

readily construed as a notice of suspension as if it had been made to the creditors generally (*Lord Hill's Trustee v. Rowlands* (1) ).

The facts show, I think, that the debtor stated that the terms imposed by Cropley's Ltd. would make his position precarious. He did not give his creditor to understand that he did not intend to pay his creditors in the course of his trade.

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CROPLEY'S  
LTD.  
v.  
VICKERY.  
Rich J.

STARKE J. I agree that the appeal should be allowed.

*Appeal allowed. Sequestration order discharged.  
Respondents to pay costs of appellant in the  
Supreme Court and this Court.*

Solicitors for the appellant, *Dawson, Waldron & Glover.*  
Solicitors for the respondents, *Sly & Russell.*

B. L.

(1) 3 Mans., 136, at p. 138.

[HIGH COURT OF AUSTRALIA.]

KAY . . . . . PLAINTIFF ;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

*Public Service of Commonwealth—Action against Commonwealth—Cause of action—  
Salary of officer—Award of Commonwealth Court of Conciliation and Arbitration  
—Judiciary Act 1903-1915 (No. 6 of 1903—No. 4 of 1915), sec. 56—Arbitration  
(Public Service) Act 1911 (No. 11 of 1911), sec. 15 (6).*

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MELBOURNE,  
March 1, 4.  
Starke J.

*Held*, that an action will lie against the Commonwealth to recover the difference between the salary paid to an officer of the Public Service of the Commonwealth, and that to which he was entitled under an award made by the Commonwealth Court of Conciliation and Arbitration pursuant to the *Arbitration (Public Service) Act 1911*.

H. C. OF A. HEARING OF ACTION.

1920.

KAY

v.

THE COM-  
MONWEALTH.

An action was brought in the High Court by Ernest Frank Kay against the Commonwealth in which by his statement of claim the plaintiff alleged as follows :—

1. The plaintiff is and at all times material has been an officer of the Telegraph Branch of the Postmaster-General's Department of the defendant and a member of the Australian Commonwealth Post and Telegraph Officers' Association, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1918.

2. At the date of the coming into operation of the award of the Commonwealth Court of Conciliation and Arbitration hereinafter referred to, the plaintiff was a senior telegraphist, class 4, properly so designated in the said Department, and as such was in receipt of a salary of £260 per annum.

3. By an award duly made on or about 19th September 1916 by the Commonwealth Court of Conciliation and Arbitration in the matter of a plaint in the said Court, Principal Registry, No. 38 of 1914, wherein the Australian Commonwealth Post and Telegraph Officers' Association was claimant and the Public Service Commissioner and the Postmaster-General were respondents, and which said award came into operation on 1st November 1916, it was awarded and ordered (*inter alia*): (a) that officers of the said Telegraph Branch who prior to the coming into operation of the said award were properly designated senior telegraphists, class 4 (in the said award designated telegraphists, class 4, grade 3) should be paid a minimum salary of £260 per annum and advance to £310 per annum; (b) that any such officer in receipt of a salary of £260 per annum at the date of the coming into operation of the said award should be paid a salary of £280 per annum.

4. The plaintiff has at all times material performed the duties of an officer properly designated a senior telegraphist, class 4, before the coming into operation of the said award, and in the said award designated a telegraphist, class 4, grade 3; or alternatively has at all material times been ready and willing to perform such duties.

5. By virtue of the facts set out in pars. 1, 2 and 3, or alternatively in pars. 1, 2, 3 and 4 hereof, the plaintiff became entitled to receive

from the defendant a salary of £280 per annum as from 1st November 1916, but the defendant in breach of the said award has refused and still refuses to pay to the plaintiff the said salary of £280 per annum or any salary greater than the said salary of £260 per annum.

The plaintiff claimed £56 13s. 4d., being the difference between £260 per annum, the salary paid to the plaintiff, and £280 per annum, the salary due to the plaintiff under the said award, during the period between 1st November 1916 and 1st September 1919.

The action was heard by *Starke J.*

*Reynolds*, for the plaintiff.

*Latham*, for the defendant.

*Cur. adv. vult.*

STARKE J. read the following judgment :—On 30th June 1916 the plaintiff, Ernest Frank Kay, was a permanent officer of the 4th class in the Clerical Division of the Commonwealth Public Service, in receipt of a salary of £260 per annum. He was described as a senior telegraphist (*Government Gazette*, 31st August 1916, pp. 2023, 2033, 2244). Kay claimed that his duties, from the time of his ranking as a senior telegraphist in July 1914 to 1st November 1916, were to work inter-State lines and supervise the operating staff. But I find in point of fact that Kay never supervised the operating staff, and that his duty was continuously working the inter-State lines. It is possible that the supervising officer was absent on some occasions, and that Kay was the senior officer then present. Naturally, perhaps, Kay has magnified the importance of these occasions. However, I am satisfied that the duty of supervision was never entrusted to Kay and that he never supervised the operating or any other staff.

In 1914 the Australian Commonwealth Post and Telegraph Officers' Association submitted a claim to the Commonwealth Court of Conciliation and Arbitration relating to salaries, &c., pursuant to the *Arbitration (Public Service) Act* 1911. The Postmaster-General and the Commissioner of the Public Service were respondents to the proceedings. Kay was, at all times material, a member of the Association. In September 1916 the Arbitration Court made

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Starke J.

an award in the before-mentioned proceedings which came into operation on 1st November 1916, and it is on this award that the present action against the Commonwealth is based.

No suggestion was made before me that the action was incompetent, and having regard to the *Arbitration (Public Service) Act* 1911, particularly sec. 15, and the *Judiciary Act*, sec. 56, it appears to me that the Court has jurisdiction to hear and determine the action. The effect of the *Arbitration (Public Service) Act* 1911 gives the award, in my opinion, the force of law.

Kay relied upon clauses 1 and 14 of the award and the schedule, and contended that he fell within the description "Telegraphists, class 4, grade 3—Officers appointed to grade 3 to regularly work inter-State lines . . . coupled with the duty of supervising the operating staff," and was entitled to a salary of £280 per annum; whilst the Commonwealth insisted that he fell within the description "Telegraphists, class 4, grade 2—Officers appointed to grade 2 to work inter-State lines continuously without supervising duties," and was only entitled to a salary of £260 per annum.

It should be noted that the grades fixed by the award are not the subdivisions set forth in the Third Schedule to the *Public Service Act* 1902-1918. Kay was never appointed since the award to grade 3 of class 4, and no such grade existed before the award. In point of fact Kay was gazetted, as on 30th June 1917, a telegraphist, grade 2, class 4 (*Government Gazette*, 6th September 1917, p. 2120). Clause 1 of the award, in my judgment, confers no rights upon an officer unless he fills or has been appointed to the designated position. Kay does not, therefore, fall within the provisions of clause 1 of the award.

Next he relies upon clause 14 of the award and the schedule as establishing his claim. Clause 14 itself was repealed by another award of 28th March 1918, but the schedule, which is in much the same terms, was allowed to remain. In order to ascertain whether Kay filled any of "the positions named hereunder" (see schedule)—that is, so far as this case is concerned, "Telegraphists, class 4, grade 3"—it becomes necessary, in my judgment, to consider not only the salary he was receiving but also the class of work he was performing, and whether the work was characteristic of grade 3,

class 4. As already indicated, the award characterized the work of telegraphists, grade 3, class 4, as regularly working inter-State lines coupled with the duty of supervising the operating staff. Kay, as already found, did not supervise the operating or any staff before or after the award, and was never entrusted with any such duty. Consequently, in my judgment, the provisions of clause 14 and the schedule do not confer any rights upon him.

The action is dismissed with costs.

*Action dismissed with costs.*

Solicitor for the plaintiff, *E. A. Smart*.

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

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KAY  
v.  
THE COM-  
MONWEALTH.  
Starke J.

[HIGH COURT OF AUSTRALIA.]

GEORGE McROBERT AND ANOTHER . . . APPELLANTS ;  
PLAINTIFFS,

AND

WILLIAM McROBERT . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

*Will—Construction—Reasonable meaning of words.*

By his will a testator stated that he wished twenty-five shillings a week to be paid to each of his two sisters “and also” to his brother “if so needed.”

*Held*, that the words “if so needed” did not apply to the payments to the two sisters.

Decision of the Supreme Court of Victoria (*Mann J.*) affirmed.

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1920.  
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MELBOURNE,  
Feb. 23 ;  
March 1.  
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Knox C.J.,  
ISAACS,  
Gavan Duffy  
and Rich JJ.