High Court of Australia.

FAIRBRASS

v.

STEVEDORING INDUSTRY COMMISSION.

REASONS FOR JUDGMENT

Oral Judgment delivered
Monday - 15/9/47.

FAIRBRASS v. STEVEDORING INDUSTRY COMMISSION.

JUDGMENT: WILLIAMS, J.

This is a summons for an interlocutory injunction in which the Plaintiff asks, under the summons as amended, for orders that the Defendant, the Stevedoring Industry Commission, be restrained, and that an injunction be granted restraining it from making any order or orders providing that payment to waterside workers at the Port of Fremantle who attend for work on any day and are not employed on that day be limited to waterside workers who are members of the Waterside Workers' Federation of Australia or are members of the Permanent and Casual Wharf Labourers' Union of Australia; or any orders having the effect of limiting employment at the said port to waterside workers who are members of the Waterside Workers' Federation of Australia; or an order or orders which have the effect of classifying the Plaintiff as a member of the registered reserve or of the Waterside Workers' reserve.

The Plaintiff's claim in the main is based upon certain alleged rights which accrue to him as a registered waterside worker under Regulation 64(b) of the National Security (Shipping Co-ordination) Regulations. This regulation is one of the regulations contained in Part 5 of these regulations, and Part 5 is the part which constitutes and regulates the functions of the Stevedoring Industry Commission, one of the Defendants. Regulations 62 and 63 of these regulations provide that the Commission shall have power to make such orders, give such directions and do all such other things as it thinks fit for carrying out the objects of this part, and also that, notwithstanding anything contained in any other law, but subject to the next succeeding sub-regulation, the terms and conditions of employment for waterside work and any stevedoring operations shall be such as the Commission by order determines.

As I have already said in the previous case of Huddart Parker Limited v. Stevedoring Industry Commission (unreported) these regulations provide generally for the regulation, control and

performance of waterside work and stevedoring operations, and confer upon the Commission very wide powers for that purpose, but all these powers must be used for the purpose of defence specified in Regulation 56, that is to say, the purpose of effecting speedy loading and unloading of ships. These regulations are part of the regulations made under the National Security Act, and rest upon the Defence power. But that particular purpose is one which I have no doubt still exists to-day as an aftermath of the war, so that I feel no doubt that these regulations, which have been embodied in the regulations in the schedule to the Defence Transition Act, are still in force. Therefore the Commission has the power to take such steps as may still be reasonably necessary for the purpose of effecting the speedy loading and unloading of ships.

The Plaintiff became a registered waterside worker at the port of Fremantle in February 1943. On the 9th August 1945 the Commission made Order No.97 under the regulations regulating waterside work at the port of Fremantle. Paragraph 1. provides that the order shall be known as the Port of Fremantle Rules of Engagement and Organisation Scheme, and shall apply to all waterside workers and all employers registered by the Commission for the Port of Fremantle. Paragraph 4. provided that the registered labour for the Port of Fremantle should be divided into two divisions, namely Division "A", Fremantle Lumpers Union of Workers, which, I understand, is part of the Waterside Workers' Federation, and Division "B", other registered waterside workers. The paragraph provided that the men in Division "A" should be absorbed, and members of the Fremantle Lumpers' Union of Workers engaged where practicable before engaging men from Division "B"; so that the order in its original form gave members of the Waterside Workers' Federation a preference (in engagement) over all other workers to do work on the waterfront at the Port of Fremantle. The other registered waterside workers at Fremantle were either members of the Permanent and Casual Wharf Labourers Union of Australia or non-unionists like the Plaintiff.

I should also refer to paragraph 24(c) of that order which provided that if any employer, his servant or agent, engaged labour

except in pursuance of this order, or transferred labour except in pursuance of the relevant awards or of this order, the Commission or the Chairman of the Waterside Employment Committee might deal with such employer, servant or agent, in accordance with the said regulations. I have no doubt that the order in its original form was intended completely to control the whole engagement of labour on the waterfront at Fremantle.

Then in December 1946 three orders (Nos.56,62 and 63) were made by the Commission to come into operation on the 2nd January 1947. The effect of these orders, shortly stated, was that the Commission ordered waterside workers registered at a number of ports, including Fremantle, to attend from day to day at the picking-up centres, for which they were to be paid, if ready and willing to accept employment but not engaged to work on the day of such attendance, the sum of 12/- for each such attendance. The Plaintiff was, therefore, one of the registered waterside workers who under those orders was bound to attend from day to day at the picking-up centre at Fremantle, and became entitled to attendance money.

Regulation 68(1)(e) of Part 5. of the Shipping Co-ordination Regulations provides that where the Commission has reason to believe that a waterside worker is not regularly attending the picking-up place or places prescribed by the appropriate award of the Court or order of the Commission, the Commission may call on him to show cause in a manner and within a period specified by the Commission why his registration as a waterside worker should not be cancelled or suspended. As I read that sub-regulation, there is no obligation on a registered waterside worker to attend at any picking-up place or places unless such a place is prescribed by an appropriate award of the Court, that is to say the Commonwealth Court of Conciliation and Arbitration, or by an order of the Commission. If there is no appropriate award of the Court or order of the Commission, a registered waterside worker does not risk the loss of his registration if he does not regularly attend at any picking-up place.

Then by Order No.6 of 1947, made on 18th February 1947 to

become operative on 19th February 1947 Order 56 of 1946 was amended so that the right to attendance money was restricted to registered waterside workers who were members of the Waterside Workers' Federation or of the Permanent and Casual Wharf Labourers' Union. The Plaintiff was not a member of either of those unions, so that under that order he lost his right to attendance money.

By Order No.9 of 1947, which applied to the Port of Fremantle, made on 21st February and to become operative on and from 17th March 1947, orders Nos.52, 62 and 63 of 1946 and No. 6 of 1947 were rescinded and replaced and in effect codified by the provisions of this new order No.9. Paragraph (1) of Order No.9 provided that the order should apply only to waterside workers who were members of the Waterside Workers' Federation or of the Permanent and Casual Wharf Labourers' Union, and who were registered under Regulation 64(b). Paragraph (2) provided that unless otherwise sanctioned by the Chairman of the Waterside Employment Committee or other authorised officer, waterside workers at a number of ports, including Fremantle, should attend from day to day at the picking-up centre or make themselves available for engagement in the manner approved by the Waterside Employment Committee at the port concerned. Paragraph (3) provided that, except as thereinafter provided, waterside workers who attended or made themselves available for engagement in accordance with the provisions of the orders of the Commission, and who were ready and willing to accept employment should, if not engaged to work on the day of such attendance, be paid an amount of 12/- for each such attendance.

By Order No.22 of 1947 dated 15th May 1947, relating to the port of Fremantle, to operate from 12th May 1947, Order No.97 was amended, inter alia, by adding after the words "waterside workers" the words "members of the Waterside Workers' Federation", and by deleting Clause 4. There was also a subsidiary order dated 17th July 1947, Order No.41 of 1947, relating to the Port of Fremantle, which was made to operate between 19th February 1947 and the 11th May 1947, both dates inclusive, which provided that notwithstanding the provisions of Clause 1 of Order No.9 of 1947, all registered waterside workers at the Port of Fremantle who attended from day to

day at the pick-up centre or made themselves available for engagement in the manner approved by the Waterside Employment Committee, and who were not engaged to work on the day of such attendance, should be paid an amount of 12/- for each such attendance. The effect of all these orders was that the Plaintiff became entitled to and received attendance money from 2nd January to 11th May 1947, but that subsequently he was excluded from the right to receive and has not received further attendance money.

The first question that arises is as to the true construction of Order No.97 of 1945 as amended by No.22 of 1947. With some doubt I agree with the submission made by Mr.Holmes that this order as amended relates solely to members of the Waterside Workers' Federation, and does not in law prevent other waterside workers registered at Fremantle from obtaining employment on the waterfront. The provisions of paragraph 24(c) of Order No.97, the contents of which I have already stated, and upon which Mr.Hunter relied, must be read, I think, in the light of the amendment as relating only to the engagement by employers of members of the Waterside Workers' Federation, and not, as it did before, to the engagement by employers of labour generally. However, I should think that the practical effect of the amendment is to give almost if not complete preference of employment to members of the Waterside Workers' Federation, and to deprive registered waterside workers who are not members of the Federation of any reasonable opportunity of employment. The Plaintiff has, therefore, in a practical sense been excluded since May 1945 from employment on the waterfront and from the same date from the legal right to attendance money because he is not a member of the Waterside Workers' Federation, but I cannot find anything in the regulations which gives the Plaintiff a legal right to challenge either Order No.6 or Order No.22 of 1947 because of this discrimination

Regulation 75 specifically provides that the right of a person registered under the regulations to accept employment as a waterside worker shall be subject in all respects to Part 5.of the Regulations and to the orders and directions of the committee; I stress the last words, "To the orders and directions of the committee."

In view of the wide powers to make orders conferred upon

the committee by Regulations 62 and 63 generally, and of this wide power in relation to the specific matter under discussion, it seems to me that it is impossible for the Court to say that it lies outside the power of the Commission to make orders from time to time conferring priority in employment on members of particular unions or of a particular union, if, in the bona fide opinion of the Committee, it is advisable to make such orders and give such preference for the purpose of the speedy loading and unloading of ships. The bona fides of the Commission have not been challenged in this action, and there is no evidence whatever before me to suggest in any way that these orders are not a bona fide exercise by the Commission of its powers.

It has been said so often before, and perhaps I should say it once again, that it is not the function of the Judiciary to consider the wisdom or the propriety or the fairness or reasonableness of such orders; it is the function of the Court to consider whether they are authorised by the powers conferred upon the body and if they are so authorised that is the end of the function of the Court.

I am quite unable to find anything in Orders Nos.9 and 22 of 1947 which is not entirely within the scope of the wide powers conferred upon the Commission. The Orders relate to the work of the port and to the loading and unloading of ships from day to day and are reasonably capable of aiding the particular purpose of defence under discussion. They are of an entirely different character in every way from the orders of the Commission which were before me in the previous case.

For those reasons I must dismiss the summons. The costs of the defendants will be their costs in the action.