[HIGH COURT OF AUSTRALIA.]

THE NORTH MELBOURNE ELECTRIC TRAMWAYS AND LIGHTING COMPANY LIMITED . . . . . } APPELLANT;

AND

THE AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION . . . } RESPONDENT.

ON APPEAL FROM THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

H. C. OF A. 1918.

MELBOURNE, *March* 7.

Barton, Gavan Duffy and Rich JJ.

Industrial Arbitration—Agreement between parties to dispute—Memorandum of agreement certified—Breach—Imposition of penalty—Construction of agreement—Appeal to High Court—Jurisdiction of High Court—"Order"—Commonwealth Conciliation and Arbitration Act 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 24, 31 (1), 38 (*d*).

An agreement made between an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1915 and a certain company, a memorandum of which was certified by the President of the Commonwealth Court of Conciliation and Arbitration under sec. 24 of the Act, provided for a minimum rate of wages per day, with a proviso that in respect of work done during a certain period before the agreement was made employees should be entitled to the difference between the "ordinary" rate of wages payable under a prior agreement and the "ordinary" rate of wages payable under the new agreement. The agreement then proceeded to provide for extra rates of wages for Sundays and holidays and for overtime. The old agreement contained a provision for extra payment for overtime but not for Sundays and holidays. The company paid one of its employees in respect of work done during the antecedent period on certain Sundays and holidays on the basis that the "ordinary" rate of wages referred to in the agreement meant the rate of wages for a day other than a Sunday or a holiday. The Commonwealth Court of Conciliation and Arbitration having, under sec. 38 (*d*), imposed a penalty on the company for a breach of the agreement,

Held, that special leave to appeal to the High Court should not be granted.

H. C. OF A. 1918.

NORTH MELBOURNE ELECTRIC TRAMWAYS AND LIGHTING CO. LTD. v. AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION.

Quære, whether the imposition by the Commonwealth Court of Conciliation and Arbitration under sec. 38 (*d*) of the *Commonwealth Court of Conciliation and Arbitration Act* 1904-1915 of a penalty is an "order" within the meaning of sec. 31 (1) of the Act so as to prevent an appeal in respect thereof to the High Court.

APPLICATION for special leave to appeal.

An agreement was made on 18th August 1917 between the North Melbourne Electric Tramways and Lighting Co. Ltd. and the Australian Tramway Employees' Association, an organization registered under the *Commonwealth Conciliation and Arbitration Act*. The agreement was certified by the President of the Commonwealth Court of Conciliation and Arbitration on 22nd August 1917, pursuant to sec. 24 of the Act, as a memorandum of the terms of an agreement for the settlement of a certain industrial dispute so far as the Company was concerned. By the agreement it was provided (*inter alia*) that the minimum rate of wages to be paid to motormen and conductors after the second year of service should be 10s. 6d. per day, with a proviso that "members of the Association now in the Company's service . . . whose rates of pay are hereinbefore set out shall be entitled to be paid for the total number of hours worked between 1st January 1917 . . . and the date of this agreement the difference between the ordinary rates of pay under the old agreement dated 14th January 1913 and the ordinary rates of pay provided herein;" that all duty done by motormen and conductors on Sundays and on certain holidays should be paid for at the rate of time and a quarter; that all duty done in excess of 48 hours in any one week should be paid for at the rate of time and a quarter; and that all work performed by motormen and conductors between 1 a.m. and 5 a.m. and all duty in excess of $8\frac{1}{2}$ hours in any one day should be paid for at the rate of time and a half. The old agreement made no provision for extra payment for Sundays or holidays, but did provide for payment for overtime.

A summons was taken out by the Association charging against the Company a breach of the agreement by failing to pay one Anthonie Hamann, a member of the Association, and then employed by the Company, a sum of £3 6s. for work performed by him for the Company as a motorman during the period commencing on 1st

January 1917 and ending on 1st September 1917, Hamann having been employed as a motorman by the Company on eighteen Sundays and six holidays during that period and paid for the work so performed by him on such Sundays and holidays at the rate of 11s. per day (which included a bonus of 6d. a day) instead of at the rate of 13s. 9d. per day. The President of the Commonwealth Court of Conciliation and Arbitration, after hearing evidence, held that there had been a breach of the agreement, and inflicted a penalty of £1 on the Company.

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

H. I. Cohen, for the applicant. The imposition of a penalty by the President of the Commonwealth Court of Conciliation and Arbitration is not an "order" of that Court within the meaning of sec. 31 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, and an appeal will lie to this Court. The word "order" there means a dealing with a plaint or industrial controversy between parties. See secs. 38 (*b*), (*d*), 44, 45, 48. The meaning of the provision for payment in respect of work done between 1st January 1917 and the date of the agreement is that payment was to be made for the total number of hours worked at a uniform rate without regard to whether the work was done on week-days or Sundays or holidays or was overtime work, and that uniform rate was to be the difference between the ordinary rate of pay for an ordinary week-day under the old agreement and that for an ordinary week-day under the new agreement.

The judgment of the COURT, which was delivered by BARTON J., was as follows :—

It is not necessary for us to determine the first point suggested by Mr. *Cohen*, because even supposing that it were good this is not a case in which we should grant special leave.

Special leave to appeal refused.

Solicitors, *Home & Wilkinson.*

B. L.