REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1930-1931.

[HIGH COURT OF AUSTRALIA.]

THE GRAZIERS' ASSOCIATION OF NEW SOUTH WALES . . . . . } APPLICANT;

AND

LABOR DAILY LIMITED AND ANOTHER RESPONDENTS.

H. C. OF A. 1930.

SYDNEY, *July* 29; *Aug.* 14.

Rich, Starke and Dixon JJ.

Constitutional Law—Industrial arbitration—Injunction—"Dispute"—Application for variation of award—Judgment reserved—Before delivery article published in newspaper "containing encouragement, advice or incitement" to strike if judgment adverse—Remarks derogatory to Court—Publishing company not party to award—Offending article not repeated—Rule nisi enlarged sine die—Commonwealth Conciliation and Arbitration Act 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *secs.* 6, 6A, 48,* 86D.*

Held, that the provision as to printing or publishing incitements to commit breaches of the Act contained in sec. 86D of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 is within the constitutional powers of the

* Sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 provides that "the High Court . . . may, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach or to enjoin any organization or person from committing or continuing any contravention of this Act or of the award under pain of fine or imprisonment, and no person to whom such order applies shall, after written notice of the order, be guilty of any contravention of the Act or the award by act or omission. In this section the term "award" includes order."

Sec. 86D provides that "Any person who prints or publishes any report or other matter containing any order, encouragement, advice or incitement to commit any breach or non-observance of this Act or of any order or award or any report or other matter containing language which is insulting to or abusive of the Court, shall be guilty of an offence. Penalty: One hundred pounds."

H. C. OF A. 1930.

GRAZIERS' ASSOCIATION OF NEW SOUTH WALES v. LABOR DAILY LTD.

Commonwealth, which extend to penalizing all incitements to commit contraventions of any law of the Commonwealth validly enacted.

Held, that although an order under sec. 48 of the Act can be obtained only by a party to an award, it is not necessary that the person to whom the order is directed should be a party to such award.

The Court held that an issue of a newspaper contained matter "encouraging, advising or inciting persons" to strike within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, but, it not appearing that the publication of such matter had been repeated or was likely to be repeated, the Court considered that the interest of the applicant for an injunction under sec. 48 would be adequately protected by enlarging the rule *nisi* with an intimation that an order in the nature of an injunction would be made if the respondent newspaper company published any further matter of a similar nature, and by ordering the respondent to pay costs.

APPLICATION for an order in the nature of an injunction.

The Graziers' Association of New South Wales, an organization of employers registered under Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, obtained a rule nisi from *Rich* J. on 4th July 1930 calling upon Labor Daily Ltd., proprietor of the *Labor Daily*, registered at the General Post Office, Sydney, as a newspaper, and having an admitted net daily sale of 73,083 copies, and one George Smith, its printer and publisher, to show cause why an order in the nature of an injunction should not be made under sec. 48 of the Act restraining them from contravening the provisions of the Act by publishing matter encouraging, advising or inciting persons to strike within the meaning of the Act. The affidavit of John William Allen, general secretary of the Association, made on 4th July 1930 showed that on 17th April 1930 the Association applied to the Commonwealth Court of Conciliation and Arbitration for a further variation of an award which was made by that Court in respect of the pastoral industry, and to which neither respondent was a party. Such application came on for hearing before the Chief Judge on 2nd June, judgment being reserved on 11th June, and it had not been delivered up to the time of the making of the affidavit. Annexed to the affidavit was a copy of the *Labor Daily* newspaper bearing date Thursday, 3rd July 1930, which the applicant complained contained matter which encouraged and incited employees of the pastoral industry to strike, and thereby contravened the provisions of the Act. The article complained of was headed

"60,000 Shearers may go on Strike," sub-headings being "Declaration of new A.W.U. Award," "May light the spark," "Precipitating Continent wide upheaval," "Biassed Judge's attitude," "Grave Outlook"; and contained (*inter alia*) the following statements:— "One of the biggest industrial upheavals ever witnessed in Australia may break out at any moment. Because of the biassed attitude of Chief Judge Dethridge in the Arbitration Court, there is every likelihood that sixty thousand pastoral workers throughout the continent, with the exception of Queensland, will cease work. . . . One of the statements attributed to the Judge, and to which the most emphatic exception is taken, is that he was too generous when considering his last award. Another factor contributing to the unrest which is permeating the industry is the parsimonious attitude of those who, while wool was booming to the house-tops, granted an award based on the ruling cost of living; but when the golden era passed, wanted to apply the Brucian 'economic state' stunt. This sought to have conditions and wages governed by a set of economic circumstances as conceived or interpreted by some of the notoriously class-biassed personages of the Industrial Bench. So fraught with distrust and suspicion has been the atmosphere of the Court, that the hearing has bordered upon the farcical. This position has developed until the general secretary of the A.W.U. . . . has deemed it advisable to withdraw from the hearing, under the belief that even at this stage judgment has already been made. . . . Recognized everywhere as being in the forefront of the militant unionists, there is not the slightest doubt that the rank and file of the organization will put up a steadfast fight equal to that of the miners. . . . It only requires a spark to set this great fighting force in motion and that spark will undoubtedly be the publication of the new award, should its tilts at the workers—who have been treated 'too generously,' says his Honor—be obviously intended to hurt. . . . There is every likelihood that during the next day or two the central council of the A.W.U. will issue a manifesto to shearers, advising them when signing new agreements to take advantage of the clause which permits them to draw 75 per cent of their earnings. This will be tantamount to an order to clear the decks for action, for it will enable the shearers to be in a financial

H. C. OF A. 1930. GRAZIERS' ASSOCIATION OF NEW SOUTH WALES v. LABOR DAILY LTD.

position to take part in the upheaval. . . . Should the jaundice of one man in his high official position be responsible for precipitating a crisis this action will be such as to warrant the closest investigation by Cabinet, especially in view of what has already transpired." Then followed some statistics as to the number of sheep in New South Wales and Australia, the wool yield and the value thereof, and reference was also made to the " staggering blow " the railways would suffer should the haulage of the wool-clip be cancelled. A further affidavit by Allen made on 26th July set out that the Chief Judge delivered his reserved judgment on the 14th of that month, *inter alia* varying the award by making the amount payable for shearing sheep 32s. 6d. per hundred instead of 41s. as previously provided, and also that at approximately 34 shearing sheds in the Moree, Walgett and Coonamble districts of New South Wales, approximately 140 shearers and other station employees, members of the Australian Workers' Union, had refused to continue work. An affidavit, made on 24th July by George Smith, one of the respondents, showed that between 7th May and 15th July he was an inmate of a hospital and had no knowledge of the article complained of until after publication, also that articles commenting upon the position in the shearing industry in New South Wales appeared in several newspapers other than the *Labor Daily* on or about 3rd July 1930, examples of which were set out in the affidavit together with observations alleged to have been made by his Honor the Chief Judge of the Commonwealth Conciliation and Arbitration Court during the hearing of the application for a variation of the award. Particulars were also set out of punitive actions commenced in the Commonwealth Court of Conciliation and Arbitration by the applicant against the respondent based on the same alleged offence. No affidavit was filed by or on behalf of the Labor Daily Ltd. There was no evidence of articles similar to the one complained of appearing in any other issue of the *Labor Daily*.

Other material facts appear in the judgment hereunder.

Windeyer K.C. (with him *Pitt*), for the applicant. The language of the article complained of brings it within the operation of secs. 6, 6A and 86D of the *Commonwealth Conciliation and Arbitration Act*

1904-1928. The article both " incites " and " encourages " within the meaning of the last-mentioned section. It " incites " because it conveys to interested members of the community the suggestion that in certain circumstances certain troubles might and could arise, and it also suggests the nature and form of such troubles, the commencement of which it is calculated to bring about. The article " encourages " the adoption and continuance of an attitude insulting and unfriendly, and even hostile, to the Court. The words used are likely to cause men to continue in a wrong course already begun. The fact that the article contains a suggestion as to how the " upheaval " referred to therein might be financed is not without significance, and must be for the purpose of strengthening the men's determination to adopt and continue such wrong course. It is an attempt improperly to influence a Court in arriving at a decision. Notwithstanding the remedies provided by the sections referred to, the applicant should be granted relief by way of injunction under sec. 48 as, in the circumstances, an order of this Court would be more effective and authoritative than the mere imposition of a penalty by an inferior Court.

Evatt K.C. (with him *McKell*), for the respondents. This is the first occasion on which an application has been made under sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 against a person not a party to the relevant award. Only a party to an award can make such application. " Person," in that section, means person bound by an award. Labor Daily Ltd. is not a party to the award in question. The effect of granting the injunction sought would be to change in a criminal matter both the procedure and the punishment. The case of *Whittaker Bros.* v. *Australian Timber Workers' Union* (1) is distinguishable, as here not only was other procedure available but it also was taken. The question is not whether there will be any advantage but whether the Court will exercise a discretion and grant an injunction. The article complained of does not offend: a fair meaning of the article is that during the hearing the Judge expressed a view that was criticized in the respondent newspaper. Every word of the article

(1) (1922) 31 C.L.R. 564.

H. C. OF A. 1930.

GRAZIERS' ASSOCIATION OF NEW SOUTH WALES v. LABOR DAILY LTD.

can be read in that general sense. No variation of the award had been made up to the date of publication. Sec. 86D of the Act looks at an objective standard, not to the consequences which follow the alleged publication. Secs. 6 and 6A are the only two sections which could be relevant, and the article does not conflict with either of those sections, which have no application whatever. How could it be said on 3rd July that there would be an award or a variation of an award? There was no incitement to commit a breach of sec. 6 or sec. 6A. At most the article is addressed to the situation which would exist after the making of an award, and therefore could only have reference to sec. 6A. There has been no criminal conduct sufficient to bring the matter within sec. 86D. As to the validity of sec. 86D, see *Stemp* v. *Australian Glass Manufacturers Co.* (1). The law in that section is a law in respect of publication, not a law in respect of conciliation and arbitration or settlement of disputes. The Commonwealth Parliament has gone too far. This law goes to the extent of prohibiting the printing of certain matters. Parliament's power is limited to the industrial power, which does not include the matters set out in sec. 86D. There is no relationship between the actual printing of the article and the alleged effects. There is no incitement to strike. The stoppage, which may or may not occur, may or may not be a strike. Sec. 86D is outside the constitutional powers of the Commonwealth (*Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (2)). The article is "spent" (*Quartz Hill Consolidated Gold Mining Co.* v. *Beall* (3)). The application is to restrain the publication of an article, not to restrain the publication of the newspaper.

Windeyer K.C., in reply. The industrial dispute continues to prevail. The remedy sought is provided for the purpose of preventing industrial disturbance in the future (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (4)). A strike implies the rupture of the industrial relationship. The language of the article contemplates such a rupture and comes within the section. The case of *Quartz Hill Consolidated Gold*

(1) (1917) 23 C.L.R. 226.
(2) (1925) 35 C.L.R. 449, at pp. 451 *et seqq.*
(3) (1882) 20 Ch. D. 501, at pp. 508, 509.
(4) (1925) 35 C.L.R. 462, at p. 477.

Mining Co. v. *Beall* (1) is distinguishable, because there the opportunity for mischief had gone but here danger is likely and probable. This is a reasonable ancillary power for the preservation of peace. The decrees of the Commonwealth Court of Conciliation and Arbitration must be respected by all members of the community, whether parties to the award or not, and the Court has power to insist that all persons respect them. The remedy before the other Courts is another and different penalty. The mischief of inciting to strike is the same whenever it happens. The applicant has done right in approaching this Court, which is the proper tribunal for an effective and speedy protection. [*Evatt* K.C. referred to *Liverpool Household Stores Association* v. *Smith* (2).] Where an injunction is sought in aid of a legal right, the Court is bound to grant it if the legal right is established (*Fullwood* v. *Fullwood* (3)), and the Equity Court may be approached for such an injunction.

Cur. adv. vult.

Aug. 14.

THE COURT delivered the following written judgment :—

The Graziers' Association of New South Wales, an organization of employers registered under Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, has obtained a rule nisi calling upon the Labor Daily Ltd. and its printer and publisher to show cause why an order in the nature of an injunction should not be made restraining them from contravening the provisions of the Act by publishing matter encouraging, advising or inciting persons to strike within the meaning of the Act.

The rule nisi was granted under sec. 48, which provides that this Court may, on the application of any party to an award, make an order in the nature of an injunction to enjoin any person from committing or continuing any contravention of the Act under pain of fine or imprisonment. Sec. 86D provides that "any person who prints or publishes any . . . matter containing any . . . encouragement, advice or incitement to commit any breach or non-observance of this Act . . . shall be guilty of an offence." The

(1) (1882) 20 Ch. D. 501. (2) (1887) 37 Ch. D. 170.
(3) (1878) 9 Ch. D. 176.

H. C. OF A. 1930.

GRAZIERS' ASSOCIATION OF NEW SOUTH WALES v. LABOR DAILY LTD.

Rich J. Starke J. Dixon J.

validity of this provision was attacked upon the return of the rule, but it cannot be doubted that it is within the constitutional powers of the Commonwealth, which extend to penalizing all incitements to commit contraventions of any law of the Commonwealth validly enacted.

The matter complained of as containing encouragement, advice and incitement to commit a breach of the *Commonwealth Conciliation and Arbitration Act* consists of an article published on 3rd July 1930 in the newspaper conducted by the respondent Company. The article is headed " 60,000 Shearers may go on Strike." After some sub-headings, the article states that " one of the biggest industrial upheavals . . . may break out at any moment " and that " there is every likelihood that sixty thousand pastoral workers throughout the continent, with the exception of Queensland, will cease work." An application had been made to the Commonwealth Court of Conciliation and Arbitration by employers bound by an award affecting the pastoral industry for a variation reducing the minimum wage prescribed for employees engaged in shearing and in other work. The application had been heard by the Chief Judge, who had reserved judgment. The article condemned some observations which the Chief Judge had made in the course of the hearing, and describes the atmosphere of the Court as so " fraught with distrust and suspicion " that the general secretary of the Australian Workers' Union deemed it advisable to withdraw from the hearing, believing that " even at this stage judgment has already been made." The article proceeds to discuss the probabilities and the advantages of a strike in the industry. It thus appears that an inter-State dispute existed about wages, and that an award prescribing minimum rates was made for the purpose of settling that dispute. The proposal to reduce wages, by varying the award so prescribing these rates, was a proposal to revise the settlement of that dispute. The application for a variation of the award was a proceeding in that dispute. The controversy between employer and employee arising as a result of this proposal is plainly described by the article as extending beyond the limits of one State. It is immaterial whether it should be regarded as a new industrial dispute, or as an incident in, or as a consequence of, the settlement of the old one. In *Waddell*

v. *Australian Workers' Union* (1) the strike, of which the organization was held guilty within the meaning of sec. 8, was treated as a strike on account of the industrial dispute settled by the award.

In either view, if such a strike as the article describes took place, it would be a strike on account of an industrial dispute extending beyond the limits of one State. Sec. 6 of the Act provides that no person or organization shall, on account of any industrial dispute (i.e., an inter-State dispute) do anything in the nature of a lock-out or strike. Such a strike as the article describes would involve a contravention of this provision. It follows that if the article contains any encouragement, advice or incitement to such a strike, an offence against sec. 86D is complete. A close consideration of the article with its headings and its inset dealing with the effect upon the railways of a cessation of work in the pastoral industry makes it impossible to doubt that the article did contain an encouragement to strike on account of the dispute described. In these circumstances a contravention of the Act had been committed, and the only remaining question is whether an order in the nature of an injunction should be made to enjoin any further contravention. On behalf of the respondent it is contended that sec. 48 does not contemplate an order being made against a stranger to the award upon which the applicant must depend in order to satisfy the requirement that the application shall be made by a party to an award. It is difficult to discover in the language of the section any such restriction upon its operation. No doubt the fact that the application for the order must be made by a party to an award tends to show that an order should be made only for some purpose arising out of that party's situation in respect of the award ; but a stranger to the award and the dispute which it settles might well be the instrument of disturbing the peace or security which the award is supposed to give, or otherwise he might interfere with the relations affected by it. In this case there can be no doubt that such a strike as the article contemplates would gravely affect the practical operation of the award as varied, and it follows that encouragement to such a strike is a thing which parties to that award are interested in restraining.

(1) (1922) 30 C.L.R. 570.

H. C. OF A. 1930.

GRAZIERS' ASSOCIATION OF NEW SOUTH WALES v. LABOR DAILY LTD.

Rich J. Starke J. Dixon J.

It was next contended that the Court should, in the exercise of the discretion which *Whittaker's Case* (1) shows the Court possesses, wholly refuse to make any order in the nature of an injunction. The Court has not an arbitrary discretion, but one which must be exercised according to the nature of the remedy and the objects of the Act. It was, however, urged that no reason appeared for anticipating any repetition of the contravention, and that the applicant had commenced proceedings in the Commonwealth Court of Conciliation and Arbitration which would afford it all the protection it needed. The proceedings in that Court, however, are not preventive. Further, in the ordinary jurisdiction of the Court, in cases otherwise appropriate for that remedy an infringement of duty is considered ground for an injunction without further proof of apprehended repetition. We are, however, impressed with the fact that no later publications have been put in evidence containing similar matter, and, while we do not think we would be justified in refusing the application and discharging the rule, we think the applicant's interest will be adequately protected, if we enlarge the rule with an intimation that an order in the nature of an injunction will be made if the respondent Company publishes any further matter containing encouragement, advice or incitement to commit any breach or non-observance of the Act or of any order or award, and if we order the respondent Company to pay the applicant's costs. The individual respondent showed by affidavit that he was not responsible for the publication, and no order for costs will be made against him.

Rule enlarged until a day to be fixed, with liberty to the applicant, if he should be so advised, to apply upon notice of motion that the rule be made absolute. Order that the respondent Labor Daily Limited do pay the applicant's costs of this rule up to this date. No order as to the costs of the respondent Smith.

Solicitors for the applicant, *McLachlan, Westgarth & Co.*
Solicitors for the respondents, *Turner, Nolan & Bender.*

J. B.

(1) (1922) 31 C.L.R. 564.