and Yorkshire Railway Co.* v. *Highley* (9); *Bell* v. *Armstrong, Whitworth & Co.* (3); *Reed* v. *Great Western Railway Co.* (1)).

(1) (1909) A.C. 31, at p. 33.
(2) (1910) 13 C.L.R. 276.
(3) (1919) 12 B.W.C.C. 138.
(4) (1920) A.C. 757, at p. 766.
(5) (1908) 1 B.W.C.C. 197.
(6) (1916) 10 B.W.C.C. 447.
(7) (1915) 3 K.B. 230.
(8) (1924) A.C. 59.
(9) (1917) A.C. 352.

H. C. OF A. 1929.

PEARSON v. FREMANTLE HARBOUR TRUST.

Sept. 10.

Sir Walter James K.C., in reply, referred to *Lawrence* v. *George Matthews* (1924) *Ltd.* (1).

Cur. adv. vult.

THE COURT delivered the following written judgment :—

This is an appeal from the judgment of the Supreme Court of Western Australia allowing an appeal from the decision of the Local Court at Fremantle by which the magistrate determined that the appellant was entitled to compensation for personal injury by accident arising out of or in the course of his employment with the respondent. The respondent is the Fremantle Harbour Trust constituted by the *Fremantle Harbour Trust Act* 1902-1913. By sec. 22 of this Act there is vested in the corporation all lands within the boundary of the harbour as described in the Schedule to the Act. The corporation is empowered to make and maintain roads and approaches to all wharves, docks, platforms and sheds erected on these lands (sec. 26). The Victoria Quay is a wharf with sheds upon it, and such a road running alongside them. On 8th February 1928 the appellant was employed by the respondent as a wharf lumper at this Quay. The terms of his employment were in a great measure regulated by an award of the Commonwealth Court of Conciliation and Arbitration. This instrument prescribed that the ordinary hours of duty should be from 8 a.m. to 5 p.m. ; that there should be certain meal-hours, that for dinner being from noon to 1 p.m. ; that an employee need not work during a meal-hour unless he chose to do so, and that, if he did so work, he should be paid at an extra rate unless he were desirous of working during a meal-hour to complete a shift or job ; that the time of duty should be treated as beginning at the time and place at which the employee was to present himself for work or for conveyance to work and, in effect, that the time of duty continued until he was discharged. Further provision was made by the award to ensure that the employees obtained meals. In substance it was provided that the employee should receive enough notice of the hours of engagement to enable him to furnish himself with meals, and that if he should be required for a further period,

(1) (1929) 1 K.B. 1.

the employer should supply him with a meal or pay him a sum of money for such meal, if provided by himself. The following further provision was included in the award: "(17) When employees are on duty at a vessel before and after a meal hour, the employer shall, when practicable, cause hot water to be provided for them to make tea, except under such circumstances that the vigilance officer or the Board of Reference decides the provisions to be unnecessary." For the purpose of complying with this provision and for other purposes the respondent had a "cook-house" upon the Quay. On the date mentioned the appellant was engaged at work in a shed about a quarter of a mile from the "cook-house," there being three intervening sheds. He was attending to the electric cables which supplied power to a travelling crane. Although the men at work were manifestly handling inward or outward cargo, it appears that there was no vessel alongside at the time. It was established by the evidence that when men were working at a shed, it was the practice for one of their number, about fifteen or twenty minutes before the meal-hour, to leave his job for the purpose of getting hot water at the "cook-house" and bringing back tea for the men so that it should be ready when the meal-hour began. This practice, besides enabling the respondent to fulfil its obligation under the clause in the award, when the men were working at a ship, had the advantage of allowing a large number of men to take their meal at the place of work without resorting in a body to the "cook-house." On this day the task fell to the appellant. At about 11.40 a.m. he left the cables, of which another man took charge, and went on to the roadway. He saw a lorry on the other side of the road, which he thought might carry him the quarter of a mile, which he would otherwise have to walk. It was usual for men going for the hot water to get a "lift" if they could. He crossed over to it, but learnt from the driver that it was not going that way. He then continued a little on his way but was struck from behind by a motor-car and sustained injuries which led to partial incapacity.

In the Local Court, the magistrate found that while there was a footpath on the further side of the roadway, the road was commonly used by the public and workmen who were on foot; and that it provided the usual and most direct route from the shed to the

H. C. OF A. 1929. PEARSON v. FREMANTLE HARBOUR TRUST.

"cook-house," and was as safe a route as any other the appellant might have taken; and that he incurred no greater risk by walking where he did than he would have incurred had he walked across or along any other part of it, or along the wharf behind, or the platforms in front of, the shed; and that if he had gone by the footpath he would have encountered the same risks by crossing and recrossing the road as well as lengthening his journey. He further found that it was the recognized practice for the workmen to be provided with hot water for their tea whether they were on duty at a vessel or on the Quay, or in sheds.

The Supreme Court upon appeal from the Local Court—a proceeding which is "in substance a rehearing" (*Federal Gold Mine Ltd.* v. *Ennor* (1))—held that the accident arose neither out of nor in the course of the appellant's employment. *Burnside* J., with whom *Northmore* J. concurred, considered that it could not arise in the course of the employment unless the appellant was under an obligation to his employer arising out of his contract of service to go and fetch the water provided by the employer, and that, so far from it being a duty to do so, it was a privilege. *Draper* J. was of opinion that a workman acts in the course of the employment when he does something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract, but if the appellant had proved that before the award was made a custom or usage existed to fetch the hot water, he would have been entitled to succeed. He considered that after the award, custom could not add to the rights and duties it prescribed, and that in any case the evidence did not establish such a usage as would form part of a contract of service.

Their Honors based their view of the meaning of the expression "arising in the course of the employment" upon the decision of the House of Lords in *St. Helens Colliery Co.* v. *Hewitson* (2). Their attention, however, does not appear to have been called to the later cases in the Court of Appeal, in which that case has been considered —*Howells* v. *Powell Duffryn Steam Coal Co.* (3) and *Howells* v. *Great Western Railway* (4). In the latter case the County Court Judge held that an accident a workman met with when going

(1) (1910) 13 C.L.R. 276.
(2) (1924) A.C. 59.
(3) (1926) 1 K.B. 472.
(4) (1928) 138 L.T. 544.

to his work by a way over the employer's premises which was permitted but not that provided by the employer did not arise in the course of his employment. *Atkin* L.J. said (1) :—" With respect I think the learned Judge was misled by the application of his meaning of the decision in the House of Lords in *St. Helens Colliery Co.* v. *Hewitson* (2). In that case the workman had never reached the sphere of his operations at all. He was on a railway and in a railway train which began to run, I think, about six miles away from the colliery where the man was in fact employed, and in a train that he was entitled to be in if he chose to be by reason of the employers having provided a train which the workman had the option to use. It is in reference to those facts that the learned Lords laid down the rule which the learned Judge refers to, and no doubt they held that in such a case as that it was essential to show that the man was in fact under a duty to his employers to be at that particular place using that appliance before it can be said that he was acting in the course of his employment. But it appears to me that the learned Lords in that case certainly never intended to overrule the principles which had already been approved of in more than one case, and certainly in *Highley's Case* (3), which have been referred to by the Master of the Rolls, and in dealing with the question of duty it is to be observed that Lord *Wrenbury* says :—' The word " duty," however, is not to be taken in a narrow sense. It is not necessary that it shall be the man's duty to do the act, it suffices that he is engaged at the moment in doing his duty. If, as in *John Stewart & Son Ltd.* v. *Longhurst* (4), the accident occurs to the man in a place in which he would not be entitled to be, except in order to perform his contract of service, the test is satisfied, because he is there solely in pursuance of his duty.' " The fact that Lord *Wrenbury* did not mean when he used the word " duty " to confine " the course of the employment " to the doing of things which the workman's contract of service obliged him to do is made even clearer by a passage in his speech in *Hewitson's Case*, before that quoted by *Atkin* L.J. He says (5) :—" The employment may be to do some defined manual work, say, hewing coal, but the accident need

(1) (1928) 138 L.T., at p. 547.
(2) (1924) A.C. 59.
(3) (1917) A.C. 352.
(4) (1917) A.C. 249.
(5) (1924) A.C., at p. 91.

H. C. OF A. 1929. PEARSON v. FREMANTLE HARBOUR TRUST.

not arise when the man is actually using his pick. He may be going down in the cage. He may be resting between shifts. He may be taking a meal. He may be merely standing by, waiting for the next job. All these, and such as these, are not 'the employment' but are incidental to the employment. The man is in the course of his employment—is engaged in his employment in all such cases. 'They also serve who only stand and wait.' In every case the facts have to be ascertained and discrimination made between the time during which or the place at which the employment is and those during or at which it is not being carried on." Again (1): "a useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the man would have owed the duty to obey it." Lord *Atkinson* says (2):—"The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word 'employment' as here used covers and includes things belonging to or arising out of it. For instance, haymakers in a meadow on a very hot day are, I think, doing a thing in the course of their employment if they go for a short time to get some cool water to drink to enable them to continue the work they are bound to do, and without which they could not do that work, and workmen are doing something in the course of their employment when they cease working for the moment and sit down on their employer's premises to eat food to enable them to continue their labours." And, in dealing with *Charles R. Davidson & Co.* v. *McRobb* (3), on which he founded his interpretation of the words "arising in the course of the employment," and of which Lord *Sumner* had said, there "a decision was given upon them which is, I hope, final, and it only remains to apply it" (*Armstrong, Whitworth & Co.* v. *Redford* (4)), Lord *Atkinson* quoted from Lord *Dunedin's* speech the following passage (5):—"In my view 'in the course of the employment' is a different thing from 'during the period of employment.' It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need

(1) (1924) A.C., at p. 92.
(2) (1924) A.C., at p. 71.
(3) (1918) A.C. 304.
(4) (1920) A.C., at p. 773.
(5) (1924) A.C., at p. 75.

not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case, the taking of meals during the hours of labour ; in the servant's, not only the taking of meals, but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof." In *Lancashire and Yorkshire Railway Co.* v. *Highley* (1) the House of Lords determined that the accident did not arise out of the employment because it was due to an added peril, one " voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself," but Lord *Finlay* L.C. (2), Viscount *Haldane* (3) and Lord *Sumner* (4) all say it arose in the course of the employment. The workman was a labourer on the railway. Early on the morning of the accident he had " checked on " and had been told to travel by passenger train to another place to work. The journey involved a change of trains and he and his fellow-workmen had to wait some time at the station at which they changed. They had food with them. There was a mess-room on the other side of the railway-line with a man in charge who was in the habit of supplying hot water to any servant of the company who applied for it. They crossed the line to get hot water to prepare their breakfast. Lord *Finlay* says: " They " (the Court of Appeal) " held that getting their breakfast was covered by the men's employment, and on this they were, I think, right." Lord *Sumner* says: " I accept that it was in the course of his employment that he should have been preparing to get his breakfast at the time in question, that he should have been going to the mess-room for hot water for that purpose, and that, in order to get the hot water, he should have been traversing a number of pairs of rails." With this may be contrasted *Pruce* v. *Davey* (5), where the employee's errand on his own behalf involved an interruption or suspension of his service.

We think that the result of these authorities is to show that the words " arising in the course of the employment " describe a

(1) (1917) A.C. 352.
(2) (1917) A.C., at p. 357.
(3) (1917) A.C., at p. 360.
(4) (1917) A.C., at p. 372.
(5) (1926) 136 L.T. 601.

H. C. OF A. 1929.

PEARSON v. FREMANTLE HARBOUR TRUST.

condition which is satisfied if the accident happens while the workman is doing something in the exercise of his functions although it is no more than an adjunct to or an incident of his service.

Upon the facts of this case the workman (the appellant) was going from one part of his employer's premises to another during hours of labour for which he was paid and when he was bound to obey his employer's lawful commands, and he was doing so for the purpose of more conveniently supplying to a gang of men that which the employer habitually provided, generally as a matter of statutory obligation, sometimes without that compulsion, but in like case. The convenience served was not only that of the gang because it facilitated the supply of water, a thing which the respondent was bound to do when work was "at a ship" and which it did in the same way although the ship was not yet, or no longer was, alongside.

Adapting and applying to this case the language of Viscount *Haldane* in *Upton* v. *Great Central Railway Co.* (1), that the appellant should have been at the Quay walking on the road to the "cook-house" "fell within the conditions on which he was employed. The accident happened while he was doing something that was incidental to his employment. It did not occur merely during a period in which he was in the employment of the respondents." He was "doing something which in contemplation of law is part of his service."

It was contended that the custom of obtaining hot water in this manner was not shown to be one to which the respondent was a party. But it was the conventional way adopted by workmen and employer in combination for fulfilling the obligation laid by the award on the latter to supply hot water. The practice could not exist without the knowledge and concurrence of the officers or foremen of the corporation and therefore the course pursued by the appellant must be taken to be authorized by the respondent as something proper to be done by or in respect of his service.

In the circumstances we think the magistrate's finding that the accident arose in the course of the employment was amply justified. The *Workers' Compensation Act* 1912-1924 of Western Australia

(1) (1924) A.C. 302, at p. 306.

does not require that the accident should also arise out of the employment. The conditions are alternative, not cumulative.

It was argued that in going by the roadway and in crossing over to the lorry the appellant exposed himself to an "added risk or peril." It is not clear that this argument is relevant to the question whether the accident happened in the course of the employment. It may concern only the condition that the accident should arise out of the employment. But in any case, we think, the magistrate's finding of fact upon this question was well founded and it is inconsistent with the argument.

For these reasons we think the appeal should be allowed.

The order will be:—Appeal allowed with costs. Order of the Supreme Court discharged and in lieu thereof order that the appeal from the Local Court to the Supreme Court be dismissed with costs. Order of the Local Court restored.

Order accordingly.

Solicitors for the appellant, *Richard S. Haynes & Co.*

Solicitor for the respondent, *J. L. Walker*, Crown Solicitor for Western Australia.