[HIGH COURT OF AUSTRALIA.]

MALLINSON . . . . . APPELLANT;
PLAINTIFF,

AND

THE SCOTTISH AUSTRALIAN INVESTMENT COMPANY LIMITED . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 19, 20, 26.

Knox C.J., Isaacs, Gavan Duffy and Rich JJ.

Industrial Arbitration—Wages—Minimum rate of wages fixed by award—Mode of enforcement—Recovery of difference between wages paid and those payable under award—Action in District Court of New South Wales—Jurisdiction—Membership of organization—Evidence—Commonwealth Conciliation and Arbitration Act 1904-1918 (*No.* 13 *of* 1904—*No.* 39 *of* 1918), *secs.* 2, 5, 40 (1) (*b*), 44-50.

Sec. 40 (1) (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1918, which authorizes the Commonwealth Court of Conciliation and Arbitration by its award to "prescribe a minimum rate of wages or remuneration," confers upon an employee a right to receive from his employer wages at the rate prescribed by the award, and there is nothing in the general scope or purpose of the Act inconsistent with the right of the employee to maintain an action in any competent Court for the amount payable at that rate, nor is there any provision therein depriving him of that right.

Held, therefore, that an action would lie in a District Court of New South Wales by an employee to recover from his employer the difference between the amount of wages paid in pursuance of their contract and that payable under an award by which they were both bound.

Membership of an organization may be proved by parol evidence though the terms which govern such membership are in writing.

Decision of the Supreme Court of New South Wales: *Mallinson* v. *Scottish Australian Investment Co.*, 20 S.R. (N.S.W.), 251, reversed.

APPEAL from the Supreme Court of New South Wales.

Joseph Mallinson and his wife, on 15th January 1917, entered into an agreement with the manager for the Scottish Australian Investment Co. Ltd. of their Mundawadra Station, under which the husband was to cook and bake for the homestead, visitors and kitchen at the station. Mallinson went to the station with his wife, and worked there under the agreement, receiving certain wages, until 8th April 1919, when they left the service of the Company. The husband subsequently brought an action in the District Court at Sydney against the Company, claiming £28 0s. 8d., being the amount of the difference between the wages paid to him between 1st January 1918 and 8th April 1919, namely, £125 14s. 4d., and the wages to which he alleged that he was entitled during that period as a station hand and a member of the Australian Workers' Union under an award of the Commonwealth Court of Conciliation and Arbitration, namely, £153 15s. A preliminary objection was taken by counsel for the defendant that the District Court had no jurisdiction to entertain the claim, but the objection was overruled. In the course of his evidence the plaintiff stated that he was a member of the Australian Workers' Union, and had been a member for the past twenty-five years. Counsel for the defendant objected to this evidence as proof of membership of the Union, but the objection was overruled. Certain correspondence between the secretary of the Union and the manager of Mundawadra was put in evidence by the plaintiff without objection. In the first letter, dated 29th May 1919, the secretary stated that the plaintiff was a member of the Union, and made a claim on his behalf under the award substantially the same as that in the action. In the other two letters, dated 1st and 6th June 1919, the manager of Mundawadra stated that the plaintiff had been paid all that he was entitled to, and that the case was one that should "come under the slow and infirm employee clause." The award which was the basis of the claim, by clauses 13, 14 and 15, made provision for minimum rates of wages payable to station hands. Clause 19 provided that "the following respondents are bound by the award as to all its clauses excepting clauses 13, 14 and 15." Then followed a list of names in which appeared "The Scottish Australian Investment Co. Ltd. of Murrulebale and Mundawadra

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Stations, New South Wales; and Kynuna Station, Queensland." Clause 20 provided that "the following respondents are bound by the award as to clauses 13, 14 and 15." Then followed a list of names in which appeared "The Scottish Australian Investment Co. Ltd., Kynuna." At the close of the plaintiff's case the District Court Judge held that the defendant was not bound by the award so far as wages of station hands were concerned in respect of employees on Mundawadra, and he therefore nonsuited the plaintiff.

From that decision the plaintiff appealed to the Supreme Court, and the Full Court held that the District Court had no jurisdiction to entertain a claim by an employee in respect of wages payable by virtue only of an award made under the *Commonwealth Conciliation and Arbitration Act*, and they dismissed the appeal: *Mallinson* v. *Scottish Australian Investment Co.* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Brissenden K.C. (with him *Perry*), for the appellant. Where a statute imposes a duty and does not give a complete remedy for a breach of that duty, the person aggrieved has a remedy at common law by an action unless that remedy is taken away expressly or by necessary implication (*Butler* v. *Fife Coal Co.* (2); *Shepherd* v. *Hills* (3); *St. Pancras Parish* v. *Batterbury* (4); *Doe d. Murray* v. *Bridges* (5); *Groves* v. *Lord Wimborne* (6)). The remedy given by the statute must cover the whole of the right (*Stubbs* v. *Martin* (7)).

[ISAACS J. referred to *Lowe* v. *Dorling & Son* (8); *Hopkins* v. *Mayor &c. of Swansea* (9); *Goody* v. *Penny* (10).

[RICH J. referred to *Booth* v. *Trail* (11).]

The case of *Josephson* v. *Walker* (12) is distinguishable, for there the statute gave a complete remedy. The effect of sec. 40 (1) (*b*) of the *Commonwealth Conciliation and Arbitration Act* is that the sum which should be paid under an award is due by virtue of the original agreement which is varied by the award, if the rate of wages

(1) 20 S.R. (N.S.W.), 251.
(2) (1912) A.C., 149, at p. 165.
(3) 11 Ex., 55.
(4) 2 C.B. (N.S.), 477, at p. 486.
(5) 1 B. & Ad., 847, at p. 859.
(6) (1898) 2 Q.B., 402.
(7) (1895) 2 I.R., 70.
(8) (1906) 2 K.B., 772, at p. 784.
(9) 4 M. & W., 621; 8 M. & W., 901.
(10) 9 M. & W., 687.
(11) 12 Q.B.D., 8, at p. 11.
(12) 18 C.L.R., 691.

fixed by the agreement is less than that prescribed by the award. Neither sec. 38 (*c*) nor sec. 48 gives a remedy to the person who should have received the wages. The latter section was not intended to apply to the recovery of money. An order under it cannot be made on the application of an employee, but can be made only on the application of an organization of employees.

Broomfield K.C. and *McGhie*, for the respondent. The provisions of the *Commonwealth Conciliation and Arbitration Act*, so far as a minimum rate of wages is concerned, are intended to be a complete code and to entirely supersede all common law rights and obligations, and the relations between the employer and the employee are in that respect intended to be wholly regulated by the statute. Sec. 48 gives ample power to the Commonwealth Court of Conciliation and Arbitration to compel employers to pay wages at the rate prescribed by an award. The object of the Act was to substitute collective bargaining for individual bargaining, and therefore no provision was made for creating a debt enforceable by any other means than those prescribed by the Act. Sec. 48 contemplates a breach of an award already committed and an order being made to compel payment of what should have been paid as well as payment of what afterwards becomes payable under the Act. The Act creates a new right and gives a special remedy, and the rule applies that that is the only remedy (*Josephson* v. *Walker* (1)). There was no evidence that the appellant was a member of the organization. The mere statement by the appellant that he was a member was not sufficient. Sec. 21A shows how the fact might have been proved; it might also have been proved by showing a compliance with the rules of the organization. The question of membership was in issue, and strict proof was necessary. The award does not bind the respondent in respect of this particular station. There was no reason for mentioning any particular station other than to indicate that the respondent was bound as to that station only.

Brissenden K.C., in reply. The statement of the appellant that he was a member of the organization is *primâ facie* evidence of that

(1) 18 C.L.R., at pp. 697, 701.

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fact. The respondent was a party to the dispute and was before the Court, and under sec. 29 it is bound by the award in respect of any business within the scope of the award as to subject matter.

Cur. adv. vult.

Aug. 26.

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

The appellant was employed by the respondent Company as a station cook from 1st January 1918 till 8th April 1919, and was paid for his services during that period at the rate of 38s. per week. Under an award of the Commonwealth Court of Conciliation and Arbitration the minimum wage payable for such services was, during the period 1st January 1918 to 30th November 1918, 48s. per week, and during the period 1st December 1918 to 8th April 1919, 42s. per week. The appellant sued in the District Court to recover the difference between the amount paid to him and the amount calculated on the minimum rate of wage fixed by the award, during the period in question. The main question for decision is whether the District Court had jurisdiction to entertain the action. The respondent Company contended that the only remedies available to the appellant were those expressly provided by the *Commonwealth Conciliation and Arbitration Act* 1904-1915, as amended by the Act of 1918, relying on the doctrine that where a statute confers a new right and provides a remedy for the enforcement of such right no other remedy is open. The rule applicable here is stated in *Shepherd* v. *Hills* (1) as follows, viz., "Wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary"; and where the amount is liquidated the action of debt is appropriate (*Hopkins* v. *Swansea* (2)). The obligation is none the less a debt because the statute gives no particular method of enforcing it (*Booth* v. *Trail* (3)). In cases in which the statute contains no express denial of the right to bring an action, the proper course to adopt in order to determine whether it contains "some

(1) 11 Ex., at p. 67.
(2) 4 M. & W., 621; 8 M. & W., 901.
(3) 12 Q.B.D., at p. 10.

provision to the contrary" within the meaning of the rule stated above is to consider whether it appears from the whole purview of the Act that it was the intention of the Legislature that the remedy provided should be a substitute for the right of action which would otherwise exist; and in determining this question it is material to consider whether the obligation imposed by the Act was designed to benefit a particular class of persons (*e.g.*, employees) and to compel their employers to perform certain duties for their benefit (*Groves* v. *Lord Wimborne* (1)). It is also material to consider whether the provision made by the Act for compelling obedience to its commands is in the nature of a penalty for disobedience or in the nature of compensation to the person whose rights are affected by the failure to perform the obligations imposed by the Act. As was said by *Vaughan Williams* L.J. in *Groves* v. *Lord Wimborne* (2):—"It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *primâ facie*, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty. I have equally no doubt that, where in a statute of this kind a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by non-performance of that duty, or whether the Legislature intended that there should be no other remedy than the statutory remedy; but it is by no means conclusive or the only matter to be taken into consideration for that purpose. If it be found that the remedy so provided by the statute is to enure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration in dealing with the question whether the Legislature intended the statutory remedy to be the only remedy. But again, the fact that the Legislature has provided that that remedy shall enure, or under some circumstances shall enure, for the benefit of the person injured, is not conclusive of the question, and, although it may be a cogent and

(1) (1898) 2 Q.B., 402.

(2) (1898) 2 Q.B., at pp. 415-416.

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weighty consideration, other matters also have to be considered." Among the "other matters" that have to be considered is the question whether the remedy provided is coextensive with the right given by the Act (*Stubbs* v. *Martin* (1)).

We proceed to examine the provisions of the *Commonwealth Conciliation and Arbitration Act* by the method indicated in the authorities above referred to. So far as the Act deals with the remuneration of employees it is clear that its effect is that, when persons standing in the relation of employer and employee respectively become bound by and entitled to the benefit of an award, the employer shall be liable to pay for the services of the employee, and the employee shall be entitled to be paid by the employer wages at a rate not less than the minimum rate of wages fixed by the award, notwithstanding that a lower rate had been stipulated for by the contract of employment. The new right created in the employee by the Act operating on the award made under it is to receive from his employer wages at a rate not less than the minimum rate fixed by the award. This is apparent from the terms of sec. 40 (1) (*b*) of the Act, which provides that the Court by its award may prescribe a minimum rate of "*wages or remuneration.*" It is important to observe that the alteration which the Court is thus empowered to make in the rights and liabilities of the parties is not an alteration in the character of the payment but in its amount. The amount is still to be paid as "*wages or remuneration,*" and this necessarily imports that the employee shall have a right to receive, and if necessary to recover, from the employer payment of the amount calculated according to the rate fixed by the award. The right conferred being a right to receive from a designated person a liquidated sum of money, the question is whether the Act contains provision forbidding the recovery by appropriate legal proceedings of the amount payable.

Mr. *Broomfield*, for the respondent, advanced two main lines of argument in support of the decision of the Supreme Court. He said that the Act was intended to provide a complete code in respect of industrial matters coming within the jurisdiction of the Court created by the Act, and that it was intended to and did supersede

(1) (1895) 2 I.R., at p. 74.

in respect of those matters all common law rights and obligations, the rights and liabilities of the parties being intended to be regulated exclusively by the award made under the authority of the Act. Independently of this line of argument, he contended in effect that the intention of the Act was to abolish individual rights as to matters within its scope and to substitute a system based on collective bargaining, and that effect was given to this intention by providing that the Court should be put in motion by organizations rather than by individuals, and that the duty of taking steps to compel obedience to an award when made should also be committed to organizations rather than to individuals, provision being made by the Act to enable awards to be enforced at the suit of organizations by the imposition of penalties for disobedience or by orders in the nature of mandamus. The first contention may be answered by pointing out that the Act has preserved by sec. 40 (1) (*b*) the right of the employee to "*wages or remuneration.*" Apart from the Act the right to receive wages sprang from the existence of the relationship of master and servant and the performance of services therein, and notwithstanding the Act it is still the existence of this relationship and the performance of services therein which confers on the employee the right to remuneration—all that the Act has done in this respect is to substitute another method of determining the amount of the remuneration. With regard to the second contention it is true that the Act was intended to encourage collective bargaining by the organization of representative bodies of employers and employees, and the submission of industrial disputes to the Court by organizations (see sec. 2 (VI.)), but it is clear that the organization was to be put forward as the representative of its members for the purpose of obtaining benefits for them as individuals and of rendering them liable to obligations in their individual capacity.

The idea of collective bargaining connotes negotiations between representative bodies as distinct from negotiations between individuals, but it is certainly not inconsistent with the notion of benefits being obtained or obligations being incurred by individuals as the result of such negotiations. There is, therefore, in our opinion, nothing in the general scope or purpose of the Act inconsistent with the right of an employee to maintain an action in any competent

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Court for the amount payable to him as wages or remuneration in accordance with the terms of an award, and it only remains to consider whether the Act contains provisions denying him that right. The remedies provided by the Act to compel obedience to awards are contained in sec. 5 and secs. 44-50. Omitting for the moment sec. 48, all these provisions are directed to the imposition of penalties for disobedience to an award or order of the Court. With regard to these provisions it is sufficient to say that while the right to institute proceedings is conferred on any member of an organization who is affected by the breach or non-observance of the award (sec. 44 (2) (*c*), the amount of the penalty bears no relation to the injury that may have been occasioned to the individual by the breach complained of, and the complainant is not entitled as of right to any portion of the amount paid by way of penalty, though by sec. 45 the Court imposing the penalty may order that the penalty, or any part thereof, be paid to such person as is specified in the order. It is clear, therefore, that these provisions afford an employee no means of enforcing payment to him of the wages which the Act operating on the award entitles him to receive from his employer. With regard to sec. 48, assuming for the sake of argument, but without deciding, that a County, District or Local Court might have jurisdiction under that section to make an order against an employer for payment of the amount of wages due to an employee under an award, yet, having regard to the fact that relief can only be obtained under that section on the application of a "*party to an award*," which, so far as the rights of employees are concerned, would in ordinary practice almost always mean an "organization" and not the individual injured by breach of the award, and to the further fact that the application can only be made to a specified Court, we do not think this section can be regarded as a "*provision to the contrary*" within the meaning of the rule in *Shepherd* v. *Hills* (1). The decision of the Supreme Court was founded on the decision of this Court in *Josephson* v. *Walker* (2), but in our opinion that decision has no application to the case now under consideration. In that case a remedy by way of action at law was given by the Act to the individual injured, but the Act expressly directed that such action

(1) 11 Ex., at p. 67. (2) 18 C.L.R., 691.

should be brought in certain specified Courts. This direction was held sufficient to exclude the right to sue in other Courts. In the present case the Act provides no means, or at any rate no reasonably effective means, by which the individual complaining of injury sustained in consequence of the breach of an award by a refusal to pay him the amount to which he is entitled thereunder can obtain any redress or compensation, unless these terms be regarded as satisfied by the imposition on the offender of a penalty to which the person injured is not entitled.

For these reasons we are of opinion that the *Commonwealth Conciliation and Arbitration Act* in no way restricts the rights of an employee to recover from his employer, by proceedings in a competent Court, the wages to which he is entitled in accordance with an award.

Two minor points were raised, namely, (*a*) that there was no evidence that the appellant was a member of the organization; and (*b*) that the award did not purport to bind the respondent in respect of employees on Mundawadra Station.

As to the former, sufficient *primâ facie* evidence of the fact of membership is contained in the letters of 29th May, 1st June and 6th June 1919, which were put in evidence without objection. Even apart from this it would appear that the existence of a particular relationship may be proved by parol evidence though the terms which govern such relationship may be in writing (see *Taylor on Evidence*, 9th ed., par. 405, and cases there cited). As to the other point, the majority of the Court is of opinion that on the true construction of the award it is binding on the respondent in respect of its employees on Mundawadra Station for the following reasons:—It is true that the name of the respondent Company is in many cases followed by the names of particular stations, but the question is whether that circumstance on a true construction of the award limits the application of the award to those stations. Reading the express terms of pars. 19 and 20, which set out the names of the respondents intended to be bound, it is seen that both paragraphs commence with the statement "the following *respondents* are bound by the award," &c. Then follow the names, and after each is given

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what may be either an address for identification or a limitation of the application of the award. In some cases the first is clear beyond question, as where the name is followed by a post office box number, or a number in a Sydney street. There is nothing inconsistent with this even in the case of names followed by the names of stations. For these reasons the majority of the Court think that, taking the words of the award itself, the respondent is bound personally everywhere.

Appeal allowed. Nonsuit set aside. Case remitted to District Court to do what is right in the matter having regard to the defences already raised in that Court. Respondent to pay costs in District Court up to date and in Supreme Court and costs of this appeal.

Solicitor for the appellant, *A. C. Roberts.*

Solicitors for the respondent, *Norton, Smith & Co.*

B. L.