[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

TONKIN AND ANOTHER;

Ex parte FEDERATED SHIP PAINTERS' AND DOCKERS' UNION OF AUSTRALIA.

H. C. of A. 1954.

Sydney, *Aug.* 20.

Dixon C.J., McTiernan, Webb, Fullagar and Taylor JJ.

Industrial Arbitration—Conciliation and arbitration—Award—Terms—Variation—New provision—Conciliation Commissioner—Powers—Conciliation and Arbitration Act 1904-1952, *s.* 49.

To change the terms of an award in part, whether by addition, excision, modification, substitution or qualification or otherwise, is "to vary the terms of an award" within the meaning of s. 49 of the *Conciliation and Arbitration Act* 1904-1952.

A conciliation commissioner made an order inserting in an award a new clause forbidding bans or limitations on work.

Held, that the order was within the power conferred by s. 49 to "vary any terms of an award".

Prohibition.

Upon the application of the Metal Trades Employers' Association E. W. Tonkin, Esquire, Conciliation Commissioner appointed under the *Conciliation and Arbitration Act* 1904-1952, on 20th January 1954, made an order inserting in the Ship Painters' and Dockers' Award 1940, as consolidated and varied, a new clause, cl. 7A, headed "Prohibition of Bans, Limitations or Restrictions", the terms of which are sufficiently set out in the judgment hereunder. The Federated Ship Painters' and Dockers' Union of Australia was granted by the High Court an order *nisi* for a writ of prohibition to restrain the conciliation commissioner from acting further in respect of the order made by him.

Upon the return of the order *nisi* it was contended, *inter alia*, (1) that the conciliation commissioner had no jurisdiction to add

cl. 7A to the said award, and (2) that the insertion of an entirely new clause in the said award was not a variation of any term or terms of that award within the meaning of s. 49 of the *Conciliation and Arbitration Act* 1904-1952.

L. C. Badham Q.C. and *F. W. Paterson*, for the applicant-prosecutor.

R. M. Eggleston Q.C. and *A. P. Aird*, for the respondents.

Counsel made reference to:—*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victorian Railways Commissioners* (1); *Australian Railways Union* v. *Victorian Railways Commissioners* (2); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (3); *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (4) and *Reg.* v. *Kelly*; *Ex parte Australian Railways Union* (5).

The following judgment of the Court was delivered by:—

DIXON C.J. This is an order *nisi* for a writ of prohibition directed to a conciliation commissioner to restrain him from acting further in respect of an order or purported order by which he varied an award. The award is that which is called the Ship Painters' and Dockers' Award of 1940. It came into force in that year and had a fixed term of three years commencing from the first pay day after 1st April 1940. The award therefore expired in April 1943.

The order made by the conciliation commissioner inserted a new clause which was numbered "7A" in the award. It is headed "Prohibitions, Bans, Limitations or Restrictions" and is divided into two paragraphs. The first says: "The Federated Ship Painters' and Dockers' Union of Australia shall not in any way directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award." The second paragraph says: "The Federated Ship Painters' and Dockers' Union of Australia shall be deemed to commit a new and separate breach of the above sub-clause on any day on which it is directly or indirectly a party to any such ban, limitation or restriction."

Probably the new clause was numbered "7A" because, in the original award there is a cl. 7 which deals with overtime and contains a sub-clause worded in a similar manner but restricted to bans upon the working of overtime in accordance with the requirements of the clause.

(1) (1935) 53 C.L.R. 113.
(2) (1930) 44 C.L.R. 319.
(3) (1925) 36 C.L.R. 442.
(4) (1919) 27 C.L.R. 72.
(5) (1953) 89 C.L.R. 461.

H. C. OF A. 1954.

THE QUEEN v. TONKIN; EX PARTE FEDERATED SHIP PAINTERS' AND DOCKERS' UNION OF AUSTRALIA.

Dixon C.J. McTiernan J. Webb J. Fullagar J. Taylor J.

The writ of prohibition is supported on a single ground, namely that the order is not within the power given by s. 49 to vary any terms of an award. There is no question of the constitutional sufficiency of the original dispute to support the provision contained in the new clause had it been included in the original award. That is a matter which has not been discussed before us.

The whole argument turns on the phrase in s. 49 " vary any of the terms of an award ". It is contended that the order is not a variation within the meaning of the language of s. 49 because it inserts a new provision on a distinct subject matter and does not consist of some modification or alteration, simplification or the like, of an existing clause. We think this argument confines the language of the clause unduly and lacks any substantial support either in the history of the provision or in the form in which it is now expressed.

To begin with, the expression " terms of an award " means much more than " clauses " and in fact it was conceded that it had a wider signification. The expression in truth appears to refer to the whole contents of the award as those contents prescribe the rights and obligations of the persons governed by the award or affected by it. The word " vary " is one which no doubt in different contexts may have different meanings. In s. 49 there is a distinction drawn between setting aside an award or any of the terms of an award and varying any of the terms of an award. But the distinction made, at all events in words, between setting aside and variation, can carry no restriction upon the meaning of " variation " beyond showing that it refers to a change in some part of the award. Probably it is enough to say that to vary the terms of the award is to change them in part whether by addition, by excision, by modification or by substitution or by qualification or otherwise.

In the present case a distinct provision is introduced into the award which has a direct bearing on the whole operation of the award, that is to say, on its contents so far as they impose obligations on one party or confer rights on the other. We think that to do this is quite fairly within the words of the power which enables the conciliation commissioner, if for any reason he considers it desirable to do so, to vary any of the terms of an award.

For those reasons we think the order *nisi* should be discharged with costs.

Order nisi discharged with costs.

Solicitors for the prosecutor, *Arthur Kennedy & Co.*
Solicitors for the respondent association, *Salwey & Primrose.*

J. B.