

[HIGH COURT OF AUSTRALIA.]

DORMAN LONG & COMPANY LIMITED . APPELLANTS ;
DEFENDANTS,

AND

THOMSON RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Employer and Employee—Minimum wages—Award of Wages Board—Similar work*
1916. *done by employees in different crafts—Whether award as to craft or to work done*
—*Factories and Shops Act 1912 (Vict.) (No. 2386), secs. 133 (2), 141 (1) (a).*

MELBOURNE,
Feb. 24.

Griffith C.J.,
Barton, Isaacs,
Gavan Duffy
and Rich JJ.

Sec. 133 (2) of the *Factories and Shops Act 1912* (Vict.) provides that “where a resolution is or has been passed by both Houses of Parliament declaring that it is expedient to appoint any Special Board to determine the lowest prices or rates which may be paid to any person or persons or classes of persons employed . . . in any process trade business or occupation or any group thereof specified in the resolution . . . the Governor in Council may if he thinks fit from time to time (a) appoint one or more Special Boards for any one of such processes trades businesses or occupations or for any branch or branches thereof or for any group or groups thereof.” Sec. 141 (1) provides that “every Special Board in accordance with the terms of its appointment (a) shall determine the lowest price or rates of payment payable to any person or persons or classes of persons employed in the process trade business or occupation specified in such appointment.”

An employee was employed by an employer who carried on business as a girder-maker, and was paid wages at the rate fixed for labourers employed in the trade of girder-making by a Special Board appointed under sec. 133. The employer had undertaken to supply and erect girders at a building in course of construction, and for one month the employee was engaged at the building in assisting to erect the girders. The work he did at the building

was of the same nature as that ordinarily done by him, and was also of the same nature as that done by a builders' labourer engaged in the erection of buildings. The lowest rate of wages payable to a builders' labourer engaged in the erection of buildings, which had been fixed by another Special Board appointed under sec. 133, was higher than that at which the employee was paid. On a complaint by the employee to recover from his employer the difference between the amount paid to him for the particular month and that which would be payable under the builders' labourers award, the Magistrate found that the employee was entitled to be paid in accordance with the builders' labourers award. An order *nisi* to review this decision was discharged. On application for special leave to appeal to the High Court,

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Held, that the question whether the complainant was during the period in question a builders' labourer engaged in the erection of buildings was one of fact.

Special leave to appeal from the Supreme Court of Victoria (*Cussen J.*):
Thomson v. Dorman Long & Co. Ltd., (1916) V.L.R., 13; 37 A.L.T., 129, refused.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

In the Court of Petty Sessions at South Melbourne a complaint was heard whereby William Milne Thomson sought to recover from Dorman Long & Co. Ltd. the sum of 14s. 4d., being the difference between the amount paid by the defendants to the complainant from 23rd June to 22nd July 1915 and the amount due to him for wages as a builders' labourer in their employ as a gear-hand during that period under an order and determination made by the Court of Industrial Appeals on an appeal from the determination of a Special Board appointed pursuant to sec. 133 (2) of the *Factories and Shops Act* 1912 to determine the lowest prices or rates which might be paid to persons "employed in the occupation of a builders' labourer engaged in the erection, repair or demolition of buildings." It appeared that the defendants, who were boilermakers and manufacturers of girders, had undertaken to supply and erect certain girders at a building then in course of erection; that the complainant before the 23rd June 1915 was employed by the defendants as a labourer, and was then and during the period in question paid wages in accordance with a determination made by a Special Board appointed under sec. 133 (2) to determine the lowest prices or rates which might be paid to persons employed in the process, trade or business of (amongst others) girder-making, as amended on appeal

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to the Court of Industrial Appeals; that during the period 23rd June to 22nd July 1915 the complainant was employed by the defendants in assisting to erect girders supplied by the defendants at the building already mentioned; and that the work done by him at such building was of the same nature as that ordinarily done by him at the defendants' works before 23rd June, and was also of the same nature as that done by a builders' labourer employed as a gear-hand, for whom the minimum rate of wages under the builders' labourers award was higher than that at which the complainant was paid. The Police Magistrate held that the complainant was entitled to be paid wages in accordance with the builders' labourers award, and he made an order for the payment by the defendants to the complainant of the amount claimed with costs.

An order *nisi* to review that decision was made absolute by Cussen J., who held that the Magistrate was justified in finding that the complainant during the period in question was a builders' labourer: *Thomson v. Dorman Long & Co. Ltd.* (1).

The defendants now applied for special leave to appeal to the High Court from that decision.

Starke, in support of the application. The learned Judge has wrongly construed secs. 133 (2) and 141 (1) (a) of the *Factories and Shops Act* 1912. He has held that those sections contemplate the fixing of wages according to the work done by the employees, whereas it contemplates the fixing of wages according to the craft in which the employee is employed. Some of the work done by employees in different crafts may be the same, and great confusion would be caused if the wages of an employee had to be altered according to the work he was from time to time doing.

[GRIFFITH C.J. Is it not a question of fact whether during the month in question the complainant was employed in the occupation of a builders' labourer engaged in the erection of a building?]

His craft remained the same during that period as before. He continued to be employed as he was before in the process, trade or business of girder-making.

(1) (1916) V.L.R., 13; 37 A.L.T., 129.

PER CURIAM. The real question involved in this case is one of fact. It is not usual, except under special circumstances, where special leave to appeal is refused to express any opinion on questions of law, and it is not necessary to do so here.

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Special leave to appeal refused.

Solicitors for the applicant, *Rigby & Fielding.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HARRY MACHIN APPELLANT ;
PETITIONER,

AND

JOSEPHINE MACHIN RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

*Practice—High Court—Appeal from Supreme Court of a State—Notice of appeal—
Service—Non-appearance of respondent in Supreme Court—Rules of the High
Court 1911, Part I., Order LV., rr. 2, 6 ; Part II., Sec. III., rr. 1, 4.*

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A petition to the Supreme Court of Victoria by a husband for dissolution of marriage which was undefended was dismissed.

MELBOURNE,
March 10.

Held, that an appeal by the husband to the High Court could not be entertained in the absence of service, personal or substituted, of the notice of appeal upon the wife.

Griffith C.J.,
Barton, Isaacs,
Gavan Duffy
and Rich JJ.

Appeal from the Supreme Court of Victoria (*Hood J.*) struck out.

APPEAL from the Supreme Court of Victoria.

Harry Machin, by petition to the Supreme Court, sought a dissolution of his marriage with his wife, Josephine Machin, on the ground of desertion for three years and upwards. The respondent did not