[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN WORKERS' UNION . APPLICANT;

AGAINST

THE GRAZIERS' ASSOCIATION OF NEW SOUTH WALES AND OTHERS . . RESPONDENTS.

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MELBOURNE, *Feb.* 23.

SYDNEY, *April* 7.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration—Industrial dispute—Log served by employers claiming minimum wage at stated rates "or such lower rates as may from time to time to the Court seem just"—Log served by employees claiming minimum wage at higher rate—Award fixing wage at an intermediate rate—Application by employers to reduce rate by ten per cent—Reduction of award below amount specified in employers' log—Jurisdiction of Arbitration Court—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *secs.* 21AA, 28 (3).

In 1927 an employers' organization served a log of demands upon the employees' organization, and prefaced the log by a letter requiring that all members of the employees' association then or thereafter to be employed by the members of the employers' organization should be paid at the rates set out in the log "or such lower rates as may from time to time to the Court seem just." For one class of work the employers' log specified the rate as 35s. per hundred. The employees' organization served a log on the employers' association and for the same class of work required a rate of 60s. per hundred to be paid. The Arbitration Court fixed 41s. per hundred for this class of work. Subsequently, the Arbitration Court reduced the rate to 32s. 6d. per hundred, a reduction therein of 20 per cent.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that the reduction to an amount below the figure stipulated in the log was not beyond the powers of the Arbitration Court, as the words in the letter covering the employers' log "or such lower rates as may from time to time to the Court seem just" prevented the reduced rate being outside the ambit of the dispute between the parties.

Australian Insurance Staffs' Federation v. *Atlas Assurance Co.*, (1931) 45 C.L.R. 409, distinguished.

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 referred to Full Court of the High Court.

This was a summons for the purpose of obtaining a determination on the validity of orders made by the Chief Judge of the Arbitration Court. The effect of the orders was to reduce the minimum rates prescribed by an award of 14th September 1927. This award expired on 30th November 1931 but was continued in force by sec. 28 (2) of the Act. The alleged disputes were alleged to have arisen out of demands made on behalf of the employers upon the employees' organization and demands made by the employees' organization upon the employers' organization. The employers first made their demand, which consisted of a log prefaced by a letter of demand dated 24th February 1927. This letter was in substance in the following terms :—" To the Australian Workers' Union, St. Andrews Place, Sydney.—We, the undersigned, have been respectively authorized by the Graziers' Association of New South Wales . . . to demand, and accordingly do hereby demand, on behalf of the said organizations and the members thereof and the individual graziers, firms and companies referred to in . . . schedules A, B and C hereto, that all members of the Australian Workers' Union now or hereafter to be employed by the members of the said organizations and individual graziers, firms and companies be paid for all work done by them on and after the first day of January 1927 the respective rates applicable to the respective classes of labour set out in schedule D hereto " (which was the log in question) " or such lower rates as may from time to time to the Court seem just, and that all employment of labour in the Pastoral Industry of the classes referred to in schedule D hereto shall be at the rates of payment and upon the terms and conditions as are set out in the said schedule D hereto or such lower rates as may from time to time to the Court seem just. We must request you to let us have a reply addressed to Mr. J. W. Allen, care of The Graziers' Association of New South Wales, 79 Pitt Street, Sydney, on or before 12th March 1927, as to whether the Australian Workers' Union agrees on its own behalf and on behalf of its members to the payment of the rates and to the observance of the terms and conditions set out in schedule D hereto ; and, in the event of a refusal by the Australian Workers' Union to agree within

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the time stipulated to such rates, terms and conditions or any of them relating to employment in the Pastoral Industry, we are respectively authorized on behalf of the said organizations and individual graziers, firms and companies to submit the claims as appearing in schedule D hereto, or such of them as shall not have been agreed to by your Union, to the Commonwealth Court of Conciliation and Arbitration.—Dated this twenty-fourth day of February 1927.—On behalf of the Graziers' Association of New South Wales—J. W. Allen, General Secretary. On behalf of the Pastoralists' Union of Southern Riverina—Leslie Smith, Secretary. On behalf of the Pastoralists' Association of West Darling—C. Sinclair Wood, Secretary. On behalf of the Pastoralists' Association of Western Australia (Incorporated)—W. L. Sanderson, Secretary. On behalf of the individual graziers, firms and companies whose names and addresses appear in schedule A—Leslie Smith. On behalf of the individual graziers, firms and companies whose names and addresses appear in schedule B—E. D. H. Virgo. On behalf of the individual graziers, firms and companies whose names and addresses appear in schedule C—A. J. Hovey." The minimum rate claimed in schedule D of the employers' log for shearing, if rations were not found, was "For flock sheep (wethers, ewes, lambs), 35s. per hundred." The Australian Workers' Union served a log on the Graziers' Association of New South Wales and others, requiring all work done by members of the organization in the pastoral industry to be paid at "the increased rates set out in the schedule hereto applicable to the respective classes of labour concerned and that such employments shall be upon the terms and conditions stated in the said schedules." The minimum rate claimed in the schedule of the employees' demand for shearing, if rations were not found, was "For flock sheep (wethers, ewes, lambs), £3 per hundred." The Arbitration Court, by its award of September 1927, fixed a minimum rate for this class of work of 41s. per hundred. The Arbitration Court subsequently varied this award, and fixed 32s. 6d. in substitution for 41s. as the rate per hundred.

The Australian Workers' Union took out a summons under sec. 21AA of the Commonwealth Conciliation and Arbitration Act 1904-1930 for the determination of the question whether the orders of

the Commonwealth Court of Conciliation and Arbitration reducing the minimum rate of wages below the rates specified by the employers were valid. The summons came on before *Evatt* J. in Chambers, and he referred the matter to the Full Court of the High Court for determination.

Nicholas, for the applicant. The Arbitration Court awarded rates lower than those within the limits of the contest between the parties, and this case is, accordingly, governed by the decision of the High Court in *Australian Insurance Staffs' Association* v. *Atlas Insurance Co.* (1). The suggested distinctions between that case and the present are illusory. Here there was a demand by the Graziers' Association for a reduction, and then a demand by the Union on the Association for an increase, and the Court varied the award and reduced the rates below the minimum rates the respondents were willing to concede. Accordingly, this case falls exactly within the decision of the *Insurance Staffs' Case.* The Court could not reduce the rate below 35s. per hundred for flock sheep, but in fact it did go below 35s., and the amount fixed was below the amount the respondents were willing to pay. The dispute in this case was between 35s. and 60s. per hundred for flock sheep, and that is the ambit of the dispute. However much scope there may be for variation, the Arbitration Court is bound by the Constitution to deal only with the dispute, and the limits to that dispute must be found somewhere within the highest and lowest demands. Here there is a definite statement of what one party is prepared to give and a definite refusal of that offer.

Robert Menzies K.C. (with him *Ferguson*), for the respondents. The claim in the log served by the respondent Association was governed by the covering letter, which claimed that the rates should be those set out in the schedule " or such lower rates as may from time to time to the Court seem just." It is impossible to ignore this covering demand in attempting to determine what was the dispute. The applicant ignores the words contained in the covering letter which were put in to guard against the very position raised in the *Insurance Staffs' Case* (1). In order to give flexibility to its

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demand, the Graziers' Association added the words in the covering letter " or such lower rates as may from time to time to the Court seem just." The respondents' demand is not 35s. per hundred, but " 35s. per hundred or such lower rate as may from time to time to the Court seem just." [Counsel also referred to *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (1).]

Nicholas, in reply.

Cur. adv. vult.

April 7.

The following written judgments were delivered :—

RICH J. This was a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 for the purpose of obtaining a determination on the validity of orders made by the Chief Judge of the Arbitration Court. The effect of the orders is to reduce the minimum rates prescribed by an award of 14th September 1927. This award expired on 30th November 1931, but is continued in force by sec. 28 (2) of the Act. The ground upon which the validity of the order of variation is impeached is that no industrial dispute existed in respect of wages or rates as low in amount as those which would be prescribed as the result of the variation if it be valid. The award was made in settlement of three alleged industrial disputes referred into Court after failure of a compulsory conference. The industry before this award had been regulated by an award of short duration, which expired in 1926 but continued in force until the making of the fresh award. The alleged disputes are said to have arisen out of demands made on behalf of the employers upon the employees' organization and demands made by the employees' organization upon the employers' organization. Having regard to the fact that the expired award continued to regulate the employment and minimum rates paid by the employers, the employers, in framing their demand, found themselves in a position of requiring an alteration downwards of the rates they were bound by law to pay unless the award were brought to an end or varied, which could only be done by some action of the Court. No agreement by the

(1) (1924) 35 C.L.R. 349.

employees in the employers' demands would be of any service to the employers as a relief from their legal obligations. No doubt agreement by the employees' in the employers' demands would have a most important effect in inducing the Court to terminate or vary its award. But the Court's intervention would none the less be necessary. The employees, on the other hand, in formulating their demands were, so far as wages were concerned, in need of no relief from any duty or obligation imposed upon them by the award. They required that higher rates should be paid than those prescribed by the award, and this demand might have been conceded to them by the employers and a new contractual minimum established without any violation of the continuing award. The employers made their demand first. It consisted of an elaborate log prefaced by a letter of demand dated 24th February 1927. The material part of the demand was that "all members of the Australian Workers' Union now or hereafter to be employed by the members of the said organizations and individual graziers, firms and companies be paid for all work done by them on and after the 1st day of January 1927 the respective rates applicable to the respective classes of labour set out in schedule D hereto or such lower rates as may from time to time to the Court seem just and that all employment of labour in the Pastoral Industry of the classes referred to in schedule D hereto shall be at the rates of payment and upon the terms and conditions as are set out in the said schedule D hereto or such lower rates as may from time to time to the Court seem just." This was followed by a request for a reply as to whether the Union agreed on behalf of its members, and an intimation that in the event of a refusal the claims would be submitted to the Arbitration Court. This evoked from the Union a reply dated 12th March 1927 to the effect that the Union did not agree but, on the contrary, demanded "the increased rates set out in" a log of demands annexed thereto and terms and conditions stated in that log. These two sets of demands form the basis of the first two industrial disputes. The third dispute was a concomitant of the second, and requires no separate statement. I find it difficult to treat these as separate disputes. It appears to me that the rival disputants were propounding their respective claims upon the same subject matter, and

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Rich J.

that the substance of the matter was that there was one dispute amongst them. The real question in that dispute was whether the rates and conditions prevailing under the continuing award should be departed from and in which direction, that is to say, up in favour of the employees or down in favour of the employers. If the statement in the employers' letter of demand that the members of the Union should be paid for all work done at the respective rates set out in the scheduled log were taken absolutely and without the qualification which follows, those specified rates would form a downward limit to the employers' demands, and it could not be said that the payment of wages lower than the specified rates was in dispute (see *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1)). But the statement is not absolute, but is qualified by the sentence "or such lower rates as may from time to time to the Court seem just." The real question seems to me to be whether this qualification gives a different meaning to the demand and prevents it from operating as a request for the fixation by agreement of specified rates to prevail throughout the duration of the agreement.

This question should be considered from the point of view of the recipients of the demand and with proper regard to the circumstances in which both parties stood. It must be remembered that the ultimate question for decision is the nature or ambit of the dispute between the parties, and that their common understanding of the document is therefore of greater importance than the discovery of its meaning *in vacuo*. Both parties contemplated a provision in any instrument, whether agreement or award, by which wage rates should be governed, elaborately providing for variation of rates calculated upon the statistician's figures, which are usually taken to exhibit the cost of living. The specified rates, therefore, would be the basis for calculating variations. Thus the reference to "such lower rates as may from time to time to the Court seem just" must have been understood to relate, not to variations according to the cost of living, but to alterations by way of reduction of the base figures specified. This could only mean that the specified figures were intended to provide an initial base which should not have effect throughout the duration of any agreement arrived at or award

(1) (1931) 45 C.L.R. 409.

made, but which after coming into immediate operation should be liable to indefinite reduction. The demand, in effect, was a request for the reduction of the prevailing wages—a statement of the amounts which for the immediate present the employers considered sufficiently low for their purposes, and a further statement that afterwards such amounts might not be sufficiently low and that a downward limit should be set only by the Court's discretion. I quite appreciate the difficulties which exist in making the Court's jurisdiction depend upon a dispute constituted by a demand that the Court shall have jurisdiction or that it shall possess or exercise the discretion; but in these proceedings we are not asked to investigate the reality of the alleged dispute or the sufficiency of the demands exchanged to create one. The award assumed so much, and we are not asked to consider, even if in proceedings under sec. 21AA we could, the existence of an adequate justification for making the award at all. Our problem is a different one. It adopts the hypothesis that the exchange of sentiments between the parties amounted to an industrial dispute, and on this hypothesis asks whether in respect of the period for which the variations were made the employers had set a downward limit to the ambit of the dispute about the wages by specifying the amounts involved. I think their demand made it clear that those specified figures did not set a downward limit to the reduction they desired, or any period sufficiently prolonged to reach into that affected by the variations made by the orders which are now under consideration.

I therefore think the variations were valid, and answer the questions accordingly.

STARKE J. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, which my brother *Evatt* directed to be argued before the Full Court. It raises the question whether the Arbitration Court had authority to make three several orders reducing certain wages prescribed by an award of that Court made in September of 1927. The decision in the *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1) has, in the main, settled the principles upon which the case must be determined.

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Unless warranted by a new dispute, no variation of an award of the Arbitration Court can be made which goes beyond the limits imposed by the industrial dispute in relation to which the award was made. The Arbitration Court, if a variation of one of its awards be sought, must keep within the area of the dispute: it cannot go beyond, though the ruin of an industry or of a craft, or indeed economic disaster, be threatened, and though the public interest may be gravely imperilled. Such, however, is the decision of this Court, from which in the *Insurance Staffs' Case* (1) I dissented, but by which I must now, unwillingly, abide. Consequently, the only question open in the present case is the ambit or limit of the industrial dispute or controversy in relation to which the award of September 1927 was made.

That question is not covered by the *Insurance Staffs' Case* (1), for the documents upon which it here depends are not expressed in the same words. The employers in the present case made a demand claiming various minimum rates of wages to employees as set forth in schedules to the demand "*or such lower rates as may from time to time to the Court seem just.*" Thus the minimum rate claimed in the schedules for shearing if rations were not found was: Flock sheep (wethers, ewes and lambs) 35s. per hundred. The employees also made a demand claiming various minimum rates of wages as set forth in schedules to the demand. Thus, the minimum rate claimed in these schedules for shearing if rations were not found was: Flock sheep (wethers, ewes and lambs) 60s. per hundred. The Arbitration Court, by its award of September 1927 already mentioned, fixed a minimum rate for this class of labour of 41s. per hundred. In July 1930 it varied this award and fixed 32s. 6d. in substitution of 41s. as the rate per hundred. The orders of January and May 1931 made other variations; but it is unnecessary to detail all the rates specified in the award, or the effects of the variations upon those rates, because they all fall into line with the reduction in the shearers' rate. Now, it was argued that the limits, or the range, of the dispute in relation to the shearers' wage for flock sheep were represented by the sums of 35s. and 60s. per hundred. The Arbitration Court reduced the rate, as already mentioned, to 32s. 6d.,

(1) (1931) 45 C.L.R. 409.

and, according to the argument addressed to us based on the *Insurance Staffs' Case* (1), in so doing it acted without authority or jurisdiction. In my opinion, the argument fails, because the employers did not, on the very words of their demand, name 35s. per hundred for flock sheep as an absolute minimum for the shearers' wage for such sheep, and so limit the controversy, so far as they were concerned, to the question whether that or a greater sum should be paid: the demand was for that sum or such lower rate as might from time to time to the Court seem just. It was suggested that a demand so framed could not constitute an industrial dispute; but even so, the words cannot, without distortion, be treated as expressing the offer of an absolute minimum. In any case, in my opinion, industrial disputes cannot be reduced to the precise terms of offer and acceptance required by the law of contract; and I see no reason why a claim for increased or decreased wages, as the Arbitration Court shall think just, should not constitute a real and genuine industrial dispute. Otherwise it would follow that the employers' demand in this case cannot form the basis of an industrial dispute, and that would leave standing only the employees' claim for a minimum rate for shearers of 60s. per hundred sheep. On this basis, the decisions of this Court hold that the controversy or dispute then in issue is whether that sum or a lesser sum should be paid (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (2) and the *Insurance Staffs' Case*.

Consequently in my opinion the questions raised by the summons under sec. 21AA should all be answered in the affirmative.

Dixon J. In these proceedings the validity is attacked of three orders of the Commonwealth Court of Conciliation and Arbitration which vary an award made by that Court on 14th September 1927 regulating the rates of pay and conditions of labour of shearers, station hands and others employed in the "pastoral industry." The orders are impeached upon the ground that they would, if valid, prescribe and establish minimum rates of pay below the amounts in dispute in the industrial dispute which the award determined and settled. That dispute arose from paper claims which the parties

(1) (1931) 45 C.L.R. 409. (2) (1924) 35 C.L.R. 349.

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made upon one another immediately after the expiration of the fixed period specified in an earlier award by which they had been bound for some six months. This award had come into operation on 1st June 1926, and was expressed to continue in force until 31st December 1926. The reasons for adopting so short a period for its duration were given by the President (*Powers* J.) when he made the award. The Court of Conciliation and Arbitration was about to be reconstituted under Act No. 22 of 1926. The employers had pressed for a reduction of the shearing rate which he proposed to fix at an amount higher than that prevailing. He had refused some claims made by the employees. He did not wish to hamper the new Court, and he considered that, if he made the fixed period of the award expire with the current shearing season, he would allow the employees to submit further statistical material to the new Court in a new case and the employers to renew the claims refused, while if neither party began new proceedings (*sc.*, raised a new dispute) the award would, by virtue of sec. 28 (2) of the Act, continue in force (1). Thus the more important questions between the parties were not finally concluded by this award, which was made as a settlement *ad interim* only and in contemplation of a revival of the controversy at the end of the term specified for its duration. But so long as the award continued in force, it would be unlawful for employers, bound by the award, to pay less than the minimum rates which it prescribed; and sec. 28 (2) provides that after the expiration of the period specified the award shall, unless the Court otherwise orders, continue in force until a new award has been made. It followed that until the Court again intervened the employers would be unable to secure a reduction of rates. To obtain that intervention it would be necessary to raise a new industrial dispute extending beyond the limits of one State; for the Court had not made and was not at all likely to make an order ending the operation of the award under the power given by sec. 28 (2) otherwise to order. Yet such an industrial dispute could not consist in some difference of opinion between the parties as to what ought to be done by the Court itself, which can do nothing unless an industrial dispute exists, and obtains jurisdiction to regulate the relations of the parties only when a

(1) (1926) 23 C.A.R. 458, at pp. 490-491.

dispute has arisen between them. The dispute could only arise out of some disagreement between them about the way in which they should carry on their own industrial relations, or the course they should adopt upon some industrial matter. No doubt, in continuing an award until a new one is made, sec. 28 (2) supposes that such a dispute may in the meantime arise notwithstanding that what one of the disputants requires or insists upon, would involve a violation of the award still in force. In this case the employers proceeded by formulating a log of rates and conditions which was forwarded on 24th February 1927 to the employees' organization, with a letter of demand of which the effect was as follows:—It was expressed to be sent on behalf of various organizations and persons bound by the award then continuing in force. It demanded that all members of the Union be paid for all work done by them the respective rates applicable to the respective classes of labour set out in a log, which it scheduled, or such lower rates as might from time to time to the Court seem just, and that all employment in the pastoral industry of the classes referred to in the log should be at the rates of payment and upon the terms and conditions set out in the log or such lower rates as might from time to time to the Court seem just. It requested a reply as to whether the Union agreed on its own behalf and on behalf of its members to the payment of the rates and observance of the terms and conditions set out in the log, and stated that, in the event of a refusal by the Union so to agree, the signatories were authorized to submit the claims as appearing in the log, or such of them as should not have been agreed to by the Union, to the Court of Conciliation and Arbitration. The log contained a clause providing for the variation of the specified rates with the rise or fall of the retail price index numbers of the Commonwealth Statistician upon which the cost of living is determined. The Union replied on 12th March 1927 that it did not agree to this demand and itself demanded increased rates, which it set out in a log annexed to the reply. The rates of remuneration specified in the employers' log for shearers, for station hands and for other work are higher than the minimum rates which the challenged orders of variation would establish. This exchange of demands was treated in the Court of Conciliation and Arbitration as creating two disputes which were

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separately referred to the Court. They were, however, settled by one award, the award of 14th September 1927, and it is not easy to see how more than one dispute could be considered to arise. The demand of the employers and that of the employees each dealt with the same subject matters which, indeed, were the subjects of the existing award, but, so far as rates were concerned, one demand sought a departure by way of decrease from what that instrument prescribed and the other by way of increase.

It is by no means so easy to ascertain the ambit of the dispute. If the employers' demands should have been understood to express an unqualified willingness to pay thenceforward for the future the rates specified in their log, any lower rates would be outside the dispute and could not be prescribed by the award (*Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1)). Indeed, on the facts of this case, the same result should follow if the demand of the employers simply was that they should be at liberty to pay these rates and no less for the future.

The critical question, therefore, arises upon the qualification expressed in the demand in the alternative to the specified rates, namely, " or such lower rates as may from time to time to the Court seem just." The affidavits filed on behalf of the applicant seek to show that this qualification was introduced by the writer of the letters of demand after the specified rates set out in the log had been adopted by the representatives of the employers, and therefore that it should be disregarded as an unauthorized addition. What appears to have happened is that a body of delegates from the pastoral associations prepared and adopted the log which was approved by the associations and by the individuals bound by the existing award. Then the Secretary of the Graziers' Association of New South Wales, in preparing or revising the letter of demand to accompany the log, introduced the qualification which has become so material. On 28th January 1927 he wrote as follows to the various pastoral associations :— " In order that no technical obstacles should be created in the way of claiming a reduction of rates during the currency of the award, if exceptional conditions should arise to justify such a claim the following words are being added to the

(1) (1931) 45 C.L.R. 409.

first paragraph of the claim, namely: 'or such lower rates as may from time to time to the Court seem just.' This precaution will, however, be likely to prove superfluous if an adjustment clause is inserted in the award on the lines of the clause which was secured in the present award." On 1st February 1927 this letter, with the log, was approved by the Executive Committee of the Graziers' Association of New South Wales. It was signed by the secretaries of the other associations, some of whom also signed it on behalf of the individual employers. On this material I do not think the qualification can be rejected as an unauthorized addition to the real demands of the employers. The inference is that the pastoral associations approved of the addition. They are all registered organizations. The demand was single and was made jointly on behalf of all members. It is of course possible that some of the employers named individually in the schedule were not members of any of these associations and did not authorize the demand in the form it was sent, but that this is so nowhere affirmatively appears. Further, the qualification is an integral part of the demand, and no other demand was communicated to the Union. The letter of demand was laid before the Court of Conciliation and Arbitration on behalf of the employers as part of the claim generating the dispute. We are not now considering, and, having regard to the decision of this Court in *Ince Brothers* v. *Federated Clothing and Allied Trades Union* (1), I doubt whether we would be at liberty on a proceeding under sec. 21AA to consider whether what occurred amounted to an industrial dispute extending beyond the limits of any one State. It is assumed that a dispute existed, and we are called upon to determine its ambit. For that purpose, I think we must regard the claim or proposal of the employers which was in dispute to be that specified rates should be payable, or such lower rates as might from time to time to the Court of Conciliation and Arbitration seem just. In considering the meaning and effect of such a demand it is important to remember the peculiar situation in which those stood who made it. They were governed by an award expressing the *ad interim* conclusions of the Court upon what must have appeared to the parties a suspended controversy; another

(1) (1924) 34 C.L.R. 457.

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award or order of the Court was required in any event, except that of the parties remaining satisfied with the continuing award. To obtain another award or order it was necessary to have the fresh disagreement of the Union or the employees in proposals for reduction unless, contrary to all expectations, the Union or the employees had come to think alike with the employers and were prepared to concede the reductions they sought, in which unlooked for event perhaps the consent of all the parties might be enough to induce the Court to terminate the operation of the existing award by an "order otherwise" under sec. 28 (2). In naming money rates and demanding that they should rise or fall in accordance with the retail price index numbers evidencing the cost of living, the log made it plain that the specified rates were put forward as a base appropriate to, and applicable at, the time of demand, and that they were arrived at with some reference to the cost of living. The further demand in the alternative for such lower rates as from time to time the Court might consider just could only mean that the employers were not prepared to establish the amounts they put forward as the base figures for the calculation, and allow them to remain the base or standard figures until they were thrown over as a result of a new dispute between them, but, on the contrary, required that they should be liable to change at the discretion of the Court. Thus the demand told the Union that, although the employers were willing for the time being to pay the variable rates it specified, they did not offer to continue them for any fixed period, but desired the question whether they should be lower from time to time to be left to the Court which, dispute or no dispute, must be resorted to before any alteration in the employers' obligations could take effect. No doubt the jurisdiction of the Court cannot be enlarged or diminished by the parties attempting to agree or disagree about what it may or may not do. But the question now to be considered is, not whether failure to reply to some demand which only the Court could deal with can constitute an industrial dispute, but whether in a demand for a reduction of wages a definite limitation has been placed upon the amount of the reduction sought. It appears to me that the employers for whom the demand was made would be understood as saying in effect: "Will you agree upon reduction of pay no lower

at first than the rates we specify, but later from time to time to lower rates if the Court by whose award we are now governed thinks they should be less ? " So understood, the demand would intimate, not that the employers were content for some period of time with the specified rates, but that they desired the employees to agree to leave the question of further reductions to an independent discretion. The choice of the Court as the proposed repository of this discretion was natural in the situation in which the employers found themselves ; but, whatever difficulties there might be in the Court's assuming the function which the proposal would have assigned to it, the fact remains that an agreement by the employees was sought to a contingent further reduction of wages. This seems to me to throw into dispute the future amount of wage reduction, that is, after some reasonable time had elapsed, and to prevent the specified rates from operating as a permanent limitation of the rates in dispute. I therefore think the ambit of the dispute was not exceeded by the orders of variation the validity of which is attacked.

The questions in the summons should be answered Yes.

EVATT AND MCTIERNAN JJ. In the year 1927 there arose one or more industrial disputes between the Australian Workers' Union, a registered organization of employees in the pastoral industry, and a number of employers' organizations and individual employers. In September 1927 the Court settled the dispute or disputes by an award. The award was expressed to continue in force until 1931.

In July 1930 the Court varied its award, reducing the rates payable to employees by 20 per cent. The main question which now arises is whether this variation was validly made. It is contended by the employees that the rates fixed in the order of variation were never in dispute between the parties, and that, as a consequence, the order was null and void.

The principle to be applied in determining the question has recently been stated by this Court in the case of *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1). That case followed and applied previous decisions. The citations contained in the judgments show that almost all the Justices of this Court have

(1) (1931) 45 C.L.R. 409.

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accepted and acted upon the view that, as a rule, the rival wage claims and demands of parties to an industrial dispute define, and by defining limit, the subject of wages dispute. And, as the Commonwealth Court of Arbitration is required to pacify disputants by dealing with the actual or probable wage controversy, it follows that it is beyond its authority to award a wage, as to which there is no dispute or controversy at all.

So that the main question with which we are now concerned is to ascertain what the employees' Union and the various employing interests were really and truly disputing, disagreeing or quarrelling about in April 1927, when the Arbitration Court assumed cognizance of the dispute or disputes. At that time, by virtue of sec. 28 of the *Commonwealth Conciliation and Arbitration Act*, an award, the fixed period of which had expired, was being continued in force. For purposes of comparison it may be noted that this award provided a shearing rate of 40s. per hundred.

The employers' organization set about the formulation of demands upon the Union for a reduction in the rates of pay. The course of events is of importance.

1. On February 1st, 1927, a meeting of the executive committee of the Graziers' Association of New South Wales was held. The minutes of such meeting show that

> "The General Secretary reported that the claims to be made against the Australian Workers' Union, as outlined by the Arbitration Advisory Committee, had been finally drafted by agreement between the Federated Associations. Copy of the claims was tabled, and it was decided to authorize the General Secretary to make these claims upon the Australian Workers' Union on behalf of the Association, and, in the event of such claims not being agreed to by the Union within the time stipulated, authority was given on behalf of the Association for the submission of the dispute to the Commonwealth Court of Conciliation and Arbitration. In accordance with this decision a form of authority was signed by members present, and the seal of the Association with the authority of the Executive Committee, affixed thereto, and also to the copy of the claims to be served upon the Australian Workers' Union."

2. Previously, on January 28th, 1927, a letter had been sent by the Secretary of the Graziers' Association of New South Wales, whether sent in that capacity it does not appear, to the Secretary of the Pastoralists' Association of Western Australia Incorporated. Part of that letter was as follows :—

> "In order that no technical obstacles should be created in the way of claiming a reduction of rates during the currency of the award, if exceptional

conditions should arise, to justify such a claim the following words are being added to the first paragraph of the claim, viz., 'or such lower rates as may from time to time to the Court seem just.' This precaution will, however, be likely to prove superfluous if an adjustment clause is inserted in the award on the lines of the clause which was secured in the present award."

3. Copies of the letter containing such extract were forwarded to other associations of employers, but, if any answers were received, they have not been placed before this Court.

4. On February 24th, 1927, a letter was sent to the organization of employees on behalf of the employers' organizations and many individual employers. The letter demanded

"On behalf of the said organizations and the members thereof and of the individual graziers, firms and companies referred to in the said schedules A, B and C hereto, that all members of the Australian Workers' Union now or hereafter to be employed by the members of the said organizations and individual graziers, firms and companies be paid for all work done by them on and after the first day of January 1927 the respective rates applicable to the respective classes of labour set out in schedule D hereto or such lower rates as may from time to time to the Court seem just and that all employment of labour in the Pastoral Industry of the classes referred to in schedule D hereto shall be at the rates of payment and upon the terms and conditions as are set out in the said schedule D hereto or such lower rates as may from time to time to the Court seem just."

5. The same letter of February 24th continued as follows :—

"We must ask you to let us have a reply addressed to Mr. J. W. Allen, care of The Graziers' Association of New South Wales, 79 Pitt Street, Sydney, on or before the 1927 *as to whether the Australian Workers' Union agrees on its own behalf and on behalf of its members to the payment of the rates and to the observance of the terms and conditions set out in schedule D hereto* and in the event of a refusal by the Australian Workers' Union to agree within the time stipulated to *such rates terms and conditions or any of them* relating to employment in the Pastoral Industry we are respectively authorized on behalf of the said organizations and individual graziers firms and companies to submit the claims as appearing in schedule D hereto, or such of them as shall not have been agreed to by your Union, to the Commonwealth Court of Conciliation and Arbitration."

We italicize a portion of this letter. It describes the demand to which an expression of agreement or disagreement was invited.

6. Schedule D was a "Schedule of Rates, Terms and Conditions" identical with the claims of the employers mentioned at the meeting of February 1st. In the schedule were included "the minimum rates to be paid for shearing to employees" and, by way of illustration, 35s. per hundred for flock sheep (rations not found) was demanded, this being a decrease of 5s. from the prevailing rate of 40s. per hundred.

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7. On March 12th, 1927, the Union of employees replied that the demands of February 24th were not agreed to, and made a counter-demand for the "increased rates set out in" a schedule annexed to the reply. The Union asked whether the employers would agree to pay the increased rates specified. The shearers' rate demanded was 60s. per hundred (an increase of 20s.).

8. On March 25th, 1927, the Secretary of the New South Wales Graziers' Association (acting on behalf of it and the other employers' organizations) refused the Union's demands

> "in so far as such demands differ from the demands made upon the said Union on behalf of the said organizations and on behalf of certain individual graziers, firms and companies on the 24th day of February 1927."

9. On the same day (March 25th) the Secretary made an affidavit which was filed in the Arbitration Court in support of a request that a compulsory conference be called. The affidavit showed :—

(*a*) That the Schedule of Rates and Conditions forwarded to the Union on February 24th (schedule D) had been submitted to and approved by the employing interests concerned in the request for the compulsory conference.

(*b*) That, on February 1st, 1927, the Committee of Management of the Graziers' Association of New South Wales gave a written authority to their Secretary, J. W. Allen, to make on its behalf claims against the Union. Such claims were those contained in schedule D. This written authority did not cover any claims for rates lower than the minimum rates contained in the schedule.

(*c*) That, on February 10th, 1927, the Committee of Management of the Pastoralists' Union of Southern Riverina gave a written authority to their Secretary to make on its behalf the claims contained in the same schedule. There is no evidence that this organization of employers gave any authority, written or otherwise, which would justify any claim upon the Union for rates lower than those set out in the Schedule.

(*d*) That, on January 24th, 1927, the Committee of Management of the Pastoralists' Association of West Darling gave written authority to its Secretary to make on its behalf the minimum claims specified in the same schedule. No written authority was given to demand lower rates from the Union.

There is no evidence that the copy of Mr. Allen's letter of January 28th was ever considered, still less acted upon, by this organization of employers.

(*e*) That, on January 27th, 1927, the Pastoralists' Association of Western Australia (Incorporated) (to which the original letter of January 28th was sent), gave written authority to demand of the Union the rates specified in the schedule. There is no evidence of this organization of employers giving any other authority.

10. When, in his affidavit of March 25th, 1927, Mr. Allen states that he was "authorized in writing by the Graziers' Association of New South Wales" to make against the Australian Workers' Union "claims . . . referred to in annexure A hereto" (par. 6), and that the secretaries of the other employers' organizations had also written authority to make "the claim . . . referred to in the said annexure 'A'" (par. 8), the claims mentioned are those contained in schedule D, but not what was added to or included in the first paragraph of the covering letter of February 24th, 1927.

11. Compulsory conferences were requested by both sides and took place on the same day. The Union's representative said, after some discussion,

> "The shearing rates thirty-five shillings per hundred asked for by the Graziers are too low and cannot be accepted by the Union nor any compromise between that rate and the existing rate of forty shillings per hundred and the same applies to all other rates."

12. On April 29th, 1927, the Chief Judge of the Arbitration Court, acting under sec. 19 (*d*), made two orders, one referring into Court "the dispute existing" between the parties as to the matters set forth in the employers' log of demands (schedule D), the other "the dispute existing" between the parties as to the matters set forth in the log of the employees, forwarded in its reply of March 12th.

What was the industrial dispute which, on April 29th, 1927, "existed" between the employers who had authorized the demands of schedule D and had refused the employees' counter-demands, and the employees' Union, which had rejected the demands of schedule D and made counter-demands for specified increases ?

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In the case presented by the present respondents, emphasis has been laid upon the fact that the covering letter of February 24th, 1927, demanded the rates specified in the log "or such lower rates as may from time to time to the Court seem just." That these words were added as an afterthought, is clear from the extract from the letter of January 28th. It was not intended that any of the employing interests concerned should demand of the Union immediate adherence to so vague a claim, but merely that "technical obstacles" might be overcome by the insertion of the words. It was thought that the phrase would assist "if exceptional conditions should arise to justify such a claim." It was anticipated that an "adjustment clause" upon the lines of the existing award would again be prescribed, in which event the precaution was "likely to prove superfluous."

It was contended that the effect of the presence of the words "or such lower rates as may from time to time to the Court seem just" in the letter of 24th February, 1927, was to include a claim for a lower rate than 35s. in the dispute. If that be the effect of those words, what is the lower limit of the dispute? Is it nil? We do not think that the parties ever had it in mind that such was the lower limit of the dispute. If a demand for "higher wages" or "lower wages" is rejected, the Court may be invested with jurisdiction to settle the industrial dispute, despite the lack of precise definition in its subject matter. But a demand for such higher or lower wages "as may from time to time to the Court seem just" is, we think, of a different character. A refusal to accede to it does not, in our opinion, give rise to a justiciable dispute.

So far as the present matter is concerned, the letter of February 24th itself shows clearly that its authors included the alternative "demand" merely in order to establish jurisdiction in the Arbitration Court to act, upon some future occasion, by reducing rates below those inserted in schedule D. The decisive part of the letter is the second paragraph, the imperative terms of which require the Union to agree to the rates and conditions specified in schedule D and threaten an approach to the Court "in the event of a refusal by the Australian Workers' Union to agree within the time

stipulated " to such rates and conditions. The Union was not asked to define its position in the event of the Court's considering it just, later on, to reduce rates below the schedule. In fact the Union did not define its position in relation to the words inserted in the first paragraph. But it did answer the request of the second paragraph by refusing the demands of the log and by insisting upon its own log of claims. It asked for a minimum rate of 60s. as opposed to 35s. And this demand the employers rejected.

This interpretation of the three letters which passed between the disputants is supported by all the surrounding circumstances. As to these, there is no conflict of evidence. It appears that the only demand against the Union which was authorized by the employing interests, was that contained in schedule D. The affidavit of Mr. Allen requesting a compulsory conference, the circumstances under which the additional words were inserted in the letter of February 24th, the proceedings at the compulsory conference and the two orders of reference (though these are not, in themselves, more than evidentiary), all show that the only industrial dispute between the parties which existed on March 25th and on April 29th, 1927, was whether the shearers' rates should be increased from 40s. per hundred to 60s. per hundred or whether they should be reduced from 40s. to 35s. per hundred. There was no real contest, controversy or disagreement between the parties as to rates lower than 35s. or higher than 60s.

It follows from decisions which bind us that the order of variation which, in dealing with the same industrial dispute, reduced the rate to 32s. 6d. per hundred sheep, went beyond the authority of the Arbitration Court.

It was suggested that its invalidity extended only to 2s. 6d., being the difference between the 35s. claimed by the employers and the 32s. 6d. awarded.

It is true that the Arbitration Court did have jurisdiction, at the time when the variation order was made, to fix the rate at 35s. But this Court is not an appellate tribunal invested with power to make the order the Arbitration Court could or should have made. All

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that can be done here is to hold that, as the orders of variation were outside the competence of the Arbitration Court, they are null and void.

Question answered in the affirmative. No order as to costs.

Solicitor for the applicant, *A. C. Roberts.*

Solicitors for the respondents, *Whiting & Byrne,* for *McLachlan, Westgarth & Co.*, Sydney.

H. D. W.

Discd *MSP Nominees* v *Comr of Stamps* (1999) 42 ATR 833

[HIGH COURT OF AUSTRALIA.]

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . . APPELLANT;
APPLICANT,

AND

THE GREATER MELBOURNE REALTY COMPANY PROPRIETARY LIMITED (IN LIQUIDATION) . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 3.

SYDNEY, *April* 7.

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

Company—Shareholder—Liability in respect of calls overdue—Shareholder unable to pay calls—Settlement of liability with company—Surrender of shares—Purchase of shares by company—Validity.

A shareholder in a company who held 1,500 £1 shares on which 5s. per share had been paid, and on which a further call of 2s. 6d. per share had been made but not paid, made the following arrangement with the company:—It was agreed that the money already paid, namely, £375, should be applied towards payment in full of 750 shares, that he should pay a further sum of £375 to