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IN THE HIGH COURT OF AUSTRALIA

THE AUSTRALIAN TIMBER WORKERS'
UNION

V.

METAL MANUFACTURERS LIMITED

REASONS FOR JUDGMENT

ORAL JUDGMENT

Judgment delivered at Sydney

on 14th November, 1946

IN THE HIGH COURT OF AUSTRALIA }
NEW SOUTH WALES REGISTRY }

AUSTRALIAN TIMBER WORKERS UNION v. METAL MANUFACTURERS LTD.

14th November, 1946.

JUDGMENT.

LATHAM. C. J. This is an appeal from a dismissal by a Magistrate of an Information alleging a breach of the Timber Workers' Award made by the Commonwealth Court of Conciliation and Arbitration. The charge made against the respondent Company, which is bound by the award in respect of wages, was as follows:- "That the Company did commit a breach of the said award by failing to observe the same in that the said Defendant had for the week ending 28th July last in its employment at its Works at Port Kembla one R. C. Birch an adult male as a wood turner and had not paid to him the minimum amount as a weekly wage provided by the said award for the class of work performed by him."

The minimum amount provided by the award for the class of work alleged by the Informant to have been performed by Birch is, under clauses 1 (a) and 2 (a) of the award, the basic wage and an additional amount as set out in Tables A. and B. In fact the man Birch was paid a wage of £5.16. 0. as a casemaker. It was claimed that he should have been paid under a provision in the award relating to wood turning which provides for a higher wage.

The Magistrate held that the evidence showed that Birch had been engaged for some portion of his time in performing some of the duties of a wood turner but in his opinion the occupation of a wood turner required much more skill in the many branches of wood turning than he Birch possessed or had been called upon to exercise.

The provision in the award upon which the Appellant relies is Item 55 (a) in clause 2 (a). This provision is in these terms: "In addition to the basic wage provided in clause 1. the margins set out in this clause shall be payable to employees herein named.....
.....(55) machinists operating the following (a) Slicer, Shaper,
.....Wood Turner" and certain machines there mentioned.

The Magistrate decided, as I have said, that Birch was not a skilled wood turner, and that for that reason he was not entitled to the margin prescribed by Item 55 (a)

In the first place it is important to see what the charge was. The charge is a charge that the Defendant failed to observe the award in that the Defendant had for a specified week a man in its employ and did not pay him the minimum amount as a weekly wage provided by the award. In other words I read the charge as relating to failure to pay a particular weekly wage for work performed during the week and not as including a charge that the Defendant had failed to pay in respect of particular times of work during the week - for so many hours perhaps - a wage assignable to those times.

The evidence showed that whether wood turning is interpreted as meaning being a skilled wood turner and working on wood turning work, as the Magistrate held, or, on the other hand, as meaning in fact performing work which falls within the category of the work of a wood turner as the Appellant contends, upon either view Birch did not work full time as a wood turner and therefore, if Item 55 (a) applies, he did not fall within it.

There is a mixed functions clause - 11a - in the award, which provides: "An employee engaged for more than half of one day or shift on duties carrying a higher rate.....shall be paid the higher rate for the time so worked."

It was contended before the Magistrate that the ordinary classification of Birch was that of a case-maker and that he was engaged for more than half of a day at wood turning, which involved higher duties or duties carrying a higher rate, and that therefore he was entitled to be paid under the higher rate. But the Magistrate found as a fact that he did not work for 50% of his time at the alleged higher duties. Accordingly, neither Item 55 (a) nor the mixed functions clause will avail in these circumstances to create an obligation to pay a full weekly wage at the higher rate.

In my opinion the only charge made is a charge of failing to pay the full weekly wage and for that reason, in my opinion, the information was rightly dismissed and this appeal must fail.

But I further mention that the provision in Item 55 (a)

is very obscure. The words are "Machinist operating the following" and then the names of certain machines follow; the words are "sliver, shaper.....wood turner". The evidence is that there is no machine known as a wood turner; a wood turner is a person and not a machine. That is a difficulty which might be removed by application to the Arbitration Court for interpretation or variation of the award.

Finally, in my opinion, there is no clear evidence as to what the classification of Birch should be regarded as being for the purposes of the mixed functions clause 11 (a). Birch himself says in his evidence: "I am a case-maker." "I am not a case-maker." He did not seem to know exactly what he was. At pages 12 and 13 his evidence is "For that work I received a case-maker's wage £5.16. 0. I am employed as a case-maker." "They put me down as a case-maker." "I am not a case-maker."

The application of clause 11 (a) depends upon the determination of the ordinary classification of the individual concerned. In my opinion it would be a very difficult and unsatisfactory thing for this Court upon the evidence given to attempt to determine the ordinary classification of Birch for the purpose of applying item 11 (a).

In my opinion the appeal should be dismissed.

ORDER: Appeal dismissed with costs.

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IN THE HIGH COURT OF AUSTRALIA

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Rich J. I agree. In my opinion neither the finding of the Magistrate nor the evidence supports the charge. I agree that the appeal should be dismissed.

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JUDGMENT.

STARKE J.

I agree that the appeal should be dismissed.

The award provides that in addition to the basic wage provided in clause 1 of the award the margins set out in the award should be payable to employees therein named - "55. Machinists operating the following", including "Wood Turner", and the marginal rate per week is set out.

The Magistrate has found - and Mr. Barwick does not contend that he was in error in so finding - that the workman in this case was not a machinist operating a wood turner or a wood turning lathe. He is therefore not within item 55. Mr. Barwick then fell back upon the position that the workman was employed under another classification and upon the mixed functions clause, which provides, so far as material, that an employee engaged for half or less than half of one day or shift on duties carrying a higher rate than his ordinary classification should be paid the higher rate for the time so worked.

The classification we have been referred to under which it was said the workman was paid is No. 7 "Boxes, crates and/or cases". I am not at all clear that the workman falls under that classification at all, but, if he does fall under it the evidence does not satisfy me that it was not part of his duties or functions under this classification to work the wood turner or wood turning lathe that he did work. If that is so the mixed functions clause has no application to the case for the workman was performing the duties or the functions of his classification and not the duties or functions of a classification carrying a higher rate.

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DIXON J.

It is not denied on the part of the appellant organization that, having regard to the findings of fact, in order that the prosecution may succeed, the case of Birch must be one ^{to} which the provision governing mixed functions applies.

That is clause 11 (a) of the award. The material part of the provision would apply if, for less than half a day or half a shift, Birch was engaged on duties carrying a higher rate than his ordinary classification. In that event he is to be paid at the higher rate for the time so worked.

It is apparent that the first step in considering whether Birch's case falls under the operation of the clause is to find what his ordinary classification is and what duties belong to it. The second step is to inquire whether for some ascertainable time he was engaged on work outside those duties, work consisting of duties carrying a higher rate of pay.

In the present case we are apparently to assume that Birch's ordinary classification was that of a maker of boxes, crates and or cases and fell under item 7 of Table B. He was so treated in consequence of an interpretation or expression of opinion by the late Judge O'Mara. The evidence does not make it clear what are the duties of a person falling under this, the fourth, description contained in item 7.

On the one side, the respondent's side, it is said that all that Birch did formed part of those duties, including the use, upon each end or plate and drum, of the lathe.

On the other side, the appellant's side, it is said that the fourth category in item 7 is confined to putting together boxes, crates and cases or the like from wood and materials already cut, turned, shaped or prepared for the purpose. Perhaps some support is to be found for this view in the word " manual " standing in

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the brackets after the words " making and/or repairing ".

But that word may be and probably was used to exclude box making and case making by machinery and not to exclude absolutely any incidental use of a machine or machine tool in case making operations substantially or predominantly manual. In any case, what duties belong to a classification is to my mind a matter to be established by evidence. There is no finding by the Magistrate to support the appellant's contention. No expert or other evidence has been referred to which satisfies me that so much turning as Birch did should not be considered as forming part of the ordinary duties of the classification to which Birch was assigned. No doubt some of the difficulties arise from the fact that the making of drums and reels is only placed in item 7 by analogy and that in the making of boxes, crates and cases in the stricter sense, the need to use a lathe must seldom, if ever, occur. But once Birch's work is classified under that or any other item, before the mixed functions provision, Cl. 11 (a), can apply, it must be shown that the classification does not include certain of the duties of that work and that has not been done.

In my opinion no transfer or transition has been shown from his ordinary work or the duties of his ordinary classification and for that reason, without going further, the appeal fails.

I think that the appeal should be dismissed with costs.

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Mc Lennan

Judgment.

I agree that the appeal should be dismissed. It does not seem to be necessary to add anything.

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JUDGMENT.

WILLIAMS. J..

The question of substance which finally emerges, and with which alone it is necessary to deal, is whether Birch, the member of the appellant union, worked for part of his time as a 'machinist operating wood turner' within the meaning of item 55(a) of Table B of the award. The expression wood turner in this item must refer in its context to a wood turning machine. Birch was paid as a case maker within item 7, and the argument has proceeded on the basis that this was his ordinary classification for the purposes of the mixed functions clause (11a). He was in fact making 140lb. wooden drums on which metal cables could be wound. He was using for part of this work a wood turning lathe. But so far as I can gather from the evidence accepted by the magistrate the use of this machine was merely incidental to the work of making the drums. I do not think that by any ordinary use of language it could be said that whilst he was using the machine he was not still doing part of his ordinary work. He could not accordingly be classified for the purposes of the mixed functions clause in the higher category of a machinist operating a wood turning lathe. I would therefore dismiss the appeal.