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AUTOMOBILE FIRE AND GENERAL INSURANCE CO. OF AUSTRALIA LTD. v. DAVEY.

Appeal allowed. Judgment of the Supreme Court of Victoria dated 17th October 1935 set aside. Declare that upon the proper construction of the policy of insurance in the award in the form of a special case mentioned the company is not liable to the insured. Order that A. V. Davey, the respondent, do pay to the company, the appellant, the costs of and incidental to the reference of the said case to the Supreme Court and also the costs of this appeal.

Solicitors for the appellant, *Mills & Oakley.*
Solicitor for the respondent, *J. B. Plant.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

CULBERT . . . . . APPELLANT;
INFORMANT,

AND

THE CLYDE ENGINEERING COMPANY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *April* 23, 30.

Starke, Dixon Evatt and McTiernan JJ.

Industrial Arbitration (Cth.)—Award—Apprentices—Deed of apprenticeship—Prescribed form—Period of apprenticeship—Specified term—Commencement—Prospective, not retrospective—Breach—Minor not bound by the award.

An award of the Commonwealth Court of Conciliation and Arbitration provided that "apprentices shall be apprenticed for a period of five years" in accordance with a prescribed form which imposed an obligation upon the employer properly to instruct apprentices during that period. Under the

award a limited sphere of work was allowed to unapprenticed boys. A boy who had been in its employ for two years was apprenticed by the respondent in accordance with the prescribed form except that the commencing date of the period of five years was antedated two years.

Held that the terms of the award required that a prospective period of five years must be specified and that the prescribed form must be adhered to; therefore, by antedating that period the respondent had committed a breach of the award.

Metal Trades Employers Association v. *Amalgamated Engineering Union*, *ante*, p. 387, referred to.

CASE STATED.

In an information laid by John Culbert, president of the Australian Timber Workers Union and secretary of its New South Wales branch, it was alleged that the defendant, the Clyde Engineering Co. Ltd., did commit a breach of an award of the Commonwealth Court of Conciliation and Arbitration, by which both the union and the defendant were bound, in that the defendant did on 22nd June 1935, apprentice a boy under the age of twenty-one years, and did not apprentice him in accordance with the provisions of the award. The award was made on 23rd January 1929, and related to the timber industry. In clause 6 of the award the word "boy" is defined as meaning a male under the age of twenty-one years. The word "employee" is defined as meaning, unless the context denotes otherwise, any person who was at the date of the claim, or subsequently became, a member of the union and who was and/or is employed by an employer a party to the award. Apprentices and unapprenticed boys are dealt with in clauses 13A and 13B, which appear under a main heading "Subsidiary Provisions." Clause 13A is headed "Apprentices and unapprenticed boys," and provides, by sub-clause 2, that an employer shall employ at least one apprentice and not more than two apprentices to each six journeymen machinists employed by him; by sub-clause 3, that an employer may employ one apprentice when there are one or more journeymen sawyers employed by him at full rates under the award, but he shall not employ more than two apprentices to each six journeymen sawyers so employed; by sub-clause 4, that the employer may employ one apprentice to each saw-doctor; by sub-clause 5, that apprentices

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shall be apprenticed in accordance with schedule D (deed of apprenticeship); by sub-clause 6, that apprentices shall be apprenticed for a period of five years; by sub-clause 7, that the minimum rates of weekly wage to be paid to apprentices shall be: 1st year, £1 per week; 2nd year, £1 5s. per week; 3rd year, £1 15s. per week; 4th year, £2 5s. per week; 5th year and thereafter up to 21 years, when the fifth year is completed before the apprentice attains 21 years of age, £3 per week; and, by sub-clause 14, that an employer may employ a boy with a view to apprenticing him for a period of three months on probation, provided that if the boy shall then be indentured, that three months shall count as part of his apprenticeship. Clause 13B is headed "Unapprenticed boys" and provides, by sub-clause 1, that an employer may employ unapprenticed boys in any position which they are capable of filling, including the position of machinist on certain specified machines, or on any other machine for which a special order is obtained from the Court, but excluding the position of sawyer, dovetailing machinist in box-making, and machinist on any machines other than those permitted as above, provided that the number of unapprenticed boys so employed does not exceed the proportion of one in four of the total adult employees of the employer; by sub-clause 5, for the payment to unapprenticed boys of minimum rates of weekly wage, ranging from £1 per week at the age of 16 years, up to £3 per week for boys aged 19 to 21 years. Schedule D is headed "Form of Apprenticeship Indenture," and, so far as material, is as follows:—"This indenture made the day of 19 between employer apprentice parent, or guardian for themselves and their respective executors, administrators and assigns. Witnesseth that the said employer doth hereby covenant with the said apprentice and the said parent or guardian that he the said employer will—(*a*) Take and receive the said apprentice as his apprentice for the full term of five years from the day of 19 . (*b*) To the best of his knowledge, power and ability teach and instruct or cause to be taught and instructed the said apprentice in the art and craft of , which shall include proficiency as indicated in the schedule to this indenture.

(*c*) Pay to the said apprentice (during such time as he shall observe and perform the terms of this indenture) wages as fixed for apprentices by the award . . . The employer, the and the apprentice hereby mutually covenant and agree with the other and others of them as follows:—1. The employer shall within fourteen days from the date hereof place the apprentice under the direction of a qualified journeyman for tuition . . . 3. The employer shall, on completion of the said term, hand over to the . . . apprentice his part of this indenture, with a certificate thereon to the effect that the said term has been faithfully served, provided the apprentice shall have duly observed and performed the covenants and conditions herein contained . . . 6. The apprentice shall truly and faithfully during the term serve the employer as his apprentice as aforesaid, and shall diligently attend to the business . . . And it is further agreed . . . 16. Should the apprentice have been employed by the employer with a view to his apprenticeship for a period of not more than three months on probation, then at the option of the boy, such period of employment on probation shall count as part of the term of his apprenticeship hereby created."

The facts showed that the boy concerning whom the information had been issued, was first employed by the defendant company about 27th July 1933. The boy was for some time prior to 22nd June 1935 engaged on a boring machine, which, according to the informant, was a machine on which an unapprenticed boy should not have been employed. On that date the boy, then nineteen years of age, and the defendant executed an indenture of apprenticeship in the form of schedule D, but inserted in clause (*a*) the date " 27th July 1933," so that, shortly, the indenture read as follows:—" This indenture made the 22nd day of June 1935 " between the defendant, the boy, and his guardian " for themselves and their respective executors, administrators and assigns. Witnesseth, that the " defendant " the employer doth hereby covenant with the " boy " apprentice and the . . . parent or guardian that he the said employer will—(*a*) Take and receive the said apprentice as his apprentice for the full term of five years from the twenty-seventh day of July, 1933."

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Although there was not any direct evidence on the point, the boy was not, apparently, a member of the union.

The magistrate determined that the evidence was insufficient to support the information. He found that the production in evidence of the indenture of apprenticeship referred to above was a good answer to the information, which he dismissed.

From that decision the informant now appealed, by way of case stated, to the High Court. The question reserved for the opinion of the Court was whether the magistrate's determination was erroneous in point of law.

J. A. Ferguson (with him *R. M. Kidston*), for the appellant. The provisions in the award relating to the entering into indentures of apprenticeship were not intended to have a retrospective operation, other than the probationary period of three months, and should not be so interpreted. If the principle of retrospectivity beyond that period is allowed, then the whole purpose and object of the award will be defeated. The only deed of apprenticeship contemplated by the award is one prospective as to period; this, for the reason that an apprentice is entitled to tuition enforceable throughout the period of apprenticeship by award provisions and penalties. Here the indenture is not in accordance with the terms of the award. Its execution is, therefore, a breach of the award. The boy concerned is not an apprentice under the Act. It is a definite obligation imposed by the award that here there should be an indenture and that the prospective operation thereof must be for a period of five years. The fact that this indenture has a prospective operation of three years does not render it valid *qua* that period. The position is unaffected by the fact that during the "retrospective" period the boy was engaged on work similar to the work he would have been engaged upon had he been apprenticed in terms of the award. The Court will not allow the purpose of, and obligations under, an award to be evaded by a subterfuge of this nature.

McKeon, for the respondent. The award does not impose any obligation upon the respondent to apprentice this boy, nor does the evidence establish that the respondent was under any such obligation. If the indenture of apprenticeship is held not to be

valid in respect of the retrospective period, the offence was that the respondent had employed the boy on a machine on which unapprenticed boys should not be employed. The indenture is valid as from the actual date of execution, and from that date the boy has been apprenticed in accordance with the award. The offence charged is not sustained. The award only imposes an obligation on the respondent to apprentice the boy if he is employed in contravention of clause 13A of the award. Throughout the period of his employment antecedent to the date upon which the indenture was executed he was employed on a type of machine not referred to in clauses 13A and 13B of the award. There is no evidence that upon the apprenticing of this boy the respondent had a greater proportion of apprentices than is allowed by the award; nor is there any evidence that the respondent did not have any apprentices and, therefore, had to apprentice the boy in order to comply with the award in this respect. Not being obliged by the award to apprentice the boy, the respondent is not bound, in an indenture of apprenticeship between itself and the boy, other than under the award, to observe the requirements of the award. Sub-clause 5 of clause 13A does not impose a duty upon anybody; it merely prescribes what is meant by apprenticeship for the purposes of the award. The sub-clause is merely directory. In the absence of the obligation the information discloses no offence in respect of the apprenticing of this boy. Sub-clauses 5 and 6 of clause 13A refer only to indentured apprentices. Even if unapprenticed boys may only be employed on machines permitted under clause 13B, it is not obligatory that a boy employed on a machine mentioned therein must be apprenticed. If clause 13A prescribes a five-yearly period, then the indenture in this case conforms to sub-clauses 5 and 6 thereof, and to schedule D. The indenture does no more than show in writing the terms of the employment as they had existed during the period of the boy's employment, and also to make provision for the future. The mere antedating of the indenture was not a contravention of the award.

J. A. Ferguson, in reply. The type of machine upon which the boy was employed does come within the scope of the award. The boy was engaged upon work not permitted by the award to be done

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by unapprenticed boys. The indenture is not a proper instrument of apprenticeship as required by the award, therefore its execution is a breach of the award.

Cur. adv. vult.

The following written judgments were delivered :—

STARKE J. The defendant was charged on information that it did apprentice a boy under the age of twenty-one years and did not apprentice him in accordance with the provisions of an award of the Commonwealth Court of Conciliation and Arbitration relating to timber workers. The award, under what are called subsidiary provisions relating to apprentices and unapprenticed boys, prescribed :—"(5) Apprentices shall be apprenticed in accordance with Schedule D (Deed of Apprenticeship). (6) Apprentices shall be apprenticed for a period of five years." The boy had been in the employ of the respondent from July 1933, but he was not, as I understand, a member of the Timber Workers' Union nor bound by nor subject to the award, and he had not been apprenticed. But in 1935 it was deemed advisable that he should enter into a deed of apprenticeship. The deed provided that the respondent would take and receive the apprentice for the full term of five years from 27th July 1933. The contention is that a deed in this form is not in accordance with the provisions of the award.

A boy is apprenticed so that he may be taught, and the requirement of the award that he shall be apprenticed for five years in accordance with the form in schedule D involves the obligation to teach him during that period. But that obligation cannot be performed for a time already past. I should not have thought that the deed was in accordance with the schedule. But it was said that the clauses in the award were merely for the purpose of determining whether a boy belonged or not to the apprentice class : if a deed were entered into in the form required by the schedule, then he was apprenticed, but otherwise he was an unapprenticed boy who could only be engaged in a limited sphere of operations. Such a construction of the award, however, runs counter to its structure and to the words used in it. The clauses limit the number of apprentices, but are quite explicit that apprentices shall enter into deeds of

apprenticeship in the form in the schedule and for a term of five years so that they may be taught.

Again I record my view that the Arbitration Court has no jurisdiction to prescribe the obligations of parties to an award towards persons who have no connection with the industrial dispute nor the arbitral proceedings. This Court, however, has decided to the contrary (*Metal Trades Employers Association* v. *Amalgamated Engineering Union* (1)), and the present case but illustrates the difficulties that arise from the decision. Once more, I think the magistrate's determination was right, but I am bound by the decision of this Court to say that it was erroneous and that it should be set aside.

The appeal should be allowed.

DIXON, EVATT AND MCTIERNAN JJ. This is an appeal from an order of a Court of summary jurisdiction by which an information under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 was dismissed.

The information alleged that the respondent, an employer bound by an award of the Court of Conciliation and Arbitration, did commit a breach of the award in that it did on 22nd June 1935 apprentice a certain boy and did not apprentice him in accordance with the provisions of the award.

Under the heading " Subsidiary Provisions " that instrument deals somewhat elaborately in two clauses with apprentices and unapprenticed boys. The clause relating to unapprenticed boys authorizes the employment of a specified proportion of unapprenticed boys in any position they are capable of filling, including some kinds of work and excluding other kinds, which it particularizes. The clause implies that no unapprenticed boy may be employed except pursuant to this authority, although it does not expressly say so. The clause relating to apprentices provides that an employer (i) shall employ at least one apprentice and not more than one to each six journeymen machinists, (ii) shall not employ more than two apprentices to each six journeymen sawyers employed at full rates under the award, and (iii) may employ an apprentice to each saw-doctor. A sub-clause

(1) *Ante*, p. 387.

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Dixon J. Evatt J. McTiernan J.

next provides that apprentices shall be apprenticed in accordance with schedule D (Deed of Apprenticeship). The sub-clause which follows says that apprentices shall be apprenticed for a period of five years. The clause contains a number of other sub-clauses dealing with the obligation of the employer to apprentices.

Schedule D is a lengthy form of indenture of apprenticeship, clause (*a*) of which contains a covenant by the employer that he will take and receive the apprentice as his apprentice for the full term of five years from the (blank) day of (blank) 19 .

It appears that the boy in question was first employed by the respondent on 27th July 1933. Probably he was not a member of the organization of employees entitled to the benefit of the award. At that time neither *Long* v. *Chubbs Australian Co.* (1), nor *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (2), had been decided and it may have been considered that the award could not affect the employment of boys, not members of the organization. At any rate, the boy was not apprenticed. But, on 22nd June 1935, the date laid in the information, the respondent and the boy executed an indenture of apprenticeship in the form of schedule D. Instead, however, of filling in a prospective date in the clause already quoted as the date from which the five years period was to run, the parties attempted to make the indenture retrospective to the date when the boy was first employed. The covenant, therefore, ran as follows: "That he the said employer will take and receive the said apprentice as his apprentice for the full term of five years from the twenty-seventh day of July, 1933." The insertion of this retrospective date is the foundation of the charge laid in the information. It is evident that the clause in the award and the form of indenture in the covenant contemplate a full period of five years throughout which the apprentice will be bound and a period of five years commencing at a date already past is not in truth such a period of five years at all. The instrument operates to bind the parties only during the residue of the period. Accordingly the information alleges a breach of the term of the award which provides that apprentices shall be apprenticed in accordance with schedule D (Deed of Apprenticeship). The answer given by the respondent is, in effect, that this clause does not mean that no apprenticeship indenture shall be entered into except in accordance with the schedule. It means, the respondent says, no more than

(1) (1935) 53 C.L.R. 143. (2) *Ante*, p. 387.

that unless the indenture of apprenticeship complies with the schedule and has a term of five years it will fail to bring an apprentice within the operation of the clause so that he may be considered for its purposes an apprenticed boy and not an unapprenticed boy within the next ensuing provision. It might follow that the boy in question should be regarded as an unapprenticed boy so that, if he was employed, as was alleged, at work other than that which the clause allows unapprenticed boys to do, the respondent committed an offence, but, if so, that is not the offence with which it is charged.

In our opinion this contention is not well founded. We read the award as dealing exhaustively with the employment of apprentices and of unapprenticed boys. Except in conformity with the clause relating to the latter, an unapprenticed boy may not be employed. But, if the boy is to be apprenticed, the provisions relating to apprenticeship must be strictly pursued. To take an apprentice on terms outside these provisions is forbidden.

When the sub-clauses say :—" Apprentices shall be apprenticed in accordance with schedule D " and " Apprentices shall be apprenticed for a period of five years " they mean what they say. They are affirmative commands necessarily implying the negative prohibition against entering into indentures on any other terms. They do much more than define the terms compliance with which will turn a boy into an apprentice for the purpose of the distinction between apprenticed and unapprenticed boys.

Accordingly, in our opinion, the clause upon which the information is based does impose a duty and, inasmuch as it was contravened, a breach of the award was committed.

The appeal should be allowed. The order of dismissal should be set aside and the information remitted to the magistrate.

Appeal allowed. Determination of stipendiary magistrate set aside. Remit matter to magistrate with the opinion of this Court that his determination was erroneous. The respondent to pay to the appellant the costs of this appeal.

Solicitor for the appellant, *V. P. Ackerman*, Hunters Hill, by *G. G. Tremlett.*

Solicitor for the respondent, *E. S. Dunhill.*

J. B.