Ref'd: Dist. 64 p. 465. (1978) 2 NSWLR 494.
Dist (1978) 2 NSWLR 495.
Dist 91 ALR 282.

[HIGH COURT OF AUSTRALIA.]

AUTOMATIC FIRE SPRINKLERS PROPRIETARY LIMITED AND ANOTHER . . } APPELLANTS;

Expl'd 52 (N.S.W) S.R. 75
69 W.N. 75

AND

WATSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1946.

SYDNEY, *July* 25, 26, 29; *Aug.* 23.

Latham C.J. Rich, Starke, Dixon, McTiernan and Williams JJ.

Master and Servant—Contract of service—Agreement for term—Notice of termination—Salary in lieu of notice—Wrongful dismissal—Appointment to inferior position—Non-acceptance by employee—Performance of duties—Continuance—Readiness and willingness of employee—Protected undertaking—Termination unauthorized—Effect in law—National Security (Man Power) Regulations (S.R. 1942 No. 34—1944 No. 175), reg. 14.

Regulation 14 (1) of the *National Security (Man Power) Regulations* provides that an employer carrying on a protected undertaking shall not, except with the permission in writing of the Director-General of Man Power or of a person authorized by him, terminate the employment in the undertaking of any person employed therein. Regulation 14 (2) provides that a person employed in a protected undertaking shall not, without a similar permission, change or terminate his employment.

Held, by *Rich*, *Dixon*, *McTiernan* and *Williams* JJ. (*Latham* C.J. and *Starke* J. dissenting), that, by reason of this regulation, a purported dismissal of an employee in a protected undertaking, without obtaining the requisite permission, was ineffectual in law to terminate the employment.

The effect of a wrongful dismissal upon a contract of employment and the relationship of master and servant created thereunder; and the rights, remedies and obligations of a servant wrongfully dismissed, discussed.

George v. *Mitchell & King Ltd.*, (1943) 59 T.L.R. 153 and *Woolley* v. *Allen Fairhead and Sons Ltd.*, (1946) 62 T.L.R. 294, discussed and applied.

Decision of the Supreme Court of New South Wales (Full Court): *Watson* v. *Automatic Fire Sprinklers Pty. Ltd.*, (1946) 46 S.R. (N.S.W.) 336; 63 W.N. 107, by majority, varied in part, otherwise appeal dismissed.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

APPEAL from the Supreme Court of New South Wales.

On 12th October 1938 George John Molesworth Watson entered into an agreement under seal with Automatic Fire Sprinklers Pty. Ltd. (hereinafter referred to as the company) and Independent Industrial Investments Pty. Ltd. which after reciting, *inter alia*, that Watson was a director of the company and had for some time past been employed by both companies as manager, and that they were desirous of appointing Watson their general manager and Watson agreed to accept the position, so far as material, provided as follows: Clause 1: That both companies appointed Watson their general manager for the term of six years computed from 1st October 1937 subject to the terms and conditions thereinafter set out. Clause 2: That Watson should at all times during the term of his employment diligently and faithfully serve both companies and observe and carry out all the reasonable instructions and directions of the respective Boards of Directors. Clause 3: That Watson should exercise and carry out all such powers and duties and should observe all such advice and directions relating to the businesses as the respective Boards of Directors from time to time conferred or imposed upon him and subject thereto should control the general management and businesses of both companies performing such duties and exercising such discretion as would generally be entrusted to a responsible general manager. Clause 4: That Watson should during ordinary business hours and in cases of emergency devote the whole of his time and attention to the conduct and advancement of both companies; should keep or cause to be kept all proper and requisite accounts, correspondence, records and papers which should at all times be available to the companies and certain specified officials, and should keep the directors of both companies advised of all proper matters. Clause 5: That as consideration for his services and for the faithful observance and performance by him of the terms and conditions of the agreement the company should pay Watson salary, expenses and an annual bonus, and the second-mentioned company should pay him an annual bonus, at the amount and rates therein set out. Clause 8: That subject to the provisions of clause 9, if in the opinion of the directors of the company Watson should become unfit to act as general manager of the company the company's board of directors could, in their discretion, determine the agreement and for that purpose could give to Watson one month's written notice of termination or pay him one month's salary in lieu of notice and upon such payment or upon the expiration of the notice the agreement should be determined but without prejudice to any existing rights of the parties thereto and both companies should pay Watson bonus ascertained

up to date of determination. Clause 9 : That in the event of Watson wilfully neglecting or refusing to observe and carry out the instructions of the company's board of directors within a reasonable time after notice so to do the said board of directors only should thereupon have power to forthwith determine the agreement by notice in writing to that effect and neither of the said companies should be liable for payment of salary and bonus other than up to the date of the said determination. Clause 12 : That in the event of Watson ceasing to be employed by the company he thereby expressly agreed and undertook to resign within a reasonable time from his position as a director of both companies and in the event of Watson continuing in the employ of the company after the expiration of the six years referred to in clause 1 the conditions of the agreement should apply to and be binding on the parties thereto during such continued employment provided that either the company or Watson should have the right to determine such continued employment by giving to the other three months' written notice of termination and upon the expiration of such notice the employment thereby created should cease and determine. Clause 13 : That in the event of any difference or dispute between the parties as to the construction of, or rights and liabilities under, the agreement the difference or dispute should be submitted to arbitration in the manner prescribed ; the award of the arbitrator should be final, conclusive and binding on the parties and the provisions of the *Arbitration Act* 1902 (N.S.W.), as amended, and the schedules thereto should apply.

Watson continued in the employ of both companies upon the conditions of the agreement after the expiration of the term of six years referred to in clause 1 and until his employment was determined as mentioned hereunder.

Differences and disputes arose between the parties as to whether Watson was the general manager of either or both of the companies and related matters as to the position held by him ; the term of his employment ; the continuance or otherwise of his employment ; and the amount, if any, of salary, other remuneration (including commission and expenses), and damages due to Watson by either or both of the companies.

Mr. *F. W. Kitto* K.C. was appointed arbitrator by Watson and his appointment as sole arbitrator was consented to by both companies. The questions submitted for the consideration of the arbitrator were as follows :—" 1. Whether Watson is the General Manager of the Automatic Company and of the Investment Company or either of them upon the terms set forth in the said agreement. 2. If the answer to the first question is " No "—(*a*) When did he cease to be

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

such General Manager ? (*b*) In what capacity was he employed by, and what were the terms of his employment with the Automatic Company and/or the Investment Company thereafter ? (*c*) Is such employment still continuing ? (*d*) If not, when did such employment cease ? 3. What amount (if any) is now due to Watson by the Automatic Company and/or the Industrial Company by way of—(*a*) Salary, (*b*) other remuneration (including commission and expenses), (*c*) damages ? "

The arbitrator heard and considered the evidence and arguments placed before him by the parties, and thereupon made and published his award in the form of a special case for the opinion of the Court upon questions of law pursuant to s. 9 (*a*) of the *Arbitration Act* 1902 (N.S.W.), as amended.

The special case was substantially as follows :—

1. The agreement referred to above was entered into by the parties on 12th October 1938.

2. From and after the expiration of the six years referred to in clause 1 of the agreement, Watson continued in the employ of both the said companies as general manager, and the conditions of the agreement applied to and bound all the parties thereto during such continued employment.

3. That continued employment was not determined prior to 29th September 1944.

4. On 2nd April 1942, each of the companies became a protected undertaking within the meaning of the *National Security* (*Man Power*) *Regulations*, and continued to be such a protected undertaking until 12th September 1945.

5. Neither the Director-General of Man Power nor any person authorized by him gave at any time any permission in writing for either of the companies to terminate the employment of Watson, or to stand him down, or to suspend him from duty.

6. Neither the Director-General nor any person authorized by him gave at any time any permission in writing for Watson to change or terminate his employment.

7. On 19th May 1944 the board of directors of the company resolved as follows :—" That the secretary of the company be instructed to advise the managers that their service agreements are terminated in accordance with the clause of the service agreements dealing with the termination of their agreements."

Watson was one of the persons referred to in the said resolution as " the managers." He was present at the meeting when the resolution was passed (being then a director of the company) but did not vote on the resolution.

8. Watson was never advised pursuant to the resolution that his service agreement was terminated.

9. On 30th June 1944 the company gave to Watson a letter dated 29th June 1944 in the following terms so far as material :—

"In view of Mr. Chisholm's return to Australia and his appointment as General Manager and Director of Automatic Fire Sprinklers Pty. Limited, the resolution of the Board of that Company concerning the proposed termination of your services with the Company will be varied and limited to the termination not of your services with the Company, but of your position as Manager under your present Service Agreement and I have therefore to give you notice that your existing agreement as Manager will terminate at the expiration of three months from this date.

After Mr. Chisholm's arrival, and he has investigated the situation, he will make his recommendations to the Board as to where and in what capacity and under what terms and conditions your services should be utilised.

The Board will, after considering Mr. Chisholm's recommendations, finally decide the matter of your then position with the Company."

10. It was conceded before me on behalf of the companies and I find that the said letter was not a three months' written notice of termination within the meaning of clause 12 of the agreement of 12th October 1938.

11. On 29th September 1944 the board of directors of the company passed a resolution (Watson as a director voting against it) in the following terms :—

"1. That in the opinion of the Directors George John Molesworth Watson has become and is unfit to act as General Manager of the Company.

2. That the Agreement dated 12th October 1938 between Automatic Fire Sprinklers Pty. Limited of the first part, Independent Industrial Investments Pty. Limited of the second part and George John Molesworth Watson of the third part be determined, and for that purpose Mr. Watson be given one month's salary in lieu of notice in accordance with Clause 8 of the Agreement.

3. That as from the determination of such Agreement and until the Board otherwise decides Mr. Watson's position and duties in the Company be New South Wales Sales Manager.

4. That from the determination of the said Agreement and until the Board otherwise decides the salary of Mr. Watson shall be £10 per week such salary being remuneration for his services in this Company and Independent Industrial Investments Pty. Limited.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

5. That Resolutions 1 and 2 above are intended to prevent any misunderstanding of the letter from the Company to Mr. Watson dated 29th June, 1944, giving Mr. Watson three months' notice of termination of the said agreement, and to remove the uncertainty (if any) as to the effect of that letter in terminating the Agreement.

6. That Mr. Watson be given six months' leave of absence as from Tuesday 3rd October.

7. That Mr. Watson be asked to resign from the Board of Directors of this Company."

12. On the said 29th September 1944 the company handed to Watson a letter dated that day in the following terms, so far as material :—

" Your attention is drawn to the Agreement dated 12th October, 1938 between this Company of the first part, Independent Industrial Investments Proprietary Limited of the second part and yourself of the third part and in particular to Clause 8 thereof, which empowers this Company to determine the Agreement in the event of the Directors of the Company being of the opinion mentioned in the clause.

As the Directors are, in all the circumstances, of the opinion referred to, this Company has decided to determine the Agreement forthwith, and I am accordingly directed to inform you of this decision. In accordance with Clause 8 of the agreement one month's salary in lieu of notice is now paid to you, and in addition you will be paid the bonus on nett profits referred to in the clause as soon as profits are ascertained.

Your attention is also drawn to a letter dated 29th June 1944 from the Company to you, giving you three months' notice of termination of the said Agreement. The present decision and action of the Company is to prevent any misunderstanding of the Company's intention in writing that letter, and to remove the uncertainty (if any) as to its effect in determining the Agreement.

The determination of the agreement does not terminate your employment with this Company and Independent Industrial Investments Proprietary Limited and until further notice your position and duties in the Companies will be New South Wales Sales Manager and your salary £10 per week (which sum covers your services in both companies). I am directed to inform you, however, that it has been decided to give you six months' leave of absence from your position and duties, with full pay (i.e. £10 per week) as from Tuesday 3rd October next."

13. The letter dated 29th June 1944 referred to in the third paragraph of the letter of 9th September 1944 was the letter mentioned in par. 9 of this case.

14. I find as a fact that the directors of the company were not, at the time of the passing of the resolution mentioned in par. 11 of this case or at any material time, really of the opinion that Watson had become or was unfit to act as general manager of the company.

15. The company on 29th September 1944 tendered to Watson a cheque as being one month's salary in lieu of notice, but Watson did not accept the same.

16. Upon the whole of the evidence before me relating to 29th September 1944 I find as a fact that on that date each of the companies purported to dismiss Watson from his position of general manager, but that Watson did not at any time accept either of such purported dismissals as terminating his employment.

17. Each of the purported dismissals was a wrongful repudiation of Watson's contract of employment and, if effective in law to determine his employment, was a wrongful dismissal of Watson.

18. It was contended before me on behalf of Watson that the purported dismissals were ineffectual to determine his employment, for the reasons :—

(1) that by reason of reg. 14 of the *National Security* (*Man Power*) *Regulations* each of the purported dismissals was in law a nullity ; and

(2) that a purported dismissal of a servant, if wrongful, does not determine the servant's employment unless it be accepted by him as a determination thereof.

19. If that contention should not be upheld for either of those reasons, I find that Watson was wrongfully dismissed by each of the companies on 29th September 1944.

20. If that contention should be upheld for either or both of those reasons, I find that Watson's employment as general manager of each of the companies was not determined on 29th September 1944 or at any time before 19th September 1945.

21. On 29th September 1944, the companies purported to appoint Watson as their New South Wales sales manager at a salary of £10 per week, but Watson did not at any time accept that appointment or any other new employment in the service of either of the said companies.

22. Throughout the period from 29th September 1944 to 19th September 1945 : (*a*) Watson continued to attend the joint office of the companies, and was ready and willing to perform the duties of general manager thereof, and did perform some of the work previously done by him as general manager, and maintained the attitude that his employment as general manager was still subsisting ; (*b*) the companies maintained the attitude that Watson's employment as

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

general manager had been determined on 29th September 1944; (*c*) the companies were ready and willing to pay Watson the salary of £10 per week, but he declined to accept that salary, and in fact received no payment from the companies.

23. On 19th September 1945 Watson was excluded by the companies from their joint office, and he was on that date wrongfully dismissed from his employment as general manager under the agreement if such employment had not been terminated on 29th September 1944.

24. The questions of law for the opinion of the Court are as follows :—

(1) Whether, on the facts as found by me, the purported dismissal of Watson by the companies on 29th September 1944 was ineffectual in law to terminate Watson's employment as general manager, by reason of: (*a*) reg. 14 of the *National Security* (*Man Power*) *Regulations*, or (*b*) Watson's non-acceptance of the purported dismissal as termination of his employment.

(2) If question 1 be answered: (*a*) No, (*b*) No, whether the measure of the damages to which Watson is entitled by reason of his wrongful dismissal on 29th September 1944 is limited, having regard to the facts stated in pars. 7 to 16 inclusive of this case, to an amount equal to the remuneration he would have earned by the continuance of his employment for one additional day.

25. Questions (1) (*a*) and (2) are submitted at the request of the companies, and Question (1) (*b*) is submitted at the request of Watson.

26. If Question (1) (*a*) or (1) (*b*) be answered Yes, I award as follows :—

(*a*) That the above recited questions be answered: 1. No. 2. (*a*) On 19th September 1945. (*b*), (*c*), (*d*) He was not employed in any capacity by either company after 19th September 1945. 3. The following amounts are now due to Watson by the companies :—(*a*) For salary, £830; (*b*) for other remuneration (including commission and expenses), £630; (*c*) for damages, £350.

(*b*) That the companies do pay to Watson the sum of £1,810, together with his costs of this arbitration and the costs of this my award.

27. If Question (1) be answered: (*a*) No, (*b*) No, and Question (2) be answered No, I award as follows :—

(*a*) That the above recited questions be answered: 2. (*a*) On 29th September 1944. (*b*), (*c*), (*d*) He was not employed in

any capacity by either company after 29th September 1944. 3. The following amounts are now due to Watson by the companies : (*a*) For salary, £4 13s. ; (*b*) for other remuneration (including commission and expenses), Nil ; (*c*) for damages, £350.

(*b*) That the companies do pay to Watson the sum of £354 13s. together with his costs of this arbitration and the costs of this my award.

28. If Question (1) be answered : (*a*) No, (*b*) No, and Question (2) be answered Yes, I award as follows :—

(*a*) That the above recited questions be answered : 1. No. 2. (*a*) On 29th September 1944. (*b*), (*c*), (*d*) He was not employed in any capacity by either company after 29th September 1944. 3. The following amounts are now due to Watson by the companies : (*a*) For salary, £4 13s. ; (*b*) for other remuneration (including commission and expenses), Nil ; (*c*) for damages, £2 6s. 6d.

(*b*) That the companies do pay to Watson the sum of £6 19s. 6d. ; and that each party do bear his or its own costs of this arbitration, and that the costs of this my award be paid as to one-half thereof by Watson and as to the other half thereof by the companies.

The questions propounded in par. 24 of the special case were answered by the Full Court of the Supreme Court of New South Wales as follows :—

1. In the affirmative on both grounds.
2. Unnecessary to answer.

Watson v. *Automatic Fire Sprinklers Pty. Ltd.* (1).

From that decision the companies appealed to the High Court.

Barwick K.C. (with him *Myers*), for the appellants. A servant may accept the master's repudiation of the contract of service so as to get rid of his own obligation under the contract for the future, or he may keep the contract on foot, both as to himself and as to the master, and sue immediately or at the end of the period, but he can still only sue for breach and the quantification of his damages in wrongful dismissal. The right of a servant who has been wrongfully dismissed was discussed in *Smith's Leading Cases*, 12th ed. (1915), vol. 2, pp. 46-55, notes to *Cutter* v. *Powell* (2).

[DIXON J. referred to *Goodman* v. *Pocock* (3).

STARKE J. referred to *French* v. *Brookes* (4).]

(1) (1946) 46 S.R. (N.S.W.) 336 ; 63 W.N. 107.
(2) (1795) 6 T.R. 320 [101 E.R. 573].
(3) (1850) 15 Q.B. 576 [117 E.R. 577].
(4) (1830) 6 Bing. 354 [130 E.R. 1316].

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

The principle is that the contract is not a mere promise to pay money; the promises are not independent of each other; the promise by one party is to pay money in return for service; the promise by the other party is to render service in return for money (*Lucy* v. *The Commonwealth* (1); *Williamson* v. *The Commonwealth* (2); *Smith's Master and Servant*, 8th ed. (1931), pp. 121, 122). Upon the receipt by him of the notice the respondent ceased to be the general manager. Even if he did perform some work he did not do so as general manager, nor was the work he so performed, if at all, the work usually performed by the general manager. The regrading of the respondent from the position of general manager to the position he formerly occupied was not a breach of reg. 14 of the *National Security* (*Man Power*) *Regulations*. There is a distinction between the relationship of master and servant and the contractual obligations that govern it. A person may employ another under a succession of contracts of employment and yet it has been held that that can be a continuous employment; the relationship may continue notwithstanding the fact that there are various forms of contract (*Price* v. *Guest, Keen and Nettlefolds Ltd.* (3)). The objective of reg. 14 is not the alteration of contractual rights between employer and employee but the imposing of a restriction upon an employer putting an employee out of his service under the particular undertaking. The promoting or demoting of an employee within the service is not a termination of his employment within the meaning of the regulation. These views on reg. 14 harmonize, in general, with the views on the Essential Work (General Provisions) Order 1942 expressed in *George* v. *Mitchell & King Ltd.* (4) subject to the excision of the words " or express reminder " from the judgment of *Scott* L.J. (5). The facts and the particular form of the Man Power Order in that case should be carefully examined. There is no authority in law for the proposition that a prohibited act is itself null and void. The regulation is directed to employment, not to contracts. It provides not that a contract shall not be terminated, but that the relationship, the employment, shall not be terminated. The word " employ " is a word of various significations (*Elderton* v. *Emmens* (6)). The distinction between a contract regulating the relationship and the relationship is a sound distinction. The word " employment " in such a regulation as reg. 14 is directed rather to the relationship than to the particular contractual provisions which go to regulate it, on the assumption that the regulation stultifies anything done in breach of it (*Adrema*

(1) (1923) 33 C.L.R. 229, at pp. 237, 238, 248, 253.
(2) (1907) 5 C.L.R. 174.
(3) (1918) A.C. 760, at p. 771.
(4) (1943) 59 T.L.R. 153.
(5) (1943) 59 T.L.R., at p. 155.
(6) (1848) 6 C.B. 160, at pp. 176, 177, [136 E.R. 1213, at p. 1219].

Ltd. v. *Jenkinson* (1)). Where an employee is given a notice which is short as to time his right to damages is limited to wages for the period by which it is short. Notice and damages were discussed in *Harding* v. *Harding* (2). The employee is entitled to remain in the employment for a stipulated time to earn his wages. Damages are limited to the period by which that stipulated time is short. *Price* v. *Guest, Keen and Nettlefolds Ltd.* (3) disposes of any idea that a master may force his servant to remain in the employment *in infinitum*.

A. R. Taylor K.C. (with him *Asprey*), for the respondent. It has not been suggested by or on behalf of the appellants that there was not a wrongful dismissal of the respondent. The respondent is entitled to salary, commission and expenses up to 19th September 1945 and damages thereafter. The notice given in June 1944 having been withdrawn there was not, on any view of the matter, any effective dismissal prior to 29th September 1944, and the submission on behalf of the appellants that damages should be limited to one day because the notice was one day short must fail because until the last-mentioned date there was no cause of action upon which the respondent could or can make a claim. The respondent does not rely upon any doctrine of constructive service. The only question is : Whether or not in the circumstances the contract remained on foot ? " Wrongful dismissal " as between parties to a contract of service was discussed in *In re Rubel Bronze and Metal Co. Ltd.* v. *Vos* (4). It is conceded that a servant cannot remain a servant against the will of the master because if the servant be wrongfully dismissed and entirely excluded by the master he is not the master's servant for the reason that he cannot work for the master. The repudiation by one party standing alone does not terminate the contract, but the issuing of the writ in an action for wrongful dismissal, which is the servant's only practical remedy, amounts to an acceptance by the servant of the repudiation by the master of the contract (*Heyman* v. *Darwins Ltd.* (5)). Unless the repudiation be acted upon by the other party the contract of service is not terminated but remains on foot. An action for wrongful dismissal is a true action for breach of contract ; the contract is not thereby dissolved, but the relationship flowing from the contract was dissolved by the repudiation. The expressions " termination of the agreement " and " termination of the employment " were used interchangeably in the agreement. The breach

(1) (1945) 1 K.B. 446, at pp. 450, 451, 453.
(2) (1928) 29 S.R. (N.S.W.) 96, at pp. 99-107.
(3) (1918) A.C. 760.
(4) (1918) 1 K.B. 315, at pp. 320, 321.
(5) (1942) A.C. 356, at p. 361.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

thereof by the appellants did not terminate the contract. That breach was not treated as entitling the respondent to a discharge of the contract. The respondent earned his salary by doing his work and the arbitrator has so found. However, the only question before the Court is whether the contract remained in existence. A contract continues to exist although one party has repudiated it (*Lumley* v. *Wagner* (1); *Warner Brothers Pictures Incorporated* v. *Nelson* (2); *General Billposting Co. Ltd.* v. *Atkinson* (3); *William Robinson & Co. Ltd.* v. *Heuer* (4); *Price* v. *Guest, Keen and Nettlefolds Ltd.* (5)). It may be that even if a servant, in the case of a repudiation by the master of a contract of service, keeps the contract on foot he is not entitled to wages unless he performs his duties (*Heyman* v. *Darwins Ltd.* (6)). During the currency of reg. 14 of the *National Security* (*Man Power*) *Regulations* it was legally impossible, under that regulation without the consent of the appropriate officer, to terminate or vary the contract of employment (*George* v. *Mitchell & King Ltd.* (7); *Alexander* v. *Tredegar Iron & Coal Co. Ltd.* (8); *Marshall* v. *English Electric Co. Ltd.* (9); *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.* (10); *Re Steel Works Employees* (*Broken Hill Pty. Co. Ltd.*) *Award* (11); *Woolley* v. *Allen Fairhead & Sons Ltd.* (12)). Upon the authority of those cases the contract continued to exist until 19th September 1945. The respondent was employed under a special contract of employment in a special capacity and not as a general employee in a general capacity as was the position in *Adrema Ltd.* v. *Jenkinson* (13), therefore that case is not applicable to the matter now before this Court, nor does it bear any real relationship to the *George* v. *Mitchell & King Ltd.* (14) type of case.

Barwick K.C., in reply. The matter of the necessity of a servant electing as to whether he would accept the wrongful repudiation of a contract before he could sue on a *quantum meruit* was dealt with in *Lilley* v. *Elwin* (15). The issue has not been whether unilateral repudiation discharges the contract; it has been as to whether the relationship was being determined unilaterally as distinct from the contract.

Cur. adv. vult.

(1) (1852) 1 De G.M. & G. 604 [42 E.R. 687].
(2) (1937) 1 K.B. 209.
(3) (1909) A.C. 118.
(4) (1898) 2 Ch. 451.
(5) (1918) A.C., at p. 771.
(6) (1942) A.C., at pp. 361, 362.
(7) (1943) 59 T.L.R., at pp. 155, 156, 157.
(8) (1945) A.C. 286.
(9) (1945) 61 T L.R. 379.
(10) (1946) 62 T.L.R. 231.
(11) (1944) A.R. (N.S.W.) 138.
(12) (1946) 62 T.L.R. 294.
(13) (1945) 1 K.B. 446.
(14) (1943) 59 T.L.R. 153.
(15) (1848) 11 Q.B. 742 [116 E.R. 652].

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales upon a case stated by an arbitrator under the *Arbitration Act* 1902 (N.S.W.) in an arbitration between G. J. M. Watson and two companies, Automatic Fire Sprinklers Pty. Ltd. and Independent Industrial Investments Pty. Ltd. Watson was employed by the companies as general manager under an agreement under seal dated 12th October 1938 which contained an arbi ration clause. The agreement provided that after a term of six years had expired Watson could be dismissed upon three months' notice. The companies gave a notice of dismissal which was a day short of the three months' period and which was, therefore, ineffective to exercise the power of dismissal given by the contract. The contract also provided that if, in the opinion of the directors of the Automatic Fire Sprinklers Co., Watson should become unfit to act as general manager of the company, the directors might in their discretion determine the agreement by giving one month's written notice of termination or paying one month's salary in lieu of notice. The agreement provided that thereupon the agreement should be determined, but without prejudice to any existing rights of the parties. The directors of the Automatic Fire Sprinklers Co. passed a resolution declaring that they were of the opinion mentioned in the agreement and on 29th September 1944 gave him one month's notice of dismissal. Differences between the parties were referred to arbitration, the arbitrator found the facts as already stated, and further found that the directors of the company were not at any material time really of the opinion that Watson had become unfit to act as general manager. Therefore the dismissal of Watson on 29th September 1944, if a dismissal, was a wrongful dismissal.

The position was complicated by the fact that the business of each of the companies was a protected undertaking, and was therefore subject to the provisions of the *National Security* (*Man Power*) *Regulations*. Regulation 14 (1) of those Regulations provided that an employer carrying on a protected undertaking should not, except with the permission in writing of the Director-General or of a person authorized by him, terminate the employment in the undertaking of any person employed therein, and reg. 14 (2) provided that a person employed in a protected undertaking should not, without permission, change or terminate his employment. These regulations were in force on 29th September 1944, and the company made an effort to comply with them by stating in a letter sent to Watson informing him of his dismissal from the position of general manager that the determination of the agreement did not terminate his

H C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Latham C.J.

employment with the company, and that until further notice his position and duties in the companies would be New South Wales manager at a salary of £10 a week. The directors further informed Watson that it had been decided to give him six months' leave of absence.

The arbitrator found as a fact that Watson did not accept this dismissal as putting an end to the contract of employment and that he continued to offer his services as general manager. He attended the office of the companies and was ready and willing to perform the duties of general manager " and did perform some of the work previously done by him as general manager and maintained the attitude that his employment as general manager was still subsisting." The companies, on the other hand, " maintained the attitude that Watson's employment as general manager had been determined on the 29th September, 1944." The companies were willing to pay Watson a salary of £10 a week, but he declined to accept that salary, and in fact received no payment from the companies after September 1944.

On 19th September 1945, after the companies had ceased to be protected undertakings (so that the man power regulations were no longer applicable), Watson was excluded by the companies from their office, and the arbitrator found that on that date he was wrongfully dismissed from his employment as general manager under the agreement if that employment had not been terminated on 29th September 1944. The arbitrator stated his award in the form of a special case in which he submitted the following questions for the opinion of the court :—

" (1) Whether, on the facts as found by me, the purported dismissal of Watson by the companies on 29th September 1944 was ineffectual in law to terminate Watson's employment as general manager, by reason of : (*a*) reg. 14 of the *National Security* (*Man Power*) *Regulations*, or (*b*) Watson's non-acceptance of the purported dismissal as termination of his employment.

(2) If question 1 be answered : (*a*) No, (*b*) No, whether the measure of the damages to which Watson is entitled by reason of his wrongful dismissal on 29th September 1944 is limited, having regard to the facts stated in pars 7 to 16 inclusive of this case, to an amount equal to the remuneration he would have earned by the continuance of his employment for one additional day."

The Full Court answered questions 1 (*a*) and (*b*) in the affirmative. Paragraph 26 of the award states that if questions 1 (*a*) and 1 (*b*) are answered in the affirmative the arbitrator awards (1) that Watson is no longer the general manager of the companies ; (2) that he

ceased to be general manager on 19th September 1945 and was not thereafter employed in any capacity by either company; and (3) that the following amounts were due to Watson by the companies :—" (*a*) for salary, £830 ; (*b*) for other remuneration (including commission and expenses), £630 ; (*c*) for damages, £350 "—a total of £1,810.

In the reasons for judgment of the Full Court emphasis is placed upon the well-established rule that a contract cannot be brought to an end by breach by one party or by unilateral repudiation of its obligations. The contract continues in existence notwithstanding such breach or repudiation unless the other party accepts the breach or repudiation as discharging the contract and the breach or repudiation is of such a character as to entitle him to do so. The Full Court has applied this principle in the following way : the contract of employment was not terminated by the wrongful dismissal of Watson on 29th September 1944, which was a unilateral repudiation of the contract by the employers ; the contract continued in existence unimpaired ; the servant, Watson, was always ready and willing to perform his contract, and therefore was entitled to his salary until 19th September 1945, when he claimed damages for wrongful dismissal (to which he was entitled) and so did then (but not before) treat the contract as discharged.

The Full Court further held that the *National Security* (*Man Power*) *Regulations* made it impossible in law for the employer to terminate the employment of the servant without the specified permission, which permission was never given, with the result that the employment, by reason of the Regulations, continued until 19th September 1945, when Watson was effectively, though wrongfully, dismissed.

On the first point the learned Chief Justice, with whom *Street* and *Maxwell* JJ. agreed, said (1) : " The statement in *Smith's Leading Cases*, 11th ed. (1903), vol. II., p. 48, repeated by *Higgins* J. in *Williamson* v. *The Commonwealth* (2), that a servant who has been wrongfully dismissed cannot wait till determination of the period for which he was hired and then sue for the whole of his wages cannot be supported as a general proposition. It is correct only in cases in which, by the contract of employment, the actual doing of work is made a condition precedent to the right to wages."

The result of the decision of the Full Court is that Watson receives his full salary and other payments under the contract from 29th September 1944 to 19th September 1945, though there is no finding that he performed the duties of the position to which that salary and

(1) (1946) 63 W.N. (N.S.W.) 107, at p. 110.

(2) (1907) 5 C.L.R., at p. 185.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Latham C.J.

remuneration were attached ; and, further, that he receives damages for wrongful dismissal upon the basis that he is entitled to three months' notice, which he did not receive when he was finally dismissed on 19th September 1945.

The wrongful dismissal of a servant is sometimes described as a repudiation of the contract of employment, as, for example, in *In re Rubel Bronze and Metal Co. Ltd.* v. *Vos* (1). "Repudiation" is a very ambiguous term, as is pointed out in *Heyman* v. *Darwins Ltd.* (2), where Lord *Wright* mentions six senses in which the term is used. Where, however, a servant is wrongfully prevented by his employer from performing the work which he was employed to do, there is, in my opinion, an actual breach of the contract, and not merely a statement of intention by the other party that he will not perform the contract. Such a breach goes to the root of the contract and entitles the other party to elect to treat the contract as discharged. Neither repudiation nor an actual breach in itself brings about a discharge of the contract independently of such acceptance : *Heyman* v. *Darwins Ltd.* (3). The servant need not accept a wrongful dismissal as discharging the contract. Generally, however, it would be immaterial whether he did so or not, because his rights and remedies would, in view of the special nature of contracts of personal service, be the same in either case.

But it might be important to him to accept the breach as discharging the contract in some cases in order to relieve himself of obligations by which he would otherwise be bound as, for example, a covenant in restraint of trade (see *General Billposting Co. Ltd.* v. *Atkinson* (4)). Again, where a servant is bound by a contract the terms of which are such that he is not entitled to claim any remuneration unless he serves for a specified period, and his employer wrongfully dismisses him before he has become entitled to be paid his wages, he is not entitled to any remuneration under the special contract because he has not earned it in accordance with its terms. He may claim on a *quantum meruit* for the value of the work which he has done in the broken period, but he can do this only if the special contract is no longer open, and therefore if he has exercised his right to accept the breach or repudiation by the master as discharging the contract: See *Cutter* v. *Powell* (5), *Smith's Leading Cases*, 13th ed. (1929), vol. II., p. 49, and the notes thereto (*Lilley* v. *Elwin* (6)).

But if a dismissed servant, as in the present case, does not accept his dismissal as a breach entitling him to regard the contract as

(1) (1918) 1 K.B., at p. 321.
(2) (1942) A.C., at pp. 378, 379.
(3) (1942) A.C., at p. 361.
(4) (1909) A.C. 118.
(5) (1795) 6 T.R. 320 [101 E.R. 573].
(6) (1848) 11 Q.B. 742 [116 E.R. 652].

discharged, he cannot ignore the wrongful dismissal and claim still to be the servant of his employer with the rights of a servant. The dismissal, though wrongful, is not a nullity. That this is the case is recognized to some extent in the judgment of the learned Chief Justice in the Full Court, where his Honour says (1) that, except where authority has been given of so special a kind as to be irrevocable, " there is nothing to prevent the employer from, effectively though wrongfully, withdrawing from the employee the legal right to act on his behalf in any respect." Thus the wrongful dismissal determines the relationship of master and servant created by the contract, even though the servant may not have accepted his dismissal as entitling him to regard the contract as discharged. Any other view would in effect grant specific performance of a contract of personal service, a remedy which the courts have always refused in such a case (see *Lucy* v. *The Commonwealth* (2), per *Knox* C.J.)

Therefore if an employer wrongfully dismisses a servant and persists in refusing to allow him to do the work for which his contract of employment provides, the position is that the only remedies which the servant has (apart from electing to regard the contract as discharged, and thereby releasing himself from any obligations of the contract, and, if he chooses, suing upon a *quantum meruit* where he has done work for which he has not been paid) are (1) an action for the enforcement of any rights which have accrued under the contract, e.g. for wages earned in accordance with the terms of the contract but not paid, and (2) an action for wrongful dismissal. There is authority that when he sues for wrongful dismissal an allowance may be included in the damages awarded which might, if the servant had so elected, have been recovered upon a *quantum meruit* upon an *indebitatus* count : *Goodman* v. *Pocock* (3).

In *Williamson* v. *The Commonwealth* (4), *Higgins* J. said : " There was for some time an impression that a servant could wait until the end of his term, doing nothing, but remaining ready and willing to work ; and then sue for his wages for the balance of the term. This view seemed to rest on the theory of a status in the servant, such as could not be affected by a wrongful act ; but the view has long since been exploded : 2 Sm. L.C., 11th ed. (1903), p. 48 ; *Goodman* v. *Pocock* (3)."

The law was stated in the same terms in *Lucy* v. *The Commonwealth* (5).

(1) (1946) 63 W.N. (N.S.W.), at p. 110.
(2) (1923) 33 C.L.R., at p. 237.
(3) (1850) 15 Q.B. 576 [117 E.R. 577].
(4) (1907) 5 C.L.R., at p. 185.
(5) (1923) 33 C.L.R., at pp. 237, 248, 253.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Latham C.J.

With respect therefore I do not agree that the statements quoted in the reasons for judgment of the Supreme Court from *Smith's Leading Cases*, 11th ed. (1903), vol. II, p. 48, and *Williamson* v. *The Commonwealth* (1) cannot be supported as a general proposition. The general rule is, in my opinion, as there stated, namely that a servant who has been wrongfully dismissed cannot wait until the determination of the period for which he was hired and then sue for the whole of his wages. It is only in an exceptional case, where the payment of money to the servant does not depend upon his doing work, that the servant can recover remuneration without doing work. He cannot remain idle, even though he truly alleges readiness and willingness to do the work, and claim wages or salary as if he had done the work. The rule that a dismissed servant is bound to mitigate his damages by obtaining other suitable employment, if available, is inconsistent with the view that he is entitled to do nothing and to sue for his full wages as if he had earned them. The duty to mitigate damages has never been held to depend upon whether the servant had accepted a breach or a repudiation of a contract as entitling him to regard the contract as at an end and upon his exercising this right. The respondent did not argue in this Court that at common law the dismissed servant remained the servant of the employer against the employer's will.

An agreement may amount to an agreement for an annuity or other periodical payment with an independent promise by the beneficiary to do work for the other party to the agreement, but the ordinary contract of employment is not of that character. The general rule with respect to contracts of employment was stated in *Browning* v. *Crumlin Valley Collieries Ltd.* (2), by *Greer* J. in the following words " The consideration for work is wages, and the consideration for wages is work." In *O'Grady* v. *M. Saper Ltd.* (3), *MacKinnon* L.J. in the Court of Appeal said : " It was rightly said . . . by *Atkinson* J. (*Petrie* v. *Mac Fisheries Ltd.* (4)), ' The question must depend, as is indicated in the notes to *Cutter* v. *Powell* (5) (*Smith's Leading Cases*, 13th ed. (1929), vol. 11, p. 49), on the terms of the contract. " The right to wages depends upon whether the consideration therefor has been performed." It is submitted in the notes to that case, as I think rightly, that it must be ascertained from the contract whether the consideration for the payment of wages is the actual performance of the work, or whether the mere readiness and willingness, if of ability to do so, is the consideration.' "

(1) (1907) 5 C.L.R. 174.
(2) (1926) 1 K.B. 522, at p. 528.
(3) (1940) 2 K.B. 469, at p. 473.
(4) (1940) 1 K.B. 258, at p. 269.
(5) (1795) 6 T.R. 320 [101 E.R. 573].

In the present case the contract between the parties (clause 5) provides for the payment of salary, expenses, bonuses and commission "as consideration for his" (Watson's) "services and for the faithful observance and performance of the terms and conditions of these presents by him to be observed and performed." It is therefore, I think, clear in the present case that Watson was not entitled to salary and other payments under the contract unless he did the work of general manager for which the contract provided. An attempt was made in this Court to argue that the arbitrator had found that he had in fact performed the work of general manager. If the arbitrator had meant so to find, it would have been very easy indeed to state the finding in unambiguous and unequivocal language. I have already referred to the findings of the arbitrator that Watson maintained that he was still general manager, that the company maintained the attitude that he was not general manager, but that he did some of the work which the general manager had previously done. In my opinion it would not be reasonable to interpret this statement as meaning that the arbitrator found that Watson had performed the duties of general manager of the companies up to 19th September 1945. Accordingly, in my opinion, in this case there can be no valid claim at common law for salary after 29th September 1944, because Watson did not do the work of general manager.

The first question submitted in the case stated asks whether on the facts as found by the arbitrator "the purported dismissal of Watson by the said companies on 29th September 1944 was ineffectual in law to terminate Watson's employment as general manager by reason of— . . . (*b*) Watson's non-acceptance of the said purported dismissal as termination of his said employment." In my opinion, for the reasons which I have stated, this part of question (1) should be answered in the negative.

Question 1 (*a*) asks whether the purported dismissal was ineffectual by reason of reg. 14 of the *National Security* (*Man Power*) *Regulations*. This regulation provides—"An employer carrying on a protected undertaking . . . shall not except with the permission in writing of the Director-General or a person authorized by him—(*a*) terminate the employment in the undertaking of any person employed therein." The *National Security Act* 1939-1943, s. 10, provides that a contravention of a regulation under the Act shall be an offence against the Act. The argument on behalf of the respondent is that the dismissal of any person in breach of the Regulations is a nullity, that is, that Watson simply could not be dismissed, and therefore never was dismissed, and accordingly still held his position as general manager

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Latham C.J.

until 19th September 1945, when the Regulations had ceased to operate. It was argued that if a statute prohibits the making of a contract the result is that the prohibited contract cannot be made—it would be void if persons attempted to make it. By analogy it is said that if the law prohibits the termination of an employment the result is that the employment cannot be terminated. It is true that a prohibition of the making of a contract has the result that any pretended contract in breach of the law would be void. As was said in *Roach* v. *Bickle* (1), "Where a Statute prohibits a transaction either expressly or by implication, no such transaction can be validly created." I call particular attention to the word "validly." But the fact that a statute prohibits the doing of an act under a penalty does not show that the act cannot be done.

In *Cope* v. *Rowlands* (2), *Parke* B. said: "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect."

It is only in this way that operation can be given to such a law. In that case the statute imposed a penalty upon brokers acting as such in the City of London without a licence. Brokers who had no licence sued for work and labour done as brokers within the City of London. It was held that they could not recover. But it could not be suggested that they had not done the work.

In the present case the regulation imposed a penalty upon the act of terminating the employment of an employee in certain circumstances. It would, in my opinion, be attributing a strange intention to the legislature to hold that the effect of penalizing an act was that it was impossible for any person to do the act which was penalized. The result of so holding would be that no person could ever be convicted for a breach of the regulation because he could say: "The act alleged against me is prohibited. It is true that I have purported to do it, but I was incapable of doing it. What I did was a nullity and therefore I did not terminate the employment and I cannot be convicted." An employer terminates the employment of a servant when he dismisses him, though, as I say hereafter, such a dismissal does not put an end to the contract between the parties. An argument that a dismissal because wrongful was a nullity was raised and rejected in both *Williamson's Case* (3) and *Lucy's Case* (4).

The meaning of the regulation, in my opinion, is that the employment cannot lawfully be terminated. If it is terminated unlawfully,

(1) (1915) 20 C.L.R. 663, at p. 671.
(2) (1836) 2 M. & W. 149, at p. 157 [150 E.R. 707, at p. 710].
(3) (1907) 5 C.L.R., at p. 185.
(4) (1923) 33 C.L.R., at pp. 237, 248, 249, 252, 253.

certain criminal and civil consequences ensue. But even if the regulation means that what purports to be a dismissal is a complete nullity, so that it must be taken never to have happened, it still does not follow that the servant is entitled to wages without working. Let it be supposed that the dismissal never took place. The contract of employment is, upon any view, still in existence. But if, under the contract, wages cannot be earned without work, the continued existence of the contract cannot entitle the servant to wages without work.

It might have been provided in the regulation that the employment of a servant should continue in certain circumstances, notwithstanding any act of the employer which would, had the regulation not been passed, have been a dismissal and that, notwithstanding any such act, the servant should be entitled to his wages, or some other payment. There was a provision of this character in the order considered in the case of *George* v. *Mitchell & King Ltd.* (1), upon which the plaintiff relied very strongly. In that case the Court considered an Essential Work Order which provided that in certain undertakings employers should not terminate the employment of specified persons, except for serious misconduct, without the permission of a national service officer, and that a specified person should not leave his employment without such permission. In these particulars the order (except for the reference therein to serious misconduct) corresponded with reg. 14 of the *Man Power Regulations*. But the order also contained a provision entitling a specified person to payment by his employer if he was capable of and available for work. A specified person was dismissed by his employer without the permission of a national service officer. The dismissed employee remained available for service for a period and was paid for a time in accordance with the order, though he did no work. Then the employer stopped payments to him and, after a second period, during which he remained available for work, he took other employment. He was held to be entitled to payment in respect of the second period but not in respect of the period after he accepted other employment. So far the decision is plain enough and creates no difficulties and gives no assistance in the present case. The servant was held to be entitled to payments in accordance with the express terms of the order for the period during which he was available for work. But the case is relied upon as establishing that under such a provision as reg. 14 the employer is incapable (lawfully or unlawfully) of terminating the employment of a servant. The argument then proceeds—the contract between the parties continues to exist and the servant is therefore entitled to wages. In my opinion the case cited (1) should, for

(1) (1943) 59 T.L.R. 153.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Latham C.J.

reasons which I proceed to state, not be regarded as an authority leading to or supporting the final conclusion.

The order which was under consideration in *George* v. *Mitchell & King Ltd.* (1) provided that an employer should in respect of every prescribed period (in the case in question every week) pay to every specified person (the plaintiff in the action was such a person) a sum which was not less than the normal wage for the prescribed period if that person was during the normal working hours capable of and available for work and willing to perform other reasonable services if his usual work was not available. Thus there was an express provision entitling the servant, not to wages, but to " a sum not less than normal wages." The actual decision of the court was only that, so long as the plaintiff was available for work, he was entitled to the payment of this sum.

But the respondent relies upon the following statement of *Scott* L.J. :—" The rights of the parties to dissolve their contract are not annulled ; they are only subjected to conditions of written leave from the national service officer, and to the condition—or express reminder—that without such leave the obligation of the employer to go on paying ' the normal wage ' will continue as long as both the employed person and his proper work continue to be ' available,' within the meaning of the Order" (2).

The obligation of the employer to pay, not " the normal wage " as stated, but " a sum which is not less than the normal wage," to which reference is here made, is plainly an obligation depending upon the express provision in the order that such a sum is to be paid if the employee is " available." There is no such provision in reg. 14. *Goddard* L.J. said : " If a statute says that a person shall not terminate a contract except with the permission of a third person, in my opinion it follows that he is incapable of terminating it without that permission. If he refuses to employ the person he commits an offence, but the contract is not terminated. I cannot see that there is any difference between saying a person shall not terminate an employment and an employment shall not be terminated. If the employment cannot be terminated, it remains in force with all its consequences ; the employed person remains in the service, and consequently has a right to his wages, and it is only fair that he should have this right as he cannot enter employment elsewhere unless and until he gets permission of the national service officer " (3).

I agree that the contract cannot be terminated by a wrongful unilateral act, and that neither the employer nor the employee could

(1) (1943) 59 T.L.R. 153.
(2) (1943) 59 T.L.R., at p. 155.
(3) (1943) 59 T.L.R., at p. 156.

lawfully terminate it without the necessary official consent, and that the regulation gave to a specified person who remained available &c. a right to be paid a sum of money. But I do not agree that the learned Lord Justice should be regarded as laying down as a rule of law that the fact that a contract of employment is not lawfully terminated gives the servant a right to wages whether or not he does any work. It was the express and very special provision of the regulation, and not the mere continuance in existence of the contract, which gave the right to the sum which is referred to, not with complete accuracy, as " wages."

The court held that the contract of employment was not brought to an end by the dismissal of the employee. This statement does no more than repeat the principle to which reference has already been made—that one party to a contract cannot by a wrongful unilateral act bring the contract to an end. If an employer wrongfully dismisses a servant he breaks, but does not terminate, the contract, whether or not such a provision as reg. 14 is applicable. In my opinion *George* v. *Mitchell & King Ltd.* (1) does not assist the argument of the respondent.

The respondent also relied upon the case of *Adrema Ltd.* v. *Jenkinson* (2), a decision of a Divisional Court upon a provision in an Essential Work Order prohibiting the termination of employment in scheduled undertakings except with the permission in writing of the national service officer. The only point decided in the case was that a change in the work to be done by a woman within the scope of her employment was not a termination of her employment.

The dismissal of an employee in a protected undertaking may be wrongful either because it is a breach of the contract of employment (e.g. because insufficient notice has been given or because there is no good cause for dismissal) or because the necessary permission of the Director-General or some other authorized person has not been obtained. In either case, in my opinion, the employee has his ordinary civil remedies. If he sues upon the contract for damages for wrongful dismissal it would not be a good defence for the employer to say that he had not dismissed him because he was incapable of dismissing him. The regulation should not, in my opinion, be read as depriving the employee of his right of action by making any dismissal (lawful or wrongful) impossible. Even if the permission of the proper officer for dismissal were given, the employee would still, in my opinion, have the right to sue for wrongful dismissal if the dismissal was wrongful under the terms of his contract. But if the permission of the officer is not given the dismissal is necessarily

(1) (1943) 59 T.L.R. 153. (2) (1945) 1 K.B. 446.

H. C. OF A. 1946. AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON. Latham C.J.

wrongful and the employee has all his civil rights according to his contract which, I entirely agree, is not terminated in the sense of " discharged " so as to be at an end, and the employer is also liable to a penalty. But none of these considerations displace the general rule that the servant cannot recover wages or salary unless he does the work for which wages or salary are the reward.

Of course the position would have been different if the Regulations included a provision for the payment of wages notwithstanding dismissal or of a sum equivalent to wages—as in the case considered in *George* v. *Mitchell & King Ltd.* (1). The *Man Power Regulations* do not ignore this kind of problem, but they make only a limited provision for solving it. Thus reg. 14 (3A) provides for cases of persons " stood down or suspended from duty otherwise than in pursuance of reg. 16A." On resuming duty they are entitled to be paid " remuneration as if they had performed their duties." Regulation 16A contains elaborate provisions relating to suspension for serious misconduct. The employer must report the grounds of suspension to the Director-General or other authorized person and the Director-General or such person or a Local Appeal Board may direct reinstatement with payment of wages for the period of suspension. These provisions were not applicable in the present case because there was no suggestion of serious misconduct or of suspension therefor. They are, however, important as showing that in that case, as in the case of suspension followed by resumption of duty (reg. 14 (3A)), express provision has been made for payment of wages irrespective of the performance of work. In the case of a termination of employment which is wrongful and punishable as an offence by reason of reg. 14 (1), there is a conspicuous absence of any such provision and, in my opinion, there is no reason for implying it.

For these reasons I am of opinion that the question whether the purported dismissal of Watson on 29th September 1944 was ineffectual to terminate his employment by reason of reg. 14 of the *Man Power Regulations* should also be answered in the negative.

The second question enquires as to the measure of damages. It was argued for the appellant that as Watson was on 29th September 1944, being entitled to three months' notice, given only one day less than three months' notice, he was entitled to damages only in respect of one day. In my opinion there is no substance in this contention. Watson was entitled to three months' notice. Any less notice was ineffectual under the contract and did not affect his rights in any particular. He was therefore entitled to a full three months' notice and to damages upon the basis that he did not receive such

(1) (1943) 59 T.L.R. 153.

notice. In my opinion the second question should be answered in the negative.

Upon the basis of the answers which in my opinion should be given to the questions, the result would be that the award of the arbitrator should be for an amount of £354 13s., as set out in par. 27 of the case stated.

In my opinion the appeal should be allowed and the order of the Full Court varied by declaring that all the questions asked should be answered in the negative.

RICH J. After studying the decision of the Court of Appeal in *George* v. *Mitchell & King Ltd.* (1), and the judgment of *Atkinson* J. in *Woolley* v. *Allen Fairhead & Sons Ltd.* (2), which follows this decision, and comparing the orders upon which those cases are based with the *National Security* (*Man Power*) *Regulations*, I have come to the conclusion that they govern the interpretation of the Regulations. There is no valid distinction between the article of the Order on which the Court of Appeal founded its decision and reg. 14 of the *Man Power Regulations*. It is little to the point that if the Court of Appeal had chosen to do so it might have found another article, viz. art. 4 (1) (*d*) in the Order upon which the same conclusion might conceivably have been reached. It preferred to rely on art. 4 (1) (*a*) which is indistinguishable from the Australian reg. 14. The interpretation attached to these statutory provisions is expressed by Lord *Goddard* C.J., as he now is, in a single sentence : " If a statute says that a person shall not terminate a contract except with the permission of a third person, in my opinion it follows that he is incapable of terminating it without that permission " (3). *Atkinson* J. puts it that the attempt to terminate " was ineffective, and the employment continued " (4). I see no reason why we should refuse to follow and apply these decisions. The application of the doctrine upon which they proceed to the present case is made plain by two paragraphs in the learned arbitrator's special case. In par. 18 he says :—" It was contended before me on behalf of Watson that the purported dismissals were ineffectual to determine his employment, for the reasons—(1) that by reason of reg. 14 of the *National Security* (*Man Power*) *Regulations* each of the purported dismissals was in law a nullity ; and (2) that a purported dismissal of a servant, if wrongful, does not determine the servant's employment unless it be accepted by him as a determination thereof."

(1) (1943) 59 T.L.R. 153.
(2) (1946) 62 T.L.R. 294.
(3) (1943) 59 T.L.R., at p. 156.
(4) (1946) 62 T.L.R., at p. 295.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Rich J.

After stating what he would find if this contention were not upheld, the learned arbitrator says in par. 20 :—"If the said contention should be upheld for either or both of these reasons, I find that Watson's employment as general manager of each of the companies was not determined on 29th September 1944 or at any time before 19th September 1945."

It will be seen that the finding expressed in par. 20 follows if the contention succeeds on either ground. For the reasons I have given, I am clearly of opinion that we should hold that it does for the first reason stated in par. 18. I see no reason in these circumstances for examining the validity of the second ground and I shall not do so more especially because the parties appear to differ as to the exact contention it means to describe. I answer the questions of law set out in par. 24 of the case stated as follows :—

1. (*a*) Yes.
1. (*b*) Unnecessary to answer.
2. Does not arise.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales in Full Court upon an award stated in the form of a special case pursuant to the provisions of the *Arbitration Act* 1902, s. 9 (*a*).

By an agreement dated 12th October 1938 the appellants, the Automatic Fire Sprinklers Pty. Ltd. and the Independent Industrial Investments Pty. Ltd. respectively, appointed the respondent, Watson, general manager for the term of six years from 1st October 1937 subject to the terms and conditions set out in the agreement. Shortly, the agreement provided that the respondent should serve the appellants as manager in their respective businesses, control the general management and businesses of both appellants subject to any directions on the part of boards of directors and perform such duties and exercise such discretions as would generally be entrusted to a responsible general manager in the conduct of such businesses. As a consideration for his services and for the faithful observance and performance of the terms and conditions of the agreement the respondent was to receive an annual sum and various allowances.

The agreement provided for its termination in various ways one of which was three months' written notice of termination. The agreement also provided that in the event of the respondent continuing in his employment after the expiration of the term of six years the conditions of the agreement should apply to and be binding on the parties during such continued employment. The respondent did continue in his employment after the expiration of the term of six years.

But the arbitrator found that on 29th September 1944 the appellants purported to dismiss the respondent from his position as general manager and that such dismissal was a wrongful dismissal if effective in law to determine his employment. He also found that on 19th September 1945 the appellants wrongfully dismissed the respondent from his employment if such employment had not been terminated on 29th September 1944. These findings confuse, I think, a termination or rescission of the agreement and a breach of its terms determining the relation of master and servant for the future (*Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1)).

The agreement was not terminated on 29th September 1944 because notices given and relied upon by the appellants were not, as the arbitrator found, in accordance with its terms and were consequently ineffective and because the termination of the agreement was prohibited by reg. 14 of the *National Security* (*Man Power*) *Regulations*. And there was no rescission of the agreement because, as the arbitrator also found, the respondent had not elected to rescind it for any breach of its terms on the part of the appellants. So I take it that the findings mean that the respondent was wrongfully dismissed from his employment on 29th September 1944 in breach of the terms of the agreement with the appellants.

On these findings, and laying aside for the moment the effect of the *National Security* (*Man Power*) *Regulations*, the rights and obligations of the parties are fairly well settled :—

1. The right of the respondent to his remuneration depends upon the terms of the agreement. And by the agreement the consideration for the services is the actual performance of the duties undertaken by him (cf. *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (2) ; *O'Grady* v. *M. Saper, Ltd.* (3)).

2. The respondent cannot sue for his whole remuneration as a debt due to him in respect of complete performance of the agreement on his part relying on his readiness and willingness to perform the agreement (*Smith* v. *Hayward* (4) ; *Fewings* v. *Tisdal* (5) ; *Elderton* v. *Emmens* (6) ; *Emmens* v. *Elderton* (7) ; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (8)).

3. But the respondent could sue for remuneration that had vested and become due and payable at the time of his dismissal (*Taylor* v

(1) (1888) 39 Ch. D. 339, at pp. 364, 365.
(2) (1888) 39 Ch. D., at p. 364.
(3) (1940) 2 K.B., at p. 473.
(4) (1837) 7 Ad. & E. 544 [112 E.R. 575].
(5) (1847) 1 Ex. 295 [154 E.R. 125].
(6) (1848) 6 C.B. 160 [136 E.R. 1213].
(7) (1853) 13 C.B. 495 ; 4 H.L.C. 624 [10 E.R. 606].
(8) (1888) 39 Ch. D., at pp. 364, 365.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Starke J.

Laird (1); *Button* v. *Thompson* (2); *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3)).

4. And he may elect to treat the agreement as rescinded and sue immediately on a *quantum meruit* for services actually rendered or he may sue immediately on the agreement for the breach thereof in wrongly dismissing him from his employment. "But he cannot do both" (*Lilley* v. *Elwin* (4); *Archard* v. *Hornor* (5); *Goodman* v. *Pocock* (6)). The measure of damages in an action for wrongful dismissal is not however the remuneration agreed upon but the actual loss sustained including compensation for the period of service up to dismissal (*Goodman* v. *Pocock* (7); *Lucy* v. *The Commonwealth* (8)).

But it is contended for the respondent that he is entitled by reason of the provisions of the *National Security* (*Man Power*) *Regulations* already mentioned to his whole remuneration under his agreement of service as if he had actually performed the duties undertaken by him: See *George* v. *Mitchell & King Ltd.* (9).

Regulation 14 of these Regulations, which is applicable to this case, provides that an employer carrying on a protected undertaking or any person or body of persons empowered to terminate the employment of persons employed in the undertaking, shall not, except with the permission in writing of the Director-General or of a person authorized by him, terminate the employment in the undertaking of any person employed therein, and that a person employed in a protected undertaking shall not except with the like permission change or terminate his employment. Doubtless the contravention of this regulation creates an offence. But it makes no provision in respect of remuneration except in special cases where an employee is discharged or refuses to work in contravention of the Regulations. Workmen "stood down or suspended" other than in accordance with the Regulations are entitled in certain circumstances to the remuneration which would have been paid to them if they had performed their duties (See regs. 14 (3A) and (16A)), but otherwise the Regulations are silent.

Consequently, it appears to me that the general rules of law and any special conditions of the agreement between the parties and relevant industrial awards or determinations must govern the rights and duties of the parties in case of a wrongful dismissal

(1) (1856) 1 H. & N. 266 [156 E.R. 1203].
(2) (1869) L.R. 4 C.P. 330.
(3) (1888) 39 Ch. D., at p. 365.
(4) (1848) 11 Q.B., at p. 755 [116 E.R., at p. 657].
(5) (1828) 3 Car. & P. 349 [172 E.R. 451].
(6) (1850) 15 Q.B. 576 [117 E.R. 577].
(7) (1850) 15 Q.B. 576 [117 E.R. 577].
(8) (1923) 33 C.L.R., at p. 253.
(9) (1943) 59 T.L.R. 153.

whether that dismissal be wrongful because of the contravention of contractual or other stipulations or of the *Man Power Regulations*. A clear and distinct provision is necessary if established rules of law are to be altered.

The case of *George* v. *Mitchell & King Ltd.* (1) depends upon the special provisions of the English order that an employer shall pay to employees a sum not less than the normal wage if his employee is available for work and willing to perform other reasonable services if his usual work be not available. Some general observations of the Lords Justices in that case (1) must be related to those provisions and should not be treated as some overriding principle of construction applicable to regulations dealing with the same subject matter but in different language.

This appeal should be allowed and the questions stated answered as follows :—

1. (*a*) The purported dismissal of the respondent was ineffectual to determine the agreement of 12th October 1938 mentioned in the case but the dismissal of the respondent on 29th September 1944 was wrongful and in breach of the agreement and effectively terminated the relation of master and servant under the agreement notwithstanding reg. 14 of the *National Security* (*Man Power*) *Regulations* and the respondent's non-acceptance of the purported dismissal as termination of his employment.

2. The measure of damages to which the respondent is entitled by reason of his wrongful dismissal on 29th September 1944 is not so limited. The result is, I think, that the award of £354 13s. together with costs of arbitration and of the award takes effect ; otherwise the matter should be remitted to the arbitrator.

Dixon J. In certain forms of executory contract where the promise of one party is to pay the other money in consideration of his transferring property, of his doing work, of his serving the former as his master, and, perhaps, of his providing other tangible things or definite services, the money to be paid is regarded as the price of or reward for the property or service when and so often as the transfer of the one or the performance of the other affords an executed consideration. In these contracts the promise to pay the price or reward is not construed as a simple obligation to pay a sum or sums at a future date supported solely by a consideration consisting in the corresponding promise to transfer the property, do the work, serve, or provide the things or services by the other party, so that a mere readiness and willingness on the one side of the latter to perform his

(1) (1943) 59 T.L.R. 153.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Dixon J.

part is enough to entitle him to the payments, notwithstanding that, whether owing to the fault of the former, or without fault on either side, the property is not transferred, the work is not done, the relation of master and servant ceases, or the things or services are not provided. The most familiar example is that of the sale of goods. There the common understanding of an agreement to sell is that it is the goods and not the promises to deliver that are to be paid for. The result is that, if the seller tenders goods in accordance with his contract but the buyer rejects them in breach of his contract, the seller cannot sue for the price ; his remedy is for unliquidated damages for non-acceptance : Cp. *Plaimar Ltd.* v. *Waters Trading Co. Ltd.* (1).

It is nothing to the point that the seller remains ready and willing to deliver the goods and refuses to treat the rejection as discharging the contract but, on the contrary, " keeps it open." Even so the price is not payable, for the reason that it is for the goods that the price is to be paid and until they are accepted there is no indebtedness. It is, of course, open to contracting parties to make what agreement they like about the matter. They may, if they choose, contract for payment of a sum certain at a time certain and make it clear that the payment is independent of the transfer of the goods. But that is not how an agreement to sell is ordinarily understood. The point is well brought out by the differences of opinion which have arisen concerning contracts for the sale of land. At one time there was a tendency to say that instalments of purchase money could not be recovered by a common law action because the purchase price was payable for the land, not for the promise to convey, and was, therefore, not recoverable except upon conveyance (*Laird* v. *Pim* (2); *Smith* v. *Noske* (3) ; and see per *Salmond* J. in *Ruddenklau* v. *Charlesworth* (4)). That is to say the construction given to the promise of the purchaser of land was like that given to the promise of the buyer of goods. The result would have been that a vendor of land could sue at law only for damages for loss of the sale. But more lately instalment contracts for the purchase of land have been treated as importing an obligation on the part of the purchaser to pay sums certain on fixed dates in exchange for a promise to convey and at the risk that, for some unforeseen reason, a conveyance may never be obtained. A discussion concerning these rival views of the character of the contract for the sale of land on terms and concerning the authorities in which they appear will be found in *Reynolds* v. *Fury* (5). One view of the payment in advance of the

(1) (1945) 72 C.L.R. 304, at p. 318.
(2) (1841) 7 M. & W. 474 [151 E.R. 852].
(3) (1913) V.L.R. 329.
(4) (1925) N.Z.L.R. 161, at p. 164.
(5) (1921) V.L.R. 14.

price, whether for land or for goods, is that, even where it is stipulated for independently of the actual transfer of the property, it can amount to no more than the provision of a sum in the hands of the vendor to be applied by him in satisfaction of the debt arising from the transfer of the property in the goods or the land when it is accomplished. That is to say that, at most, it is a payment of a debt in advance, a debt that can only arise from the execution of the consideration. Up till then it is a promise to pay money which if fulfilled or enforced, results in a provisional payment defeasible by the subsequent failure, for any cause, of the real consideration. It is a payment made in advance to await application in discharge of an indebtedness which arises immediately the consideration is executed (See *Timmins* v. *Gibbins* (1)).

A contract for the establishment of the relation of master and servant falls into the same general category of agreements to pay in respect of the consideration when and so often as it is executed, and is, therefore, commonly understood as involving no liability for wages or salary unless earned by service, even though the failure to serve is a consequence of the master's wrongful act.

It is, of course, possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service. Indeed that is, in effect, what the Duke of Westminster persuaded the majority of the House of Lords he had done in *Inland Revenue Commissioners* v. *Duke of Westminster* (2). But, to say the least, it is not usual. The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by breach. See *Archard* v. *Hornor* (3); *Snelling* v. *Lord Huntingfield* (4); *Smith* v. *Hayward* (5); *Fewings* v. *Tisdal* (6); *Emmens* v. *Elderton* (7), more particularly the advice of *Crompton* J. to the House; *Brace* v. *Calder* (8); *Petrie* v. *Mac Fisheries Ltd.* (9).

His only remedy is in unliquidated damages for wrongful dismissal. By keeping his contract open, he may be able to resume his service without a new contract, if his employer is induced to retract the

(1) (1852) 18 Q.B. 722, at p. 726 [118 E.R. 273, at p. 274].
(2) (1936) A.C. 1.
(3) (1828) 3 Car. & P. 349 [172 E.R. 451].
(4) (1834) 1 C.M. & R. 20, at p. 26, note *b* [149 E.R. 976, at p. 978].
(5) (1837) 7 Ad. & E. 544 [112 E.R. 575].
(6) (1847) 1 Ex. 295 [154 E.R. 125].
(7) (1853) 4 H.L.C. 624 [10 E.R. 606].
(8) (1895) 2 Q.B. 253, at p. 263.
(9) (1940) 1 K.B., at pp. 269, 270.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Dixon J.

discharge. A good illustration of the situation is given by the facts and decision of the otherwise not very notable case of *Barnsley* v. *Taylor* (1). There the employee under a contract for a term was dismissed without sufficient justification. He proffered his services, and in the County Court sued for and recovered wages for the period he was excluded from his employment. He was then taken back by his employer but again dismissed without just cause. Again he sued, this time for wrongful dismissal. But he was met by the fact that in his former action he had recovered judgment; and, it was said, since wages under the contract could not be recovered for a period in which there was no service, he must be considered to have recovered damages for wrongful dismissal. *Ergo*, the old contract had been discharged by breach, judgment had been recovered for the breach and when he went back to the employment it must have been under a new contract of service. *Non constat* that it was not a service at will. At all events, there was no evidence of a contract for a term and the second action, therefore, failed.

Some difficulty has been felt in saying what is the service which carries wages. The wages are incident to the subsisting relationship of master and servant. A master who sends his servant upon a holiday upon full pay can be sued for wages under the contract, although not on a common count for work and labour done. They also serve who only stand and wait. Difficulties, too, arise from the fact that a refusal to work on the part of a servant, who neither leaves his master's service nor is discharged, may disentitle him to wages for the period of the refusal. That is for non-fulfilment of the conditions by which wages are earned. But, broadly speaking, it is enough to say that wages are for the service reasonably demanded under a subsisting relationship of master and servant. That relationship may be ended by the servant forsaking the master or the master discharging the servant, although the act of the one or of the other amounts to a breach of contract.

In the present case the question for decision is, in substance, whether the general manager of two companies which, without justification, purported to dismiss him from that position can recover wages for a period in which he continued to proffer his service, or must be content with unliquidated damages. The contract of employment consists in a document under the seals of the companies and possibly that of the employee, containing special terms. But, in my opinion, the terms include no provision which could take the employment out of the category I have discussed. That is to say, there is nothing in the agreement which makes the

(1) (1867) 37 L.J. Q.B. 39.

payment of salary independent of actual service, or which would operate to give the employee a title to salary, notwithstanding that he had been discharged from the service of the companies, however wrongfully.

But the case presents a special complication because of the *National Security* (*Man Power*) *Regulations*. These Regulations remained in force until 12th September 1945. It was on 29th September 1944 that the companies purported to dismiss the general manager from that position. Their business was a protected undertaking. Regulation 14 provided that an employer carrying on a protected undertaking should not, without the permission of the Director-General of Man Power, or of a person authorized by him, terminate the employment in the undertaking of any person employed therein. In view of this prohibition, the resolution for the removal of the employee from his position of general manager was not expressed as a complete discharge from the service of the companies. After resolving that the agreement be determined, the resolution proceeded to say that from the determination of the agreement and until it was otherwise decided the employee's position and duties in the company be New South Wales sales manager; that his salary should be £10 a week, an amount much lower than his salary as general manager; and that he should have six months' leave of absence.

The agreement contained clauses for the termination of the agreement (1) without cause by three months' notice and (2), if the directors were of opinion that the employee had become unfit to act as general manager, by one month's notice, or upon payment of a month's salary in lieu of notice. It was under the second clause that the companies purported to act, but a finding has been made that the directors did not hold in fact the prescribed opinion which they professed. It had been resolved three months before to terminate the agreement by due notice, but, in serving the notice, a mistake was made and a day less than the full three months was allowed. That notice was, therefore, abortive. The notice of 29th September 1944 to the employee purporting to terminate his employment followed fairly closely the resolution of that day. It is apparent that these materials left room for the view that what the companies did amounted not to a purported discharge of the employee from their service but to an unjustifiable attempt to vary the terms of his employment. The matter, however, came before the Supreme Court, whose decison is under appeal, upon an award in the form of a special case and we have before us only findings of the

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Dixon J.

ultimate facts without any statement of the evidentiary circumstances. The findings in relation to the acts of the employee are, that he did not accept the purported dismissals as terminating his employment; that he continued to attend the joint offices of the companies and was ready and willing to perform the duties of general manager and did perform some of the work previously done by him as general manager; that he maintained an attitude that his employment as general manager was still subsisting; that he did not at any time accept the appointment as New South Wales manager, or any other new appointment in the service of either company; and that he declined to accept the salary of £10 a week and in fact received no payment from the companies.

It will be seen that there is no finding that the companies, or either of them, accepted any of the services of the employee.

As to the acts of the companies, the findings have all the appearance of careful framing. In the first place, the arbitrator said that, on the whole of the evidence before him relating to 29th September 1944, he found as a fact, that on that date each of the companies purported to dismiss the employee from his position of general manager. Then he found that each of the purported dismissals was a wrongful repudiation of the employee's contract of employment and, if effective in law to determine his employment, was a wrongful dismissal of the employee. The arbitrator then proceeded to state the contention made before him on the part of the employee. That contention was that the purported dismissals were ineffectual to determine his employment for the reasons:—"(1) that by reason of reg. 14 of the *National Security* (*Man Power*) *Regulations* each of the purported dismissals was in law a nullity; and (2) that a purported dismissal of a servant, if wrongful, does not determine the servant's employment unless it be accepted by him as a determination thereof."

Finally, the arbitrator said that, if the contention should not be upheld for either of the foregoing reasons, he found that the employee was wrongfully dismissed by each of the companies on 29th September 1944; but, if it should be so upheld, then he found that the employee's employment as general manager was not determined on 29th September 1944 or at any date before 19th September 1945. On the latter date, the *Man Power Regulations* at that time being no longer in operation, the employee was excluded by the companies from their joint offices and then wrongfully dismissed, if the employment had not earlier terminated, that is on the former date.

For the employee, who is the respondent on the appeal, it was suggested that the arbitrator did not mean to find that the employee

had been discharged from the service of the companies unless, on one or other of the grounds assigned, the purported dismissal was ineffectual to terminate his employment. It was said that the word " employment " had been used not to mean the relationship of master and servant, but the contract under seal pursuant to which that relationship had arisen. The purpose, it was contended, of the speaking award was to raise the question whether, (1) under the general law; (2) under the *Man Power Regulations*, it was possible for the one party to bring the binding operation of such an agreement to an end by a repudiation on his part not accepted by the other party as discharging the latter from further performance, it being assumed that the actual relationship of master and servant continued to subsist in some way or other.

I do not so read the award in the form of a special case. I understand it to mean that, unless the law prevented it, the companies had discharged the employee from their service, although, of course, wrongfully. However, if the fate of the appeal depended upon the interpretation which we attach to the award, I think, in view of the evident differences between the parties upon the subject, it might have been proper to make an order remitting the award to the arbitrator for his re-consideration and to accompany the order with declarations expressing the Court's decision upon the questions of law which appeared to be raised.

For the reasons I gave in the earlier part of the judgment, I think that there is nothing in the general law preventing the wrongful dismissal of a servant operating to discharge him from service, notwithstanding that he declines to accept the dismissal as absolving him from further performance but keeps the contract open and remains ready and willing to serve.

There is nothing in the special terms of the contract in this case entitling the employee to salary in respect of a period in which he did not serve and, therefore, apart from the effect of the *Man Power Regulations*, the employee's remedy would from 29th September 1944 be for unliquidated damages.

But the provisions of Part II. of the *Man Power Regulations* governed the parties until 12th September 1945 and the question is whether they made it impossible that the *de-facto* discharge of the employee from the service of the companies should operate to disentitle the employee to salary for the period during which he continued to proffer his services as general manager after the *de-facto* discharge.

Regulation 14 is expressed to forbid in a protected undertaking not only the termination by the employer of the employment without

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Dixon J.

permission, but also his standing the employee down or suspending him from duty. On the other side, it forbids the employee to terminate or change his employment without permission. So far it resembles the Essential Work Orders of the United Kingdom. It does not, however, contain a provision like art. 4 (1) (*d*) of the English Essential Work (General Provisions) Order 1942, which requires the employer in respect of every prescribed period to pay every specified person, that is the employee falling within the category (except as there otherwise provided) a sum not less than the normal wage for that period, if the person is during the normal working hours—(i) capable and available for work; and (ii) willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.

Under the Essential Work Orders of the United Kingdom two decisions have been given in England, which, unless they are distinguished on the ground of this difference in provision or we think that for some reason we ought not to follow them, lead to the conclusion that the Regulations made ineffectual any attempt by an employer contrary to their provisions to discharge a servant who remains ready and willing to serve. The attempt is made ineffectual with the result that the relationship continues with the consequent liability on the employer's part for wages for any period for which the employee offers his services. The first decision is *George* v. *Mitchell & King Ltd.* (1). There the employer replaced a foreman by another man and offered the foreman work at a lower wage in an inferior grade, which the employee refused. The national service officer declined to give his permission for the course adopted. After about six weeks of idleness the man accepted temporary work at lower wages with the informal consent of that officer. The Court of Appeal decided that for the interval the employee was entitled to his wages, but that, after taking other employment, he was not entitled under the Order to the difference in wages which he had lost as he claimed through his dismissal contrary to the Order. I am not sure of the ground on which *Scott* L.J. met the point that there had been a dismissal *de facto* and that wages were only earned by service. It may be that his Lordship relied on art. 4 (1) (*d*) for the purpose. But *Mackinnon* L.J. met it on the ground that the notice given without permission by the employers to the employee was ineffective, by reason of the Order, and the contract of service continued. "The defendants refused to let him work," his Lordship proceeded, "I do not agree with the judge that the only result of this was that the defendants

(1) (1943) 59 T.L.R. 153.

became liable to prosecution but the plaintiff has no claim for his wages. I think that he had a claim for wages while, pursuant to the order, his contract of employment continued in existence " (1).

Goddard L.J. said: " It seems to me that the order imposes a statutory condition or provision on the contract. If a statute says that a person shall not terminate a contract except with the permission of a third person, in my opinion it follows that he is incapable of terminating it without that permission. If he refuses to employ the person he commits an offence, but the contract is not terminated. I cannot see that there is any difference between saying a person shall not terminate an employment and an employment shall not be terminated. If the employment cannot be terminated, it remains in force with all its consequences; the employed person remains in the service, and consequently has a right to his wages, and it is only fair that he should have this right as he cannot enter employment elsewhere unless and until he gets permission of the national service officer " (1).

Two of the Lord Justices, therefore, appear to decide the matter upon the effect of a prohibition indistinguishable in form and policy from that contained in reg. 14.

The second case is *Woolley* v. *Allen Fairhead & Sons Ltd.* (2), decided by *Atkinson* J. The facts were that the employee was dismissed by a week's notice given without the permission of the national service officer and, by agreement, ceased work a day or so before the expiration of the notice. A fortnight later the national service officer gave his permission for the termination of the service, but the employee successfully appealed against that decision and his reinstatement was ultimately ordered. He sued for his wages for the whole intermediate period from the time he had ceased work. *Atkinson* J. held that the notice was ineffective to terminate the employment, since permission had not been given and, therefore, that the contract of service continued throughout and the employee was entitled to wages.

I am afraid that, but for the guidance of authority, I should have regarded the Regulations as attempting to prevent the unpermitted discharge of a man from employment only by penalizing it and not as making the relationship legally infrangible. But I think that we should apply the two decisions I have mentioned to the *Man Power Regulations*. No doubt points of distinction may be found between the United Kingdom Order and these Regulations. But these points of distinction do not appear to affect the *ratio decidendi* of *Mackinnon* and *Goddard* L.JJ. (1) or of *Atkinson* J. (2), and I

(1) (1943) 59 T.L.R., at p. 156. (2) (1946) 62 T.L.R. 294.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

DIXON J.

see no reason why in the interests of consistency of decision this Court should not follow their authority.

I am, therefore, of opinion that we should hold that the employee in the present case is entitled to salary or remuneration until the *Man Power Regulations* went out of operation.

I would, therefore, answer the questions of law submitted by the Award for the opinion of the Court as follows :—

(1) The purported dismissal referred to was ineffectual in law to terminate the respondent's employment as general manager, by reason of reg. 14 of the *National Security* (*Man Power*) *Regulations*.

(2) The question does not arise.

This means that in substance the appeal fails.

McTIERNAN J. This appeal arises out of an award, stated in the form of a special case for the opinion of the Court, in pursuance of s. 9 (*a*) of the *Arbitration Act* 1902 (N.S.W.), upon questions of law. I do not repeat the facts found by the arbitrator and the question of law submitted by him.

As regard Question 1 (*a*), it is clear that the intention of reg. 14 (1) (*a*) is to prohibit the termination of the employment in a protected undertaking of any person employed therein, save with the prescribed permission. The violation of this prohibition is punishable as an offence against the *National Security Act* 1939-1943, s. 10. A court will not lend its aid to give any effect to an act done in breach of the regulation. Such an act can have no effect upon the contractual relationship between the employer guilty of the breach and the employee in respect of whose employment the breach is committed: See *Whiteman* v. *Sadler* (1); *Cope* v. *Rowlands* (2). By the letter dated 29th September 1944, the appellants purported to terminate the respondent's existing employment in their undertaking. The sending of that letter was a contravention of the regulation. The answer to the question, whether this purported dismissal was " ineffectual in law " to terminate the respondent's employment as general manager, should in my opinion be : Yes. The arbitrator states in the special case what his award is if Question 1 (*a*) is answered in the affirmative. The question whether, if Question 1 (*a*) is thus answered, the award is right, is not submitted by the arbitrator. This award decides that the respondent ceased to be general manager on 19th September 1945 and that certain amounts are due to the respondent for salary and other remuneration respectively from 29th September 1944 to 19th September 1945 ; also a sum by way of damages for the wrongful dismissal of the respondent on 19th

(1) (1910) A.C. 514, at pp. 525, 526.

(2) (1836) 2 M. & W., at p. 157 [150 E.R., at p. 710].

September 1945. The regulation having ceased to apply to the appellants' undertaking, he was excluded from it on that date. If the regulation had not been in force on 29th September 1944, the dismissal of the respondent from the employment of general manager, although made in breach of the contract of employment, would have been effective at common law to terminate the respondent's service as general manager and the remedies of a servant for wrongful dismissal would have been available to the respondent.

It was a term of the agreement that the respondent was to receive payment as consideration for his services and the performance of his part of the agreement. The facts of the present case are peculiar. It appears that although the appellants purported to terminate the respondent's employment as general manager, he attended their office from 29th September 1944 down to 15th September 1945 and performed work previously done by him as general manager; the respondent did not acquiesce in his dismissal; and after 29th September 1944 he did not receive any payment from the appellants.

If the appellants had not purported to dismiss the respondent he would have been entitled to be paid for such attendance and work the consideration which the appellants agreed to pay him for his work as general manager. The termination of his employment as general manager being illegal and void, the appellants cannot rely upon it to relieve themselves from liability to pay the respondent the salary and remuneration which the arbitrator says he awards if Question 1 (*a*) is answered yes.

If the respondent had not attended the undertaking after the illegal termination of his employment on 29th September 1944, I should doubt whether the cases of *George* v. *Mitchell & King Ltd.* (1) and *Adrema Ltd.* v. *Jenkinson* (2) would establish that the appellants' liability to pay salary or other remuneration continued after 29th September 1944.

In regard to Questions 1 (*b*) and 2, it is apparent from the terms of the special case that if Question 1 (*a*) is answered: Yes, these questions do not arise.

In my opinion the appeal should be dismissed.

WILLIAMS J. This is an appeal from the answers given by the Full Supreme Court of New South Wales to certain questions of law submitted in the form of a special case for the opinion of the Court under the *Arbitration Act* 1902.

From the facts stated by the arbitrator in the special case it appears that by an agreement under seal made on 12th October 1938 the

(1) (1943) 59 T.L.R. 153. (2) (1945) 1 K.B. 446.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Williams J.

appellant companies appointed the respondent general manager of their respective businesses for a term of six years computed from 1st October 1937. Clause 8 of the agreement provided that if in the opinion of the directors of the first-named company the respondent should become unfit to act as general manager the board of directors might, in their discretion, give him one month's notice of termination or pay him one month's salary in lieu of notice. Clause 12 provided that in the event of his continuing in their employ (which happened) after the expiration of six years the conditions of the agreement should apply to and be binding on the parties during such continued employment, provided that either the first-named company or the respondent should have the right to determine such continued employment by giving to the other three months' notice in writing. Clause 5 provided that as consideration for his services the respondent should be paid £850 per annum payable weekly, and certain travelling and entertainment expenses and annual bonuses.

By letter dated 29th June 1944 the company gave the respondent notice that the agreement would terminate at the expiration of three months from that date. But the letter was not handed to the respondent until the following day and it was conceded before the arbitrator and he found that this letter was not therefore a proper notice of termination within the meaning of clause 12.

On 29th September 1944 (the date on which the previous notice if valid would have expired) the company handed the respondent a further letter purporting to dismiss him on the ground that the directors of the company were of the opinion that he had become unfit to act as general manager, and tendering him a cheque for one month's salary in lieu of notice which he refused to accept. This letter stated that the termination of the agreement did not terminate his employment with the appellants, and that until further notice his position and duties would be New South Wales sales manager at a salary of £10 per week. It also stated that he was given six months' leave of absence on full pay from 3rd October.

The arbitrator found that the directors of the company were not at the time of passing the resolution really of the opinion that the respondent was unfit to act as general manager. Upon the whole of the evidence before him relating to 29th September 1944 he found as a fact that on that date each of the companies purported to dismiss the respondent from his position of general manager, but that he did not at any time accept either of such purported dismissals as terminating his employment. He also found that throughout the period from that date to 19th September 1945 the respondent continued to attend the joint office of the companies and was ready

and willing to perform the duties of general manager, and did perform some of the work previously done by him as general manager, and that he maintained the attitude that his employment as general manager was still subsisting ; but that the companies maintained the attitude that his employment as general manager had been determined on 29th September 1944 and were ready and willing to pay him the salary of £10 per week ; but he declined to accept that salary, and in fact received no payment from the companies. The arbitrator further found that on 19th September 1945 the companies excluded the respondent from their office, and that the respondent was on that date wrongfully dismissed from his employment as general manager under the agreement, if such employment had not been terminated on 29th September 1944.

The questions of law which the arbitrator submitted for the opinion of the Court were as follows :—

(1) Whether, on the facts as found by me, the purported dismissal of Watson by the companies on 29th September 1944 was ineffectual in law to terminate Watson's employment as general manager, by reason of : (*a*) reg. 14 of the *National Security* (*Man Power*) *Regulations*, or (*b*) Watson's non-acceptance of the purported dismissal as terminating his employment.

(2) If Question 1 be answered : (*a*) No, (*b*) No, Whether the measure of the damages to which Watson is entitled by reason of his wrongful dismissal on 29th September 1944 is limited, having regard to the facts stated in pars 7 to 16 inclusive of this case, to an amount equal to the remuneration he would have earned by the continuance of his employment for one additional day.

The Supreme Court answered Question (1) in the affirmative on both grounds and it therefore became unnecessary to answer Question (2).

It will be convenient to discuss the position at common law in the first instance. The arbitrator found that during the period 29th September 1944 to 19th September 1945 the respondent was able to perform some of his duties as general manager and was always ready and willing and offered to perform all these duties completely. But the consideration for his remuneration was the performance of the whole of the duties so that a partial performance would not be sufficient. Neither the notice of 29th June nor that of 29th September 1944 was a valid termination of the agreement. His dismissal from the position of general manager on 29th September 1944 was therefore wrongful. The appellants were then protected undertakings within the meaning of the *National Security* (*Man Power*) *Regulations* and they continued to be so until 19th September 1945.

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Williams J.

This no doubt explains why they did not exclude the respondent from the joint office prior to this date. They evidently thought that if they continued to employ him in some capacity they would not infringe the provisions of reg. 14. But they maintained that after 29th September 1944 the respondent was employed only as New South Wales sales manager at a salary of £10 per week and they would not allow him to act as general manager. He was with respect to his services in an analogous position to the vendor of goods in which the property has not passed, which the purchaser wrongfully refuses to accept. Such a vendor can only sue for the damage which he has suffered by the refusal of the purchaser to accept the goods. So an employee who is wrongfully dismissed can only sue for the damage which he has suffered by the employer depriving him of the right to give his services and thereby earn his remuneration. He cannot continue to offer his services and sue for his remuneration as a debt as and when it becomes due and payable under the terms of his employment. The law is, I think, correctly stated in *Halsbury's Laws of England*, 2nd ed., vol. 22, pp. 167-169, where the cases are collected. It is epitomized in the judgment of *Erle* J. in *Goodman* v. *Pocock* (1). He said, "I think that the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service after dismissal. I think the true measure of damages is the loss sustained at the time of the dismissal. The servant, after dismissal, may and ought to make the best of his time; and he may have an opportunity of turning it to advantage."

In *Barnsley* v. *Taylor* (2), *Lush* J. said, "The . . . contract was broken by the wrongful dismissal of the respondent; he had at that time no other cause of action except for that breach of the contract."

The employer cannot discharge the contract of employment by a unilateral breach. But if he refuses to allow the employee to do his work and earn his remuneration, the employee cannot sue for specific performance. The result is that, while the contract is not discharged, its purposes have failed. The employee is relieved from further fulfilling the obligations which he has undertaken by the contract to the employer and the contract survives only for the purpose of measuring the claims arising out of the breach: *General Billposting Co. Ltd.* v. *Atkinson* (3); *Heyman* v. *Darwins Ltd.* (4).

(1) (1850) 15 Q.B., at pp. 583, 584 [117 E.R., at p. 580].
(2) (1867) 37 L.J. (C.L.), at p. 42.
(3) (1909) A.C. 118.
(4) (1942) A.C., at p. 374.

Question (1) (*b*), although somewhat awkwardly expressed, appears to be addressed to the question whether the respondent would, in the circumstances, have been entitled at common law for his remuneration as general manager between 29th September 1944 and 19th September 1945, and so construed should, in my opinion, be answered in the negative.

It remains to consider the position under the *National Security* (*Man Power*) *Regulations*. The purpose of reg. 14 was to ensure that protected undertakings should retain an adequate staff who could not be solicited and enticed away to other work. The regulation forbids an employer terminating the employment of an employee without the written permission of the Director-General or to stand him down or to suspend him from duty except as provided in reg. 16A. It also forbids an employee changing or terminating his employment without such written permission. Regulation 14 (3A) provides that if an employee is stood down or suspended from duty otherwise than in pursuance of reg. 16A he shall, on assuming duty, be entitled to be paid for that portion of the period for which he was stood down or suspended the remuneration which would have been paid to him if he had performed his duties. Regulation 16A provides that an employer can suspend an employee from duty if he has reason to believe that he has been guilty of serious misconduct. The Director-General (or on appeal, the Appeal Board) must then decide whether the suspension should be confirmed or be removed unconditionally or be removed but the person suspended should be employed in his former position or in some lesser position and the date from which and the conditions on which (including loss or partial loss of wages or pay for the whole or portion of the period of suspension) he should be so employed. If the suspension is confirmed the employment of the person suspended is deemed to have been terminated on the date on which he was suspended. If the suspension is removed unconditionally the employer must pay the person suspended the wages of which he was deprived during the period of his suspension.

Regulation 14 therefore makes it illegal and void for the employer or employee to terminate the relationship of employer and employee without permission. Regulation 16A gives an absolute right to the payment of wages in respect of the period of suspension to an employee who is lawfully suspended from work under reg. 16A but whose suspension is removed unconditionally, and a conditional right to an employee whose suspension is removed subject to conditions. Regulation 14 (3A) gives an absolute right to the payment of wages in respect of the period of suspension to an employee who is stood down or suspended from duty otherwise than in pursuance

H. C. OF A. 1946.

AUTOMATIC FIRE SPRINKLERS PTY. LTD. v. WATSON.

Williams J.

of reg. 16A. Regulation 14 does not, like the corresponding English Essential Work Order, give an express statutory right to the payment of wages whilst the employment continues and has not been lawfully terminated with the consent of the Director-General. But an undertaking was protected because it was engaged on work of national importance and employees were compelled to remain in their employment and forbidden to enlist because their services were required for this work. The whole basis of the Regulations is that the contract of employment can only be lawfully terminated in the prescribed manner. Until it is so terminated the relationship of employer and employee must continue to exist. The express provision for the payment of wages where the employment is suspended necessarily implies a right to such payment where an employee who has not been suspended offers to do his work. He cannot terminate or change his employment without permission, so that unless he is entitled to his remuneration he would starve. In *Woolley* v. *Allen Fairhead & Sons Ltd.* (1), *Atkinson* J. said: "A man can repudiate what he has agreed to do, but he cannot repudiate a statutory duty such as that imposed by the order, claiming that it is on the same level as a term of a contract."

The ordinary principle is that, in the absence of a sufficient indication of intention to the contrary, a transaction which is made illegal by statute is void. But the statute may indicate, either expressly or by implication, that it is not intended that the illegality shall avoid the transaction, but only that the wrongdoer shall incur some punishment. It was submitted that an employer in a protected undertaking who illegally dismissed an employee would incur punishment, but that the employee would be limited to the same remedies as he would be in the case of wrongful dismissal. But there is no indication either express or implied in the Regulations that the attempt to dismiss the employee would not be void. The indications of intention are all to the contrary. Even if the employer purported to terminate the employment without permission, the employee could not without permission accept such termination as a breach of the contract of employment. He would still have to offer his services to the employer and could not lawfully accept employment elsewhere. Any attempt by the employer or employee to repudiate the employment without permission is avoided by the Regulations. In *George* v. *Mitchell & King Ltd.* (2), *Goddard* L.J. said in reference to the English Essential Work Order: "It seems to me that the Order imposes a statutory condition or provision on the contract. If a statute says that a person shall not terminate a contract except

(1) (1946) 62 T.L.R., at p. 295. (2) (1943) 59 T.L.R., at p. 156.

with the permission of a third person, in my opinion it follows that he is incapable of terminating it without that permission. If he refuses to employ the person he commits an offence, but the contract is not terminated." The same view of the effect of the English order was again taken by the Court of Appeal in *Marshall* v. *English Electric Co. Ltd.* (1) and *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.* (2). The decisions in *Sputz* v. *Broadway Engineering Co. Ltd.* (3), and *Trussed Concrete Steel Co. Ltd.* v. *Green* (4), and *Alexander* v. *Tredegar Iron & Coal Co. Ltd.* (5) are based on the same assumption. In the last-mentioned case Lord *Simonds* said (of a master) :— "Is he to be responsible for the acts of those servants of whom he cannot, without permission of the national service officer, be rid, but rest under a new responsibility to his own servants because they cannot, if they would, be rid of him ? " (6).

The attempted repudiation by the appellants of the agreement with the respondent on 29th September 1944 without the written permission of the Director-General was therefore illegal and void under reg. 14. It was equally a breach of the regulation and therefore illegal and void to attempt to demote him to the position of New South Wales sales manager without this permission (*Powell Duffryn* v. *Rhodes* (7)).

In my opinion Question (1) (*a*) should be answered in the affirmative.

For these reasons I would dismiss the appeal.

Order of the Supreme Court varied by substituting for the words "on both grounds" the words "on ground (a)." Otherwise appeal dismissed with costs.

Solicitors for the appellants, *Laurence & Laurence.*
Solicitors for the respondent, *Clayton, Utz & Co.*

J. B.

(1) (1945) 61 T.L.R. 379.
(2) (1946) 62 T.L.R. 231.
(3) (1944) 171 L.T. 50.
(4) (1945) 174 L.T. 122.
(5) (1945) A.C. 286.
(6) (1945) A.C., at p. 302.
(7) (1946) 62 T.L.R. 441.