[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

METAL TRADES EMPLOYERS ASSOCIATION AND ANOTHER;

Ex parte AMALGAMATED ENGINEERING UNION AND OTHERS.

H. C. of A. 1949.

Melbourne, *June* 6.

Latham C.J., Dixon and McTiernan JJ.

Industrial Arbitration (Cth.)—Industrial dispute—Award—Variation—Ambit of dispute—Dispute constituted by employers' and employees' logs—Conflicting demands as to hours of work and as to rates of pay for ordinary hours, overtime and shift work—Principle of special payment for work outside ordinary hours not contested in employers' log—Ordinary hours of work and minimum rates of pay therefor prescribed by award—Other provisions of award prescribing special rates of pay for overtime and shift work—Application by employers for variation of award by eliminating such provisions—Commonwealth Conciliation and Arbitration Act 1904-1948 (*No.* 13 *of* 1904—*No.* 77 *of* 1948), *s.* 49 (*b*).

An award of the Commonwealth Court of Conciliation and Arbitration provided that the ordinary hours of work in the industry concerned should be forty per week and that the spread of hours should be from 7 a.m. to 5.30 p.m. on Monday to Friday and from 7 a.m. to noon on Saturday. It prescribed minimum rates of pay and provided for increased rates for work done outside the ordinary hours of work by way of shift work and overtime. Because of difficulties caused by the restriction of the use of electricity in New South Wales the employers applied to a conciliation commissioner for a variation of the award in relation to employment in that State by the insertion of a clause to the effect that they might require employees to work the ordinary hours prescribed by the award at any time or on any day and the ordinary rates prescribed by the award should be paid for such work. The employees objected that the proposed variation was beyond the ambit of the original dispute as defined by the employers' and employees' logs of demands, inasmuch as it was the scheme of each of the logs—as was reflected in the award—to distinguish

between work in ordinary hours at ordinary rates of pay and work outside those hours at special rates of pay, and accordingly the right to such special rates was not in contest.

Held that, in making the original award, the court could have refused to award special rates of payment for shift work and overtime and a variation having that effect was therefore within power. Accordingly, it was within the jurisdiction of the commissioner, if he thought fit, to make the variation sought.

ORDER NISI for Prohibition.

The Metal Trades Award was made by the Commonwealth Court of Conciliation and Arbitration in the matter of an industrial dispute the parties to which were the Amalgamated Engineering Union and other organizations of employees and the Metal Trades Employers Association and its members and other employers in the engineering and metal trades industries. The award provided (in clauses 2 to 6) for minimum rates of pay for various classes of employees. It also provided (clause 10), subject to exceptions not here material, that "the ordinary hours of work shall be 40 per week to be worked in five days of not more than eight hours (Monday to Friday inclusive), and one day (Saturday) of not more than four hours; or five days (Monday to Friday inclusive) of eight hours each continuously except for meal breaks at the discretion of the employer, between 7 a.m. and 5.30 p.m. on Monday to Friday inclusive, and 7 a.m. and noon on Saturday." Clause 11 of the award dealt with shift work. In sub-clause (1) (*a*) "afternoon shift" was defined as any shift finishing after 6 p.m. and at or before midnight, and "night shift" as any shift finishing subsequent to midnight and at or before 8 a.m. So far as is here material, sub-clause (1) provided that "the ordinary hours of . . . shift workers shall not exceed—(i) 8 in any one day; nor (ii) 48 in any one week; nor (iii) 88 in 14 consecutive days; nor (iv) 160 in 28 consecutive days" (par. (*b*)); "shift workers . . . whilst on afternoon or night shifts shall be paid 7½ per cent more than the ordinary rate for such shifts" (par. (*g*)); "shift workers for all time worked in excess of or outside the ordinary working hours prescribed by this award . . . shall . . . be paid at the rate of double time" (par. (*h*)). In sub-clause (2) it was provided: "(i) An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement." Clause 13 dealt generally with overtime, the principal provision being that "for all work done outside ordinary hours the rates of pay shall be time and a half for the first

H. C. OF A. 1949.

THE KING v. METAL TRADES EMPLOYERS ASSOCIATION; EX PARTE AMALGAMATED ENGINEERING UNION.

four hours and double time thereafter" (par. (*a*)). It was also provided (by par. (*k*) (i)): "An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement."

The Metal Trades Employers Association applied to Mr. G. A. Mooney, Chief Conciliation Commissioner, for a variation of the award by the insertion of the following new clause, 11A:—"Notwithstanding anything elsewhere contained in this award any employer in the State of New South Wales required to restrict the consumption of electricity in accordance with regulations made under the *Gas and Electricity Act*, 1935-1948, may, whilst such regulations continue in force, require employees to work the ordinary hours prescribed by this award at any time or on any day on the basis of 40 hours per week or 80 hours per fortnight and the ordinary rates prescribed by clauses 2, 3, 4, 5 and 6 shall be paid for such work."

The Amalgamated Engineering Union and other organizations of employees which were parties to the award obtained from the High Court an order nisi to prohibit the proceedings for variation on the ground, substantially, that there was no power to make the variation sought because it was not within the area of the original dispute. To show the area of the dispute the prosecutors relied on the provisions of logs of demands, delivered by the employers to the prosecutors and by the prosecutors to the employers, out of which the original dispute arose. These provisions sufficiently appear in the judgment of *Latham* C.J. hereunder.

Weston K.C. (with him *Gowans*), for the prosecutors. The original award could not validly have declared that the ordinary hours of work should be forty hours, to be worked at any time of the day or night, which is the effect of the proposed variation. In this regard the scheme of both employers' and employees' logs, by which the ambit of the dispute is determined, is also the scheme of the award. It is that workers are divided into two categories, day workers and shift workers; and there is a division of the work of each category. The day workers are in what might be termed the "day shift," though it is not so called. They work the prescribed number of hours per day, and they may also work overtime. Then there are the shift workers, who work what are called the afternoon and night shifts, which may or may not overlap the ordinary hours of the day workers. The shift workers work a prescribed number of hours (their ordinary hours being fixed differently from those of day workers) and get a premium; if they work overtime, they get

an addition. The effect of the new clause would be to abolish the distinction between day workers and shift workers, notwithstanding that the logs were in agreement that there should be such a distinction. As between the respective logs, the real dispute was whether the ordinary hours of work should be forty or forty-eight per week. The ordinary hours of work were fixed in each of the logs by reference to particular days and particular hours of the day; they were necessarily daytime hours. Each log accepts the view that there will be a prescribed number of hours, which will be ordinary time, and a prescribed spread of hours; to these the ordinary rates of pay will apply, and there will be additional payment for work done outside the prescribed number of hours or the prescribed spread. The ambit of the dispute is defined by the difference between the two logs as to what hours shall be prescribed as ordinary time, as to what the spread of hours shall be and as to the amount to be paid. Otherwise, there was no dispute as to hours and, therefore, no dispute to the settlement of which the clause now proposed by way of variation could have been directed in the original award. Accordingly, it is not now admissible as a variation, and the order nisi should be made absolute. [He referred to *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.* (1); *Federated Millers and Mill Employees' Association of Australasia* v. *Butcher* (2).]

S. C. G. Wright, for the respondent Metal Trades Employers Association. The structure of each of the rival logs involves the splitting up of the days of the week and the segregation of Sundays and holidays from other days of the week, all for the purpose of —and merely for the purpose of—specifying the rates of pay to be observed on those respective occasions. Neither log seeks a prohibition of shift work. Each of them allows for the possibility of only one shift per day being worked, and each contemplates that portion of the standard hours of work may be worked outside the specified daytime span. The purpose of the variation which is now sought is simply that, if, during the period of emergency, an employee is required to perform any of his standard hours of work outside normal daytime hours, or outside his normal shift-work hours, nevertheless he is not entitled to a penal rate of payment. There is no suggestion that the definition of times in the award should be altered. Plainly the object is to alter the rates of remuneration applicable to work done at particular and specified periods of the day: for example, if a man who normally worked in the daytime was required to work at night, he would not be entitled to overtime

(1) (1931) 45 C.L.R. 409.
(2) (1932) 47 C.L.R. 246.

H. C. OF A. 1949. THE KING v. METAL TRADES EMPLOYERS ASSOCIATION; EX PARTE AMALGAMATED ENGINEERING UNION.

merely because he worked outside the ordinary daytime span of hours, but he would still be entitled to overtime at the penalty rates if he worked in excess of his normal weekly quota of hours. The employers' log reserved the right to apply for a variation of rates of payment in the event of a change of circumstances, and that is what is now applied for. Moreover, the employers' log was based entirely on a working week of forty-eight hours; also, it imposed a time limit of three years on its own ambit, and that time has expired. The employees' log did not impose any such limit. It fixes what might be called the " ceiling " of the dispute; but since the lapse of the employers' log there is no " floor " fixing the ambit of the dispute in such a way as to be an impediment to the proposed variation. This view is supported by *Australian Workers' Union* v. *Graziers' Association of New South Wales* (1). It is also supported by passages in the judgments in *Federated Millers and Mill Employees' Association* v. *Butcher* (2), which was cited for the prosecutors. The expression " ordinary hours of work " has not the significance the prosecutors seek to attach to it. It is used in clause 11 of the award, in relation to shift workers, as well as in clause 10. If the proposed variation is within the ambit of the dispute and, therefore, within the jurisdiction of the Chief Commissioner, it is for him to work out the variation to be granted, both as to substance and as to how the variation (if any is granted) is to be expressed. If granted in the form in which it is sought, it will not by reason of the word " require " compel any employee to work outside ordinary hours, although if he does so he will be entitled only to ordinary rates of pay unless his weekly quota of hours is exceeded.

The respondent Chief Commissioner did not appear.

Weston K.C., in reply. The employers' log did not reserve any question of variation of hours; the only reservation was as to rates of pay. The new clause, it is true, would affect the amounts to be paid by way of wages; but it would do so only by changing the hours in which ordinary rates of pay apply. It does not ask for any variation of those rates. The respondent suggests that the expression " ordinary hours " has the same meaning in clause 10 of the award as it has in relation to shift work in clause 11, where the expression is " ordinary hours of . . . shift workers." The answer is that clause 11 contains its own definition of the expression,

(1) (1932) 47 C.L.R. 22, at pp. 27, 28, 35, 36.

(2) (1932) 47 C.L.R., at pp. 253-256.

which shows the meaning there to be quite different from that in clause 10. Apart from clause 11, there is in the award only one set of hours with one designation; it involves the specification of a number of hours and the allocation of parts of a week, parts of a week being defined by reference to days and days being defined by reference to hours. The question here is whether the commissioner has power to grant the variation actually applied for; it is no answer to the prosecutors' contention to say that the commissioner may grant some other form of variation, nor is it any answer to say that both logs contemplate the possibility of working outside ordinary hours and create a dispute as to rates of payment for any and all hours of work. Of course they do, but what is important is the division in each log between, on the one hand, ordinary hours and ordinary rates of pay, and, on the other hand, work outside ordinary hours and special rates of pay therefor. The logical conclusion of the respondent's argument would seem to be that the ambit of the dispute is not now ascertainable; if so, it cannot be shown that the variation is within power.

The following judgments were delivered:—

LATHAM C.J. This is the return of an order nisi for prohibition directed to Mr. George A. Mooney, Chief Conciliation Commissioner under the *Commonwealth Conciliation and Arbitration Act* 1904-1948 and to certain organizations of employers who are bound by an award binding also the Metal Trades Employers Association. An application has been made to Mr. Mooney for variation of the consolidated award applying to the industries specified in the award, and the variation is a variation which is contended by the employers to be necessary or desirable by reason of action taken in the State of New South Wales under the *Gas and Electricity Act* 1935-1948.

Difficulties have arisen with respect to the supply of electricity to industry in New South Wales, and particularly in Sydney within the County of Cumberland, and under the statute which I have mentioned regulations were made on 18th May which provided for a reduction in factories after 1st June of the consumption of electricity to a maximum of seventy per cent of the maximum rate at which electricity was consumed in a factory between specified hours during three months, namely, June, July and August, in 1948. The decrease of power available is considered by the employers to justify some alteration in the award applying to their industries.

H. C. OF A. 1949. THE KING v. METAL TRADES EMPLOYERS ASSOCIATION; EX PARTE AMALGAMATED ENGINEERING UNION. Latham C.J.

Accordingly, an application was made to Mr. Mooney for a variation of the award in the following terms: to insert in the award the following new clause 11A :—" Notwithstanding anything elsewhere contained in this award any employer in the State of New South Wales required to restrict the consumption of electricity in accordance with regulations made under the *Gas and Electricity Act*, 1935-1948, may, whilst such regulations continue in force, require employees to work the ordinary hours prescribed by this award at any time or on any day on the basis of 40 hours per week or 80 hours per fortnight and the ordinary rates prescribed by clauses 2, 3, 4, 5 and 6 shall be paid for such work."

Clauses 2, 3, 4, 5 and 6 of the award are clauses which specify minimum rates of wages to be paid by any employer to his employees. There are also provisions in the award which provide for ordinary hours of duty and provide that overtime, when overtime is properly worked, shall be paid for at higher rates than the rates mentioned in clauses 2 to 6 of the award. When the award was made, overtime was defined as relating to work done outside the ordinary hours or in excess of the number of hours prescribed as ordinary hours. The award also contains provisions to the effect that an extra payment of seven and one-half per cent is to be made to employees working on afternoon and night shifts.

The object of the application is to enable the employers, if the application is successful, to employ men at hours outside the ordinary hours, but to pay them ordinary rates of wages and not to be compelled to pay overtime simply because the hours of work are outside the ordinary hours or to pay extra rates as at present provided in the award in relation to shift workers.

The Arbitration Court can make awards only for the prevention or settlement of industrial disputes extending beyond the limits of any one State. The possible extent of an award is therefore limited by the ambit of the dispute in respect of which an award is sought. The objection which is taken here to the application is that, if the application were granted, an order would be made by way of variation of the award which cannot properly be made in relation to this dispute because the matters to which it relates were not within the ambit of the dispute.

It is therefore necessary to ascertain the ambit of the dispute by looking at the demands made by the employers with respect to the employees and on behalf of the employees upon the employers. In this case, there was an employers' log, as it is called, and an employees' log. These logs show that demands were made on both sides with respect to the wages to be paid for work at any time

during the day or night on any day of the week, including Sundays and Saturdays and also on holidays. Varying demands were made by the employers and the employees with respect to these matters. Clause 9 of the employers' log sets out what the employers desired as to spread of hours. They proposed between 7 a.m. and 5.30 p.m. Clause 11 of this log sets out what the employers proposed as to extra payments for work done outside those hours, and clause 12 sets out the proposals with respect to payment for overtime.

In the log which was delivered to the employers on behalf of various organizations of employees in clause 6 there is a claim that the ordinary hours should be worked between 8 a.m. and 5 p.m. There is a claim as to overtime—that is to say, as to the rates of payment to be made for work done outside those hours—and then there is a claim in clause 8 for extra pay for shift workers in relation to the hours at which they work, and there are claims also in relation to Sunday and holiday work.

Accordingly, the position is that the parties were in dispute making various claims as to the subject matter of the payment to be made for work done at different hours of the day and night. A provision varying the rates of pay in relation to the time of the day or the day of the week during which work is performed is a provision which, in our opinion, is within the ambit of the original dispute. That proposition may be illustrated or supported by considering the fact that, in making its original award, the court could have omitted any provision for extra pay for overtime in respect of work done outside ordinary hours and it could have omitted any provision for extra pay for shift workers. It would have been impossible to challenge the validity of the award on the ground that no provision was made in it for such matters. If, then, the award could have been made without the provision which it is now asked should be struck out of the award, it is apparent that a variation bringing about the same result is an order which can properly be made within the ambit of the original dispute.

Reference has been made to some of the cases decided in this Court with respect to the ambit of industrial disputes. Those cases, it should be observed, were cases in which the Court was dealing only with the quantum of a minimum wage and with a dispute with respect to that quantum. Such a case is quite different from a dispute relating to times of work and to the manner in which, if at all, remuneration should vary with those times of work.

For these reasons, we are of opinion that the conciliation commissioner has jurisdiction to make the variation sought, if he thinks proper so to do, after considering all the circumstances; that the

H. C. OF A. 1949.

THE KING v. METAL TRADES EMPLOYERS ASSOCIATION; EX PARTE AMALGAMATED ENGINEERING UNION.

objections which have been relied upon fail, and therefore that the order nisi should be discharged with costs.

DIXON J. I agree that the order nisi should be discharged.

In my opinion, the relief sought by the application to the Chief Conciliation Commissioner amounts to no more than the incorporation in the award of an overriding clause which eliminates from the award so much of the provisions for overtime rates as operate to prescribe overtime rates for work done in New South Wales outside the times of the day fixed by the award for the ordinary performance of work.

I do not think that, in settling the original dispute, it was absolutely incumbent upon the Court of Conciliation and Arbitration to award overtime rates for work done outside times so fixed. The omission of such a provision from the award would not have rendered the award void. The elimination, by a variation of the award of so much of the award actually made as so provides, is therefore, in my opinion, not beyond the power of the arbitral tribunal, which is now the conciliation commissioner. I do not see why a provision having the same effect should not be framed in some such way as that proposed in the application. The word "require" in the application conceals some ambiguity, but I think that the meaning is clear.

McTIERNAN J. I agree.

I have no doubt that this application to vary the award does not travel beyond the ambit of the dispute which is the basis of the award. If the award had been originally made in the form it would take, if this application for a variation of its provisions were fully granted by Mr. Mooney, the award would in that respect have been clearly within the ambit of the dispute; the ambit of the dispute is to be ascertained by referring to the log of the employers and that of the employees.

Order nisi discharged with costs.

Solicitors for the prosecutors: *Sullivan Bros.*, Sydney.

Solicitors for the respondent association: *Salwey & Primrose*, Sydney, by *Darvall & Hambleton.*

E. F. H.