[HIGH COURT OF AUSTRALIA.]

KILMINSTER . . . . . APPELLANT;
PLAINTIFF,

AND

SUN NEWSPAPERS LIMITED . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 23.

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

Employer and Employee—Contract of service—Termination of employment—Notice—Award made subsequent to contract—Contractual rights—How affected.

The plaintiff entered the service of the defendant company, a newspaper proprietor, to work as a journalist in Sydney under an agreement made in Canada by which it was provided that he should remain in that service until the expiration of reasonable notice to be given by either party, salary being fixed on a yearly basis. After entering upon his duties he became a member of an industrial organization which subsequently applied for, and obtained from the Commonwealth Court of Conciliation and Arbitration, an award covering his calling. Clause 22 of the award provided that "the employment of a member . . . shall not without just cause in law be terminated by either party unless," in the case of the plaintiff, "two months' notice of such termination shall have been given." The defendant company gave to the plaintiff two months' notice of its intention to terminate his employment. In an action by the plaintiff for damages on the ground that such notice was not "reasonable notice" as required by the agreement,

Held, that the provisions of clause 22 did not interfere with the plaintiff's right *ex contractu* for a period of notice longer than that prescribed by the clause.

Judgment of the Supreme Court of New South Wales (Full Court): *Kilminster* v. *Sun Newspaper Ltd.*, (1931) 31 S.R. (N.S.W.) 472, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought by Stanley August Kilminster against the Sun Newspapers Ltd., a company incorporated under the laws of New South Wales and carrying on the business of a newspaper proprietor within that State, the plaintiff claimed £1,000 damages on the ground of the wrongful termination of an agreement in pursuance of which he had, whilst in Canada, been engaged to work for the Company in Sydney under certain terms and conditions.

The declaration, dated 7th November 1930, stated that "by an agreement made in . . . Canada between the plaintiff, who was then a cable specialist, and the defendant, in consideration that the plaintiff would enter into the service of the defendant and serve it until the service should be determined as hereinafter mentioned, as a member of the staff of the defendant's newspaper in Sydney for the salary of £650 per annum, the defendant promised the plaintiff to retain him in the said service until the expiration of a reasonable notice to be given by the plaintiff or the defendant to the other of them to determine the said service; and the plaintiff entered into the said service on the terms aforesaid and so continued therein for a long time, and until the breach of the said promise hereinafter alleged, and was always ready and willing to continue in the said service until the said service should be determined as aforesaid whereof the defendant always had notice; yet the defendant without any such reasonable notice as aforesaid having been given by either the plaintiff or the defendant to the other of them to determine the said service dismissed the plaintiff from the said service and refused to retain the plaintiff therein until the said service should be so determined as aforesaid," whereby, he alleged, he suffered certain damages.

The Company pleaded that after the plaintiff came to New South Wales and entered into the service of the Company, and before the happening of the alleged breach, he became a member of an industrial organization known as the Australian Journalists' Association. Subsequent to his so joining, a dispute having arisen between the Association (acting on behalf of and for the benefit of its members) and the Company and other newspaper proprietors, an application

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was made by the Association to the Commonwealth Court of Conciliation and Arbitration for an award, which was granted. The award so made provided for the classification of the members of the Association into grades A, B, C and D respectively, and, as regards each such grade, the "minimum weekly rates of pay," the hours of employment to be observed, termination of services, and other terms and conditions relating to the industry of journalism; and that the two months' notice prescribed by the award as applicable to the plaintiff had been duly given to him.

The plaintiff was, by the terms of the award, classified as a member of B grade, and, although the salary prescribed in the award for such grade was considerably less than the amount stated in the agreement, the higher salary was preserved to the plaintiff by clause 20 of the award, which provided that "any member who before this award coming into force is in receipt of a higher salary than that fixed by this award for his grade shall during the currency of this award be entitled to receive at least such higher salary, irrespective of the work done by him." Clause 22 of the award was headed "Termination of Services," and provided substantially as follows:—"(*a*) After a period of two months' service, during which period one week's notice shall suffice, the employment of a member of the classified staff . . . shall not, without just cause in law, be terminated by either party unless the following period of notice of such termination shall have been given, or, in the case of termination by a respondent, payment made in lieu thereof:— . . . B Grade—Two months; (*b*) In the event of any newspaper ceasing publication the respondent concerned shall give members an additional month's notice of the termination of their employment to that provided in sub-clause (*a*) and in default such members shall be entitled to payment in lieu thereof; (*c*) Payments made in lieu of notice shall be made from week to week," and they were to cease or be proportionately reduced if the employee secured other employment, equally or less remunerative respectively, during the currency of the notice. By clause 25 any respondent or employee was empowered to make application in writing to the Registrar of the Commonwealth Court of Conciliation and Arbitration "for a certificate of the Registrar's opinion that by reason of exceptional circumstances

the applicant ought in relation to a particular case to be exempted from the operation of some specific provision of the award.

The plaintiff in his replication stated that the nature of the work performed by him did not come within the scope of the award, and he also demurred to the defendant Company's plea on the ground that the award fixed a minimum notice that should be given to terminate services of persons bound thereby, and it did not prevent such persons making contracts of service not inconsistent with its terms. The replication was demurred to by the defendant Company, its principal contentions being (1) that the terms and conditions of the award were also terms and conditions of the plaintiff's service with the Company, and that two months' notice of the determination of such service should be regarded in law as reasonable notice of the determination of such service, and (2) that the terms and conditions of the award with reference to "termination of services" became an express condition of the service of the plaintiff with the defendant and should be accepted as the condition under which the defendant was entitled to determine the service of the plaintiff with the defendant.

The cross-demurrers were argued before the Full Court, which gave judgment thereon in favour of the defendant Company: *Kilminster* v. *Sun Newspaper Co.* (1).

From this decision the plaintiff now, by special leave, appealed to the High Court.

Watt K.C. (with him *Windeyer*), for the appellant. The question for determination is: What is the effect of an award upon an existing contract under which the employee is entitled to greater benefits as to general conditions than under the award, and receives a higher wage than the minimum wage prescribed by the award? The condition fixed in the award as to sufficiency of notice might be appropriate to a maximum weekly wage, but is totally inappropriate to the contractual condition in which the term of service is yearly, and the salary higher than that prescribed by the award. An award does not *in toto* supersede a contract. The most an award can do is to give rights to the employer or employee to reshape his contract

(1) (1931) 31 S.R. (N.S.W.) 472.

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in terms of the award. The award does not make the contract: it only prescribes the law in relation to which the contract is made. The award does not have the effect of cutting down the more beneficial provision of the contract to the minimum conditions prescribed by the award. Wages are payable under the award on a weekly basis, and the period of the notice as prescribed by the award was determined upon that basis. Considering that the appellant was specially engaged in Canada on a yearly basis, and at a rate of wage considerably in excess of the wage prescribed by the award, the period of notice mentioned in the award is neither applicable nor reasonable. The effect of an award is to make a law on the basis of which future contracts may be made; it has no effect upon contracts already in existence. The appellant's rights depend upon the contract and not upon the award. This is not a case of supersession; the appellant is entitled to all the benefits of the award (*Federated Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1)). Under the contract the appellant was entitled to reasonable notice; the only effect the award had on this provision was that he should get two months' notice as a minimum. In the circumstances of this case the appellant is entitled to more than the minimum prescribed by the award.

E. M. Mitchell K.C. (with him *Cook*), for the respondent. Clause 22 of the award should be construed as prescribing proper and adequate notice, that is, sufficient notice. An award is the settlement of a dispute, and, as the award in this case was made after the contract, there was, after such contract, a dispute in the industry in respect of all the matters adjudicated upon including (*inter alia*) wages and termination of employment. By becoming a party to the dispute the appellant showed that he was dissatisfied with the terms and conditions of the contract, which, upon the points in dispute, must be regarded as having been superseded by the award. Under clause 25 of the award the appellant could have applied for exemption from the operation of the award; no such application has been made by him. Where existing conditions were to be preserved the award makes express provision to that end. Clause 22, which

(1) (1922) 30 C.L.R. 144, at p. 163.

deals in detail with mutual notice as to termination of employment, must be regarded as fixing what is reasonable and requisite.

[DIXON J. As applying to this case it means that at least two months' notice must be given.]

The award lays down maximum conditions as well as minimum conditions; minimum conditions are expressly stated to be such. The contract between the parties is silent as to what period of notice shall be given. Upon a proper construction of clause 22 as a whole, the two months' notice applicable in the case of the appellant is not fixed as being the minimum but as being mutual notice reasonable between the parties; the clause establishes the mutual and reciprocal rights of the parties: it does not purport to say that at least two months' notice must be given. In the circumstances the award should be construed as if it were an agreement between the appellant and the respondent themselves, covering (*inter alia*) what period of notice they deem to be reasonable between them, the two months' notice prescribed by the award being the measure of the mutual notice which should be given between them and which they regarded as being sufficient.

Watt K.C., in reply.

THE COURT delivered the following judgment:—

We are all of opinion that the provisions of clause 22 of the award merely mean that the employment shall not be put an end to unless notice as therein prescribed shall be given, and they do not interfere with the rights of the parties with respect to longer notice by contract or otherwise. The judgment of the Full Court must, therefore, be reversed and the appeal allowed. The plaintiff is entitled to judgment on both demurrers, and the defendant's demurrers are overruled. The defendant must pay the costs of these proceedings and in the Court below.

Appeal allowed. Judgment for plaintiff on demurrers.

Solicitors for the appellant, *Marsland & Co.*

Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.