[HIGH COURT OF AUSTRALIA.]

DUNLOP PERDRIAU RUBBER COMPANY LIMITED . . . . . Appellant;
Defendant,

AND

FEDERATED RUBBER WORKERS' UNION OF AUSTRALIA . . . . . Respondent.
Informant,

Industrial Arbitration—Award—Interpretation—"For the purpose of saving payment for any holiday"—"A full week's wages"—Dismissal of employees—Validity of notice—"Week"—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930).

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Sydney, *Aug.* 4.

Melbourne, *Oct.* 2.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

By an award of the Commonwealth Court of Conciliation and Arbitration it was provided that "No employer shall—for the purpose of saving payment for any holiday—in any week in which a holiday or holidays fall, give employees notice of an intention to determine their employment. In all weeks in which holidays occur—including holidays not kept on Mondays—the employees shall be entitled to a full week's wages if it is not through" their "own fault that any deduction can properly be made by the employer."

On 8th April 1930 a company informed its employees by a notice posted up in its factory that, unless otherwise instructed, their engagements would be terminated on 17th April; that all employees, unless otherwise notified, could present themselves for re-engagement when work was resumed at the factory on 28th April; and that employees so re-engaged would receive payment for statutory holidays occurring during the intervening period. Many employees, all of whom had been paid up to and including 17th April, subsequently received a notice, dated 17th April, that they need not present themselves for re-engagement and, not being re-engaged, were not paid for 18th April, which was Good Friday and an "award" holiday. Although there was evidence that a marked falling off of orders rendered it necessary to restrict the output, the company was convicted of failing to pay one of such employees a full week's wages for the period from 14th April to 20th April, both days inclusive.

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Held, by *Gavan Duffy* C.J., *Rich* and *Dixon* JJ. (*Starke* and *McTiernan* JJ. dissenting), (1) that "saving payment for any holiday" was not "the purpose" for which a notice of dismissal was given when the real cause of terminating the engagement was not the desire to avoid payment for a holiday, though the occurrence of a holiday was the reason for fixing the precise date for the expiry of the notice; (2) that the provision in the award as to employees being entitled to a "full week's wages" for weeks in which a holiday occurred did not mean that a full week's wages must be paid although the engagement was finally and completely terminated before the end of the "week," and that the notice given to the employee in question was effectual to determine his employment on and from 17th April 1930: and, accordingly, that the company had been wrongly convicted.

APPEAL from the Chief Industrial Magistrate of New South Wales.

An information was laid by Robert Lyndon Day, an officer of the Federated Rubber Workers' Union of Australia, alleging that the Dunlop Perdriau Rubber Co. Ltd. on 17th April 1930, being then bound by the provisions of an award of the Commonwealth Court of Conciliation and Arbitration, No. 186 of 1925, made in a matter in which the Union was claimant and Perdriau Rubber Co. Ltd., which company was succeeded and taken over and acquired by the defendant Company, was a respondent, did commit a breach of the award by failing to pay Charles Clerihew, an employee within the meaning of the award, in the employ of the defendant Company, a full week's wages due and payable to him for the period extending from 14th April to 20th April, both days inclusive, contrary to the provisions of the *Commonwealth Conciliation and Arbitration Act* and the award. The information came on for hearing on 20th November 1930 before the Chief Industrial Magistrate for New South Wales, a Stipendiary Magistrate for the Metropolitan Police District in that State.

The award in question prescribed (*inter alia*) minimum wages at weekly rates; that "the hours of duty for males shall not (without payment of overtime) exceed 9¼ hours on each of the five days of the week—Monday to Friday inclusive—or more than 46¼ hours a week," the hours of duty for females not to be more than 44 hours per week. Other material provisions of the award were as follows:—"14. (*a*) For all time on duty on Sundays and on the holidays hereinafter mentioned, employees shall be paid for at the rate of double time. (*b*) The holidays referred to are . . . Good

Friday, Easter Monday, Anzac Day," &c. "(*c*) All employees shall be entitled to the . . . holidays above mentioned without any deduction from the weekly rates, and if worked upon they shall be entitled to an extra day's pay equal to double ordinary time. . . . (*e*) No employer shall—for the purpose of saving payment for any holiday—in any week in which a holiday or holidays fall, give employees notice of an intention to determine their employment. In all weeks in which holidays occur—including holidays not kept on Mondays—the employees shall be entitled to a full week's wages if it is not through his own fault that any deduction can properly be made by the employer." "15. . . . (*c*) (1) Employees not attending for duty will lose their pay for the time of . . . non-attendance unless he produces or forwards within 24 hours of the commencement of such absence a medical certificate or other evidence satisfactory to the management that his non-attendance was due to personal accident arising out of and in the course of his employment, or to personal ill-health necessitating such absence. (2) Provided that no employee shall be entitled to payment for non-attendance on the ground of personal ill-health for more than six days in any one year of his employment. (*d*) (1) Employment is to be determined only by a week's notice on either side, and such notice may be given at any time during the week. (2) This shall not affect the right of any employer or his manager to dismiss any employee without notice for malingering, inefficiency, neglect of duty or misconduct, and in such cases wages shall be paid up to the time of dismissal only, or to deduct payment for any day the employee cannot be usefully employed because of any strike by the union or any other union, or through any breakdown of machinery or any stoppage of work by any such cause which the employer cannot reasonably prevent." "16. Wages shall be paid not later than Friday in each week. No employers shall be allowed to keep more than two days' pay in hand. If an employee leaves on proper notice or is dismissed he shall be paid his wages on leaving or being dismissed except in cases where the employee is dismissed outside ordinary office hours." The meaning of the words "week" and "weekly" was not defined in the award. The evidence showed

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that on 8th April 1930 the Company's employees numbered approximately 950. On that day the factory manager caused a notice, which was substantially as follows, to be posted up in a prominent position in the factory :—" Employees are hereby notified that this factory will be closed from Thursday, 17th April, until Monday, 28th April next. Employees are further notified that their engagements will be terminated at ceasing time on the following dates (unless otherwise instructed), viz., Employees in No. 21 Mill Room, Wednesday, 16th April 1930 ; employees in other mill rooms and on tubing and tread machines, Tuesday, 15th April 1930 ; all other employees Thursday, 17th April 1930. The factory will resume work on Monday, 28th April instant, and all present employees may present themselves for re-engagement on the undermentioned dates (unless otherwise notified), viz., employees on tyre-making and vulcanizing and in shoe-making departments, Tuesday, 29th April 1930, all other employees, Monday, 28th April 1930. All employees who are thus re-engaged will receive three days' payment in lieu of the statutory holidays occurring during the period of stoppage." Of the period between 17th April and 28th April, the 18th was Good Friday, the 20th a Sunday, the 21st Easter Monday, the 25th Anzac Day, and the 27th a Sunday. Clerihew, who had been in the employ of the Company for seven years, continued to work until closing time on Thursday, 17th April, and was paid his wages up to and including that day. The practice at the factory was to pay wages on the Friday in each week calculated up to the previous Wednesday. On 23rd April Clerihew received by post from the Company a notice, dated 17th April 1930, as follows : " As circumstances preclude your further employment there will be no necessity for you to apply for re-engagement when this factory resumes operation." A similar notice was received by about 100 other employees of the Company. Clerihew accordingly did not present himself for re-engagement and received no further payments from the Company. Employees, numbering about 730, who did not receive such a notice resumed their work on 28th or 29th April in the ordinary way, and were paid for the holidays which occurred during the intervening period. The evidence of the factory manager and other responsible officers of the Company was that, owing to a marked

falling off in the demand for the Company's various commodities, stocks had accumulated at the factory far in excess of requirements, and as there were no signs of an improvement in the demand it was essential that the services of some of the employees should be dispensed with in order to reduce the output. This, according to the factory manager, was the sole reason for terminating the engagement of the employees on the dates shown in the notice, and, although such dates were just prior to a statutory holiday, they were not chosen merely with a view to avoiding payment for such holiday. The factory was again closed for some days in May 1930 owing to the stocks then on hand being considerably in excess of the demand for same.

Having been convicted by the Magistrate, the Company appealed to the High Court by way of case stated. The Magistrate stated (*inter alia*) that on the evidence before him he found that the notice of 8th April 1930 was given for the purpose of saving payment for the usual Easter holidays during which the works were closed; that Clerihew was paid all wages up to and including Thursday, 17th April 1930, but was not paid for Good Friday, 18th April 1930, and held that as Clerihew was not so paid for Good Friday he was not paid a full week's wages for a week in which a holiday occurred, and he determined further that the matters put in defence by the Company afforded no ground of answer or defence to the information.

Manning K.C. (with him *Cook*), for the appellant. Clerihew was not an employee of the Company on Good Friday; his engagement with the Company terminated on the previous day in pursuance of a notice given nine days earlier: therefore, he was not entitled to wages for the holiday. The evidence shows a very considerable falling off in orders and a consequent necessity to restrict the output. The Magistrate's finding that the notice of 8th April was given for the purpose of saving payment for the usual Easter holidays does not apply to this matter. There is no evidence that the factory was closed for that purpose. The use of the word "deduction" in clause 14 (*e*) of the award suggests that the case there being provided for is that of a person who is entitled to a full week's wage. It

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would not apply to the case where a person has received notice of the termination of his engagement during the week. The notice was not given in a week during which a holiday fell. The word "week" is ambiguous and could mean a "calendar" week of seven days from Sunday to Saturday inclusive, or a "working" week of five days, or a "pay" week from Wednesday to Wednesday, &c. The notice of dismissal may commence on any working day and expire on any working day provided a week or more intervenes. The prohibition contained in clause 14 (*e*) of the award is against the giving of notice and not against the termination of employment. Here notice was not given in a week in which a holiday fell. Owing to a great falling off of orders the company was entitled to close down its factory and to reduce the number of its employees, and it should not be penalized because the period of closing down included a holiday or holidays.

Flannery K.C. (with him *H. G. Edwards*), for the respondent. On the evidence before him the Magistrate was entitled to disbelieve the reasons put forward by the Company, and come to the conclusion that the Company's action was for the purpose of saving payment for the holidays. If the intention of the Company was to close up its factory in order to save expense, the week should not begin with a holiday. The words "in any week" in clause 14 (*e*) refer to the determining of the employment. The prohibition is against employing a person for any days in a week without paying him for any holiday in that week. On such a reading of the clause a meaning is found that accords with the scheme of the award, which intends to prevent employers dismissing employees before holidays occur for the purpose of saving wages on such holidays. Whether the purpose was proper or improper, there was no notice definitely terminating the engagement.

Manning K.C., in reply.

Cur. adv. vult.

Oct. 2. The following written judgments were delivered:—

GAVAN DUFFY C.J. I concur in the judgment of my brother *Dixon*.

RICH J. No useful purpose will be served by restating the facts or reiterating the reasons expressed in the judgment of my brother *Dixon*, with which I agree. The appeal should be allowed with costs and the conviction quashed.

STARKE AND MCTIERNAN JJ. This is an appeal in the form of a special case from a Stipendiary Magistrate of New South Wales exercising Federal jurisdiction. The Dunlop Perdriau Rubber Co. Ltd. was charged on information that it, in breach of an award of the Commonwealth Court of Conciliation and Arbitration, failed to pay Charles Clerihew, an employee, a full week's wages due and payable to him for the period extending from the 14th to 20th April 1930, both days inclusive. Under the award, made on 13th May 1926, employees in the position of Clerihew were entitled to a weekly wage which was to be paid not later than Friday in each week, but no employer was allowed to keep more than two days' pay in hand. Employment could be determined by a week's notice on either side, given at any time during a week. But clause 14 (*e*) in the award provided as follows:—"No employer shall—for the purpose of saving payment for any holiday—in any week in which a holiday or holidays fall, give employees notice of an intention to determine their employment. In all weeks in which holidays occur—including holidays not kept on Mondays—the employees shall be entitled to a full week's wages if it is not through his own fault that any deduction can properly be made by the employer." The holidays referred to are nine, and include Good Friday, Easter Monday and Anzac Day. Employees are entitled to these nine holidays "without any deduction from the weekly rates" and "if worked upon" they are entitled to double time. The question in this appeal depends upon the proper interpretation of the ill-drawn and badly punctuated clause 14 (*e*). The object of the first part of the clause is to prohibit the termination of employment for the purpose of saving payment for any holiday in any week in which a holiday falls, whilst the latter part of the clause reinforces the earlier clause 14 (*c*) providing that employees shall be entitled to the nine holidays without any deduction from weekly rates, except such deductions as are allowable owing to the fault of the employee (cf. clause 15 (*c*) (1)

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and (2), (*d*) (2)). A re-arrangement of the clause will better indicate our opinion of both its meaning and its purpose:—No employer shall give employees notice of an intention to determine their employment for the purpose of saving payment for any holiday in any week in which a holiday or holidays fall. In all weeks in which holidays occur—including holidays not kept on Mondays—the employees shall be entitled to a full week's wages if it is not through their own fault that any deduction can properly be made by the employer. It is not, as it seems to us, the point of time at which the notice is given or its expiration in a week in which a holiday falls that is important, but whether the notice is given for the purpose of saving payment for any holiday in any week whatever in which a holiday or holidays fall. A notice given for that purpose is bad, and the employment is not thereby terminated, with the result, expressly stated in the award, that the employees are entitled to a full week's wages for the week in which the holiday or holidays occur, subject to any allowable deduction. Now, the Stipendiary Magistrate has found, upon the evidence before him, that the notice of intention determining the employment of Clerihew and the other employees was given for the purpose of saving payment for the Easter holidays, namely, Good Friday, Easter Monday and Anzac Day. In our opinion that finding is supported by the evidence and should not be disturbed. In the early part of 1930, there was a serious decline in the sales of the commodities manufactured by the Dunlop Perdriau Rubber Co. Ltd., and a shortening of hands in its Sydney factory seemed advisable. But the Company did not shorten hands: by notice on 8th April 1930, it terminated the engagement of all the employees, and notified them that its factory would be closed down from Thursday, 17th April, until Monday, 28th April 1930, and that they might present themselves for re-engagement (unless otherwise notified) on Monday 28th or Tuesday 29th, according to their several classes of work. The factory was accordingly closed down for the period mentioned. But it is to be observed that in this period three holidays fell, and also two Saturdays and two Sundays, as shown in the following table: 18th (Good Friday), 19th Saturday, 20th Sunday, 21st Monday (Easter Monday), 22nd Tuesday, 23rd Wednesday; 24th Thursday, 25th Friday (Anzac Day), 26th Saturday, 27th

Sunday. Consequently, there were, in the period, only three working days—the 22nd, 23rd and 24th—unless overtime or double time were paid. The manager of the Company declared that the factory was closed down and all hands dismissed during the Easter period because of the decline in trade. But the Stipendiary Magistrate did not accept this statement—partly, we should think, because he did not believe that the full extent of the decline in trade was known to the manager until after the posting of the notice of dismissal, and partly because he did not believe that the decline in trade warranted the dismissal of all the employees, but only a shortening of hands. The Magistrate, putting on one side the suggested reason for closing down, then concluded that the real purpose of the notice of intention to dismiss, and the dismissal of, all the employees was to save payment for holidays in the weeks in which Good Friday, Easter Monday and Anzac Day fell. Such a finding obviously depends upon the opinion the Magistrate formed of the credibility of the witnesses called for the Company, and this Court has said over and over again that it must be guided by the opinion of the tribunal which has seen and heard the witnesses. Some reliance was placed on the fact that all employees who were re-engaged were notified that they would receive and did receive three days' payment in lieu of holidays occurring during the period of stoppage. If, however, the notice terminating the engagement of the employees was a good notice, then the payment was a gratuity; and, if it was not good, then the employees were not paid the weekly wage awarded to them for the weeks in which the holidays fell. This notification, therefore, does not seem to us of any real importance, though it was suggested that it recognized the obligation to pay, because the employees were dismissed for the purpose of saving payment for holidays in the Easter period. Again, reliance was placed on the fact that Clerihew received a notice on the 23rd April that he would not be re-engaged, but that is immaterial if the prior notice of dismissal posted by the Company was bad. It is not very clear on the evidence whether Clerihew was employed from Wednesday to Wednesday, Friday to Friday, or Monday to Monday. The information alleges Monday to Monday, but the week of employment

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is unimportant, for, whichever period is taken, the Good Friday holiday falls within it.

The question stated for the opinion of the Court should, we think, be answered in the negative, and the appeal thus dismissed.

DIXON J. Notwithstanding the caption of some of the process, the parties agree that the conviction from which this appeal is brought was in fact made by a Stipendiary Magistrate sitting as a Court of Petty Sessions exercising Federal jurisdiction. Upon this view the appeal is given by sec. 73 (II.) of the Constitution and is governed by sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1927 and sec. IV. of the Appeal Rules. In determining such an appeal it is the duty of this Court to give its own judgment according to its own opinion in the same manner as on appeals from a Judge sitting without a jury (*Bell* v. *Stewart* (1)).

The information upon which the appellant was convicted was laid under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, and alleged that the appellant on Thursday, 17th April 1930, committed a breach of an award of the Commonwealth Court of Conciliation and Arbitration by failing to pay to an employee named Charles Clerihew a full week's wages due and payable to him for the period extending from Monday, 14th April, to Sunday, 20th April 1930, both days inclusive. The award, by which the relations between the appellant and its employee were regulated, prescribed minimum wages at weekly rates. It prescribed maximum hours of duty (without payment of overtime) for " each of the five days of the week—Monday to Friday inclusive " as well as maximum hours for " a week," and it determined the overtime rates to be paid " for work done beyond the prescribed hours of duty in the industry on any one day or night or week." It provided that for all time on duty on Sundays and on nine specified annual holidays, of which Good Friday, Easter Monday and Anzac Day were three, employees should be paid at the rate of double time and that all employees should be entitled to these nine holidays without any deduction from the weekly rates. It further provided that employment might be determined only by a week's notice on either side, but that such

(1) (1920) 28 C.L.R. 419.

notice might be given at any time during the week. The clause of the award upon which the information was founded is in the following terms:—"No employer shall—for the purpose of saving payment for any holiday—in any week in which a holiday or holidays fall, give employees notice of an intention to determine their employment. In all weeks in which holidays occur—including holidays not kept on Mondays—the employees shall be entitled to a full week's wages if it is not through his own fault that any deduction can properly be made by the employer." The number of employees whom the appellant employed at its factory in Sydney on or about 8th April 1930 was somewhat more than 900. On that day the factory manager caused a notice to be posted up notifying employees that from Thursday, 17th April, until the next Monday, 28th April, the factory would be closed, and further that their engagements would be terminated at closing time, some on the 15th, some on the 16th, and the others on the 17th April, according to the nature of their work. The notice stated that the factory would resume work on Monday, 28th April; that all present employees might present themselves for re-employment unless otherwise notified, and that all employees who might be thus re-engaged would receive three days' payment in lieu of the holidays occurring during the period of stoppage. The holidays so occurring were Good Friday, 18th April, Easter Monday, 21st April, and Anzac Day, 25th April. Clerihew fell within the class of employees for whom the notice fixed 17th April as the date of the termination of their engagements. He received his wages up to and including that day. The practice was to pay wages weekly on Fridays calculated up to the previous Wednesday. This was in accordance with the award, which provided that wages should be paid not later than Friday in each week: that no employers should be allowed to keep more than two days' pay in hand; and that if an employee left on proper notice, or was dismissed, he should be paid his wages on leaving or being dismissed. On 23rd April Clerihew received by post a notice from the appellant, dated 17th April, stating that as circumstances precluded his further employment there would be no necessity for him to apply for re-engagement when the factory resumed operations. A large number of similar notices was sent out to employees and when the

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factory resumed the number re-engaged was little more than 740. Upon the next pay-day these hands were all paid a day's wages for each of the three holidays, Good Friday, Easter Monday and Anzac Day. Nevertheless, the Magistrate expressly found that upon the evidence before him the notice of 8th April "was posted for the purpose of saving payment for the usual Easter holidays during which the works were closed." It is evident that his finding cannot apply to payment of the employees who were re-engaged; because the notice announced that they would be, and they in fact were, paid for the holidays. And in relation to the employees who were not re-engaged the finding cannot be accepted, at least without explanation and modification. It appears clearly enough from the evidence that the appellant's factory manager was faced with the necessity of reducing, if not suspending, production; although it is true that until the day following the posting of the notice he did not receive from his head office a statement of the amount by which his manufactures for April must be diminished. He decided before 8th April that he must reduce the number of employees and he put in hand the work of selecting those who must be dismissed. The proper inference is that he closed the factory in order to effect the dismissals and to suspend production but that he decided upon the period 17th April to 28th April for doing so because it contained three holidays and two Saturdays and Sundays. It appears probable that wages were paid for the three holidays in order to show that the appellant had no intention of avoiding this payment, at least in the case of those whose employment was resumed after the suspension. The purpose therefore of giving notice in the case of those who, like Clerihew, were not to be re-employed was to terminate their services finally, but the reasons for choosing 17th April as the date upon which the notice should expire included the fact that it was followed by holidays for which the appellant must pay persons who remained in its employment. The question whether such a reason amounts to the purpose of saving payment for a holiday which the award proscribes, depends upon the interpretation of the ill-drawn provision of that instrument which has already been set out. Its language should, in my opinion, be construed as if it said that a notice of dismissal expiring in a week in which a holiday falls

shall not be given for the purpose of avoiding payment of wages for the holiday, but notwithstanding any notice given for such a purpose, an employee shall be entitled to a full week's wages for the week in which the holiday occurs, except in so far as any deduction may be allowable by reason of some default of the employee. While this re-statement of the provision removes some of the obscurities and answers some of the questions which arise from the disorder of its terms and the peculiarities of its punctuation and syntax, it preserves the ambiguity contained in the word "week." This word is capable of meaning the calendar week commencing on Sunday, any consecutive seven days, the week observed by the particular employer in the calculation of wages, or the five days from Monday to Friday which the award calls a week; and other meanings may be suggested. As a notice given for the purpose of avoiding payment for a holiday must not expire in the week in which the holiday falls, it might become important to decide amongst these alternative meanings. But in this case the holiday fell on the day after the expiry of the notice, and in no view of the word "week" could the day of expiry of the notice, a Thursday, end the week. It follows that in this case the expiry of the notice and the holiday must occur within the same week whatever meaning is given to the word "week." In saying this, it is, of course, assumed that the notice itself cannot operate to constitute the period of seven days terminating with the notice the "week" by reference to which the validity of the notice itself shall be tested. The case is thus reduced to the question whether the employer, when he has decided finally to dismiss an employee without any definite expectation of re-engagement, is forbidden in his choice of a time for the termination of the engagement to select a date because it is followed by a holiday within the same week. This, in my opinion, is not what the provision means to inhibit: it is directed against the device of creating a break in the relation of employer and employee when, unless that relation were discontinuous, a holiday would be included in the time for which wages were calculated.

Upon the true interpretation of the provision, I do not think that "saving payment for any holiday" is "the purpose" for which a notice of dismissal is given when the real cause of terminating the engagement is not the desire to avoid payment for a holiday, though

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the occurrence of a holiday is the reason for fixing the precise date for the expiry of the notice. In this case an apparent complication exists because the notice, when given, was addressed indifferently to those who were to be dismissed finally and those who were to be re-engaged and paid for the intervening holidays, and because the identity of the members of those two classes remained to be ascertained. But this circumstance does not tend to show that the purpose of the notice was really to save payment for a holiday contrary to the true meaning of the provision. It shows no more than that a total suspension of manufacture was decided upon during the period in which the holidays occurred in order to effect a number of objects. It remains true that in so far as it resulted in employees receiving no payment for Good Friday, it was because their discharge was final. The purpose of final discharge was not to bring about this result although the dismissal having been decided upon for other reasons the holiday was not left out of account in selecting the date for the expiry of the notice. It may be that the appellant desired to avoid payment of wages for the three working days which occurred between 17th and 28th April, but this is not material. The notice, therefore, was effectual to end the employment on and from Thursday, 17th April 1930.

The last paragraph in the provision of the award relating to holidays, in my opinion, does not mean that a full week's wages must be paid, although the engagement is finally and completely terminated before the end of the "week."

The appeal should be allowed and the conviction quashed.

Appeal allowed with costs. Conviction quashed.

Solicitors for the appellant, *Ferguson & Vine Hall.*

Solicitors for the respondent, *Sullivan Bros.*

J. B.