[HIGH COURT OF AUSTRALIA.]

WHITTAKER BROTHERS . . . . APPELLANTS;

AND

LEWIS & REID LIMITED . . . . APPELLANT;

AND

PORT & COMPANY LIMITED . . . . APPELLANT;

AND

AUSTRALIAN TIMBER WORKERS' UNION . RESPONDENT.

ON APPEAL FROM A LOCAL COURT OF WESTERN AUSTRALIA.

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PERTH, *July* 28; *Aug.* 9.

Knox C.J., Higgins and Starke JJ.

Conciliation and Arbitration—Award—Retrospective pay—Breach—Order "in the nature of a mandamus"—Mandamus—Injunction—Power of Court to make order — Application by organization — Remedies of members — Commonwealth Conciliation and Arbitration Act 1904-1920 (*No.* 13 *of* 1904—*No.* 31 *of* 1920), *sec.* 48.

Sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1920 provides that "The High Court or a Justice thereof or a County, District or Local Court may, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach or to enjoin any organization or person from committing or continuing any contravention of this Act or of the award under pain of fine or imprisonment, and no person to whom such order applies shall, after written notice of the order, be guilty of any contravention of the Act or the award by act or omission. In this section the term 'award' includes order. Penalty: One hundred pounds or three months' imprisonment."

Upon applications under sec. 48 by an organization of employees which was a party to an award made by the Commonwealth Court of Conciliation and Arbitration, orders in the nature of a mandamus were made by a Local Court

of Western Australia, exercising Federal jurisdiction, directing the appellants, who were also parties to the award, to comply with an award of the Commonwealth Court of Conciliation and Arbitration by paying moneys due to certain of their employees by way of retrospective pay under the award.

Held, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that the orders should not have been made.

By *Knox* C.J. and *Starke* J.:—(1) The power to make an order under sec. 48, being given by reference to "mandamus" and "injunction," should be exercised according to the general principles governing the use of those remedies. (2) Other remedies being open for the enforcement of the award just as convenient, beneficial and effective as the remedy by an order "in the nature of a mandamus," the orders should not have been made. (3) The remedy under sec. 48 should be applied only where special circumstances exist. (4) The power of the Courts as given by that section is discretionary, and the Local Court had, in the circumstances, wrongly exercised its discretion.

APPEAL from the Local Court of Western Australia at Perth.

The Australian Timber Workers' Union applied, on 14th December 1921, to the Perth Local Court, for an order directed to Whittaker Bros. that they be required to comply with the award (to which the Union and Whittaker Bros. were parties) made by the Commonwealth Court of Conciliation and Arbitration on 18th December 1920, and to pay the moneys due to their employees by way of retrospective pay under that award. The Local Court, on 3rd February 1922, made an order that the said Whittaker Bros. comply, on or before 3rd March, with the award by paying to the six men mentioned in the proceedings retrospective pay as prescribed by the award. The Court also made similar orders upon applications by the Union with respect to Lewis & Reid Ltd. and Port & Co. Ltd.

From the judgment of the Local Court each of the defendants now appealed to the High Court on the ground that the decision of the Local Court was wrong in law.

Further material facts are set out in the judgments hereunder.

Keenan K.C. (with him *Jackson*), for the appellants. The jurisdiction conferred by sec. 48 of the *Commonwealth Conciliation and Arbitration Act* does not give power to make "an order in the nature of a mandamus or injunction" where the party immediately affected by the non-observance of the award has himself an adequate civil

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remedy otherwise. Here the employees concerned could bring actions for civil debts due to them under what amounts to a statutory contract. There was no breach of the award, within the meaning of sec. 48, by the appellants. To constitute a breach within the section, there must be an intention to violate the award: a mere failure to pay is not sufficient; and the employer must be in a position to pay. The appellants admit their liability, and are willing to pay. The section is meant to apply only in extreme cases. The word "may" is discretionary; and, in the circumstances, the Local Court should, as a matter of discretion, have refused to make the order. [Counsel referred to *Mallinson* v. *Scottish Australian Investment Co.* (1); *Kerr on Injunctions*, 4th ed., p. 6.]

Dwyer (with him *Dumphy*), for the respondent. The appellants have, each of them, committed a breach of the award by not complying with it. The Union has no adequate remedy at law, and it must protect its members' interests. The only remedy which the Union has is under either sec. 44 or sec. 48 or sec. 49. Remedies are given to the members of the organization, but there are no restrictions with regard to the organization. The order under sec. 48 may be general: it need not be restricted to compliance with the award so far as the particular members alleged to be affected are concerned. An amount payable under an award is presently payable unless the award provides otherwise. An agreement between employees and employer outside the award does not affect the rights of the Union under the award. The discretionary power of the Local Court was properly exercised in favour of the Union; or, at least, it has not been shown to have been wrongly exercised. [Counsel referred to *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (2); *Mallinson* v. *Scottish Australian Investment Co.* (3).]

Keenan K.C., in reply.

Cur. adv. vult.

Aug 9. The following written judgments were delivered:—

KNOX C.J. AND STARKE J. On 18th December 1920 an award was made by the Commonwealth Court of Conciliation and Arbitration

(1) (1920) 28 C.L.R., 66. (2) (1920) 28 C.L.R., 1.
(3) (1920) 28 C.L.R., at pp. 73-74.

(No. 5 of 1919) to which various employers, including the appellants in the present appeals, and the respondent Union were parties. The award, so far as relevant to this case, prescribes a minimum rate of wages to be paid by the employers to members of the Union "in the employ of the employers." Clause 39 provides: "The wages . . . shall come into operation on the 1st day of August 1920." Clause 40 provides: "Retrospective pay shall be paid to" (defined) "adults . . . on the basis of" certain "margins . . . for all work performed from the 3rd day of February 1919 to the 1st day of August 1920." The Union applied to the Local Court of Western Australia at Perth, under sec. 48 of the *Commonwealth Conciliation and Arbitration Act*, for an order in the nature of a mandamus that the appellants should comply with the award by paying the moneys due to their employees by way of retrospective pay under the award. The Local Court made the order as asked; and against this order the appellants now appeal.

The dispute before the Local Court was whether employers bound by the award were under an obligation to pay their employees, who were not in their employ on or after 18th December 1920, retrospective pay for work performed from 3rd February 1919 to 1st August 1920. The employers never contested their liability to give "retrospective pay" as to the employees in their employ on and after 18th December 1920, but the pay was in some cases deferred by reason of an agreement with particular employees, and in the case of Lewis & Reid Ltd., one of the appellants, the Company wanted a reasonable time to find the money. On the argument before this Court it was pointed out from the Bench that there was some misapprehension in treating 18th December—the date of the pronouncement of the award—as the date from which the wages came into operation, for clause 39 provided, as already noticed, that the wages came into operation on 1st August 1920. The appellants at once conceded that their contention must be limited to employees who were not in their employ on or after 1st August 1920. But, unfortunately, owing to this misapprehension as to the date from which the wages operated, the evidence is not clear, except in the case of one Hindle, which of the workmen were in the

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employ of the respective appellants on and after 1st August 1920. Statements in the affidavits that the appellants had in their employ, during the time in which the award has been declared to be operative, certain employees who had not received the full pay due to them under the award, must be read in connection with the real dispute which the parties were litigating, namely, whether employers were bound to make "retrospective pay" to employees who were not in their employ when the wages came into operation. This was a *bonâ fide* dispute; and, without expressing any concluded opinion on the matter, we incline to the view that the appellants were right in their contention, though both parties were mistaken as to the date on which the wages did in point of law commence. And, putting on one side the weakness of the evidence as applied to the proper date, there does not seem much necessity for a mandatory order compelling the employers to discharge a liability which they concede as soon as the mutual misapprehension as to the date of the commencement of the wages is pointed out.

The real dispute between the parties, therefore, hinges upon the evidence in relation to one Hindle, who was employed by Port & Co. Ltd. from 13th April 1918 to 6th December 1919. The amount said to be due to Hindle in respect of retrospective pay was £23 3s. 5d., of which Port & Co. actually paid him £17 15s. 1d. under the award, though now alleging that the award did not entitle him to any retrospective pay at all. We, as already indicated, incline to this view, but leave the point open for consideration because we think these appeals should be disposed of upon a different ground.

The provisions of sec. 48 of the Arbitration Act provide that the Courts there named may make an order in the nature of a mandamus or injunction. Now, this power is permissive, and the question whether its exercise depends not "upon the discretion of the Courts . . . but upon the proof of the particular case out of which such power arises" (*Macdougall* v. *Paterson* (1)) is determined by the context in which the words are found, "the particular provisions, or . . . the general scope and objects, of the enactment

(1) (1851) 6 Ex., 337 (n.), at p. 340.

conferring the power " (*Julius* v. *Lord Bishop of Oxford* (1), per Lord *Selborne*). In the Act now under consideration we find that an award of the Arbitration Court may be enforced by several methods. An action will lie at the suit of the employee for the recovery of wages, &c., due under the award, before any Court of competent jurisdiction (*Mallinson* v. *Scottish Australian Investment Co.* (2)); or an organization or any member affected by breach or non-observance of an award may proceed for a penalty under sec. 44 of the Act, and in case of wilful default in compliance with an award the provisions of sec. 49 are available.

Other remedies are therefore open for the enforcement of the award just as convenient, beneficial and effectual as the extraordinary remedy of an order in the nature of a mandamus or injunction. It can hardly be that every " trivial and insignificant " term of an award must be enforced by an order in the nature of a mandamus, and every " trivial and insignificant " breach restrained by an order in the nature of an injunction. Thus, in *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* (3)—upon the construction of a statute in the following terms, " The County Court . . . may by summary order require any person to abstain from the commission of " an " offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified "—*Lindley* L.J. said : —" It is quite obvious to my mind that the word ' may ' there means ' may,' not ' shall,' because amongst other things which he can do is to grant an injunction. An injunction is always discretionary." The learned Lord Justice did not, of course, mean an arbitrary and capricious discretion, but a judicial discretion, having regard to the circumstances of the case. A prerogative writ of mandamus is not, as a rule, granted if there be another remedy equally convenient, beneficial and effective ; and a mandatory order under the provisions of the *Judicature Act* and *Rules* cannot be claimed as of right in all cases and in all circumstances (see *Croydon Corporation* v. *Croydon Rural Council* (4)). So the Courts did not feel bound to issue injunctions if they would be ineffective, or if the mischief complained

(1) (1880) 5 App. Cas., 214, at p. 235.
(2) (1920) 28 C.L.R., 66.
(3) (1894) 2 Q.B., 842, at pp. 848-849.
(4) (1908) 2 Ch., 321.

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of was trivial or could be properly, fully and adequately compensated by a pecuniary sum (see *Kerr on Injunctions*, 5th ed., pp. 34-35). A power given by reference to mandamus and injunction should be exercised according to the general principles governing the use of those extraordinary remedies. It is no light matter to issue an order in the nature of a mandamus or injunction compelling the observance of an award under pain of fine or imprisonment. A union only acts for its members; and when its members have an easy, convenient and effectual method of enforcing their rights to wages or pay by civil action, the exercise of the extraordinary powers given by sec. 48 should be based upon some special circumstances. So far as the present cases are concerned, no such special circumstances exist. The employers did not question their obligation to obey the award, though they *bonâ fide* disputed its proper interpretation. This dispute could have been easily settled in a civil action by a workman, backed by his Union if necessary, for wages or retrospective pay. As we understood the learned counsel for the Union, the workman might have been victimized or "bluffed" if he took any such proceedings; but how the workman was less subject to victimization when the Union brought forward his name was not made clear to us. (Note also the Arbitration Act, sec. 9.) If workmen will not enforce their rights to wages or retrospective pay, or appeal to their unions to back them in enforcing their rights to wages or pay, by the simple and convenient process of a plaint for wages or pay, that does not seem to us any special circumstance such as would justify the exercise of the extraordinary powers conferred by sec. 48. The drastic provisions of that section should not ordinarily be used for enforcement of mere money claims which can be easily and effectively recovered in other and simple proceedings not involving the harsh sanctions of fine and imprisonment. It is not enough to say that the magistrate has exercised his discretion. The appeal is as of right to this Court, and it must exercise its own independent judgment as to the propriety of the orders made on the material before the Local Court.

The mandatory orders should not have been made in the circumstances of these cases, and the appeals must be allowed.

HIGGINS J. *Whittaker Bros.' Case.*—This is an appeal from an order made, as under sec. 48 of the *Commonwealth Conciliation and Arbitration Act*, by the Local Court of Perth. The order, which was made on the application of a union, a party to an award, directs the appellants, on whom the award is binding under sec. 29, to comply with the award before 3rd March 1922 (that is, within one month from the order), by paying to six employees, whose names are stated, retrospective pay as prescribed by the award. The only ground stated for the appeal, under High Court Appeal Rules, Sec. IV. and Sec. III., is that the decision is "wrong in law."

The facts appear in two affidavits—one made by the secretary of the Union, the other made by Arthur George Whittaker, a member of the appellant firm; but there were also some admissions. The secretary's affidavit exhibits the award, which is dated 18th December 1920; states that the appellants were a party bound by the award, that they had in their employ "during the time in which the award has been declared to be operative" the six men named, all members of the Union, and that none of them had received the full amount "due to them" for retrospective pay as prescribed. The affidavit of Whittaker stated that, of the six men named, Gates, Ederson and Ree were in the employment of the firm on 18th December 1920 (the date of the award being made) but that Keenan, Richards and Reneveldt were not; that "an agreement has been entered into between the said firm and Ederson, Ree and Gates respectively that they will accept payment from the company of the retrospective wages due to them under the said award at a deferred date." The deferred date is not stated; the agreement has not been produced; but, as the allegation has not been denied by the Union, we must treat the (so-called) agreement as proved in fact for what it is worth. An agreement, however, to give time, if made without consideration, is not an enforceable agreement; and further, no agreement made between individual employees and the employers can operate to relieve the employer of a duty imposed by an award made in the public interest. Awards supersede private agreements if they are in conflict. Then the affidavit says that the firm has paid "or is agreeable to pay" on application to all its employees who were in its employ on 18th December 1920 the full amount of retrospective

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pay due to them under the award. This is no valid answer to a claim for a penalty under sec. 44 or to a claim for an order under sec. 48. The fact that the defendants are "agreeable to pay" three out of the six employees is no defence. A debtor must find his creditor, and pay him; it is not enough to be "agreeable to pay" him. There is no allegation even that these three men cannot be found, or that the appellants are unable to pay at present. As for the other three employees, Keenan, Richards and Reneveldt, they seem to me to be entitled to the retrospective pay as they also were in the employment of the appellants "during the time in which the award has been declared to be operative." There is no evidence whatever to contradict or qualify the statement made to that effect in par. 3 of the secretary's affidavit—that all six men were in the employment of the appellants during that time, from 1st August 1920 onwards, though not on or since 18th December (admission (e)). If there was any misapprehension on the part of counsel in their argument as to the time during which the award was operative, there was no such misapprehension in the framing of the secretary's affidavit (par. 3). We must act on the evidence as it stands; and there was not at the trial, and there is not now, any request for leave to contradict the statement. But here the award must be considered.

In the award appear wages for the country districts of Western Australia, payable by appellants:—"The minimum rate of wages per week to be paid by the respondents set forth in Schedule H" (Whittaker Bros. appear in Schedule H) "to members of the said Union in the employ of the employers shall be as follows:—" and then the rates are set out for the various grades. These are followed by "working conditions," and in clause 39 it is provided that "the wages and working conditions . . . shall *come into operation on the 1st day of August* 1920"; in clause 40, it is provided that "retrospective pay shall be paid to adults . . . on the basis of existing margins . . . for all work performed from the 3rd day of February 1919 to the 1st day of August 1920."

I may assume in this case (it is not clear) that the employees who were not in the employment on or after 1st August 1920—the date of

the wages and working conditions coming into operation—are not entitled to retrospective wages as from 3rd February 1919. The point is immaterial as to the six men; for they were employed by the appellants during the time in which the award has been declared to be operative—that is, on and after 1st August 1920. I take it the award, though actually made on 18th December, speaks as on 1st August 1920.

Under these circumstances, it seems to be clear that the appellants are bound to pay these six employees the margins between the amounts actually paid and the amounts that are payable under the award, as from 3rd February 1919. So far, the decision is not "wrong in law."

It has been suggested, however, that the order made by the Local Court is wrong, because the employees can sue the employers for the deficiency, in a civil action (*Mallinson* v. *Scottish Australian Investment Co.* (1)), and because it has been held that a mandamus will not be granted—either on a rule for the prerogative writ or in an action for mandamus—if there is any other remedy equally effective and convenient. I much doubt that this doctrine as to mandamus is to be imported into sec. 48. The section says only "an order in the *nature of a mandamus or injunction*"—that is to say, an affirmative order to do, or a negative order not to do, something. The purpose of this section is quite different from the purpose of true mandamus. In the true mandamus the party cannot be compelled to do the specific duty without the mandamus; under an award the party is already bound to do the specific duty. There is a duty to pay under the award; and the order under sec. 48 does not add to that duty. But, assuming that the doctrine does apply to sec. 48, has the Union here a remedy equally effective and convenient? The Union cannot bring a civil action for payment. It has no cause of civil action against employers who do not comply with an award. The Union has duties and rights independent of the employees' duties and rights. It has to protect its members, to see that they get their rights without having to sue for them, to see that the members get the benefit of any award made in their favour without the cost and risk of legal proceedings taken by

(1) (1920) 28 C.L.R., 66.

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individual employees, and to bear the brunt of the employer's displeasure in the assertion of the employees' rights. The Union has no control over any civil action of the employee; it cannot bring the action or prevent it; but the Union has, under the Act, a distinctive right and even duty, to see that their members are not "bluffed," or the awards flouted. Therefore the *Union* has not another remedy equally effective and convenient in the right of the employee or employees affected to bring a civil action.

But it is said that sec. 44 provides an equally effective and convenient remedy for the Union—an application for a penalty for breach of the award. It so happens that in this case this remedy was not practically available; for when the Union made its application under sec. 48, on 26th November 1921, the Local Court had just recently held, in another case, that mere non-payment of wages awarded was not a ground for an application under sec. 44. However, a mistake in the law made by the Local Court ought not to be treated as an answer to the objection that a remedy under sec. 44 is provided by the Act on its true construction. Assuming still that we must construe sec. 48 as if the doctrines applicable to prerogative mandamus are imported into it, I cannot think that a mere order to pay a penalty in money is as effective in compelling the observance of an award as an order under sec. 48, which, if disobeyed, will enable the Local Court, on a subsequent application, to imprison for any time up to three months, and which applies to contravention of the award in cases of other members of the Union generally. Under sec. 48 the employer, after notice of the order, must not be guilty of "*any* contravention of the Act or the award." Moreover, if (for instance) the award directed the employers to provide a truck when the article to be carried or moved by the employee is over 200 lbs. weight, the Union would much prefer to see the direction obeyed rather than secure a mere order for payment of a penalty all of which may be paid into the consolidated revenue (sec. 45).

In my opinion, it is the duty of the Local Court to make the order under sec. 48 when it is shown that there is a valid award in a dispute, binding the employer concerned, that the Union is a party to the award, that the men mentioned were in the employment at the

appropriate date, and that the duty alleged is imposed by the award and has not been fulfilled. Of course, the word "may" used in sec. 48 is in itself merely "facultative," merely gives a power; but it is obvious, from the object of the Act and the nature of the conditions imposed by sec. 48, that the power is coupled with a duty to make the order when the conditions are fulfilled (*Julius* v. *Bishop of Oxford* (1)). In *Macdougall* v. *Paterson* (2) the words of *Jervis* C.J. were :—"When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application. For these reasons, we are of opinion, that the word 'may' is not used to give a discretion, but to confer a power upon the Court and Judges; and that the exercise of such power *depends, not upon the discretion of the Court* or Judge, but upon the proof of the particular case out of which such power arises." This case has been followed in numerous subsequent cases (*Halsbury*, vol. XXVII., p. 171). Where justices were empowered to issue a distress warrant to enforce a poor rate ("it shall be lawful . . . if they think fit"), then, if certain specified facts are proved—that a rate valid on its face was made by competent authority, that the rated land was in the district and occupied by the defaulter, that he had not paid and had been summoned—it was held that the justices had no power to refuse the warrant (*R.* v. *Finnis* (3); *R.* v. *Boteler* (4); *Maxwell on Statutes*, 5th ed., p. 404). "They *must* 'think fit' . . . whenever the occasion . . . has arisen." The case of *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* (5) does not, when the position with which the Court of Appeal was dealing is examined, contradict this principle. Under the *Rivers Pollution Prevention Act* every person who causes or knowingly permits to flow into any stream any sewage commits an offence; but if he show that he is using the best practicable means to render harmless the sewage matter he does not commit the offence. The County Court Judge "may" require any person to abstain from

(1) (1880) 5 App. Cas., 214.
(2) (1851) 11 C.B., 755, at p. 773.
(3) (1859) 28 L.J. M.C., 201.
(4) (1864) 33 L.J. M.C., 101.
(5) (1894) 2 Q.B., 842.

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the offence, or may require him to perform his duty in manner in the order specified. The County Court Judge gave judgment for the defendant on the grounds that the defendant was not liable in respect of an outflow which existed before the sewers came under its authority, and that none of the alterations made by the defendant had caused any increase of pollution. The Divisional Court and the Court of Appeal held that this construction of the Act was wrong, and directed a new trial—saying that it was the duty of the Judge to see if any and what order could be made which would have the effect of compelling the defendant to keep the foul matter out of the stream. Then, if he found that an injunction or order would be of no use, he should not make an order to compel the defendant to do what would be useless. *Lindley* L.J. said, however (1): "If he" (the Judge) "can make an order which will be of use, he *ought* to make it." The power contained in sec. 48 of our Act does not involve any such consideration of uselessness. *This* is the position to which the Lord Justice applied the expression "An injunction is always discretionary" (2); for the Court need not and should not make a useless order.

I cannot regard the remedy provided by sec. 48 as an extraordinary remedy, to be applied only under special circumstances in addition to the circumstances prescribed in the section. When the section states the circumstances, we have no right to say that additional circumstances must be proved. Even if the power were discretionary the Local Court has exercised its discretion, and no attempt has been made to show that the discretion was exercised on wrong grounds. I should say that applications under sec. 48 should be encouraged, not condemned; for, on the one hand, such an application relieves the employers from being attacked as offenders —criminals—if they refuse to pay on some arguable ground (as here); and, on the other hand, it lays the way for effectively punishing employers who disobey the order of the High Court, or of the Local Court, as well as of the Court of Conciliation. Sec. 48 can be applied either before or after a penalty has been imposed under sec. 44. Under the Act as it originally stood, the power to make the order under sec. 48 was given to the Court of Conciliation;

(1) (1894) 2 Q.B., at p. 850. (2) (1894) 2 Q.B., at p. 849.

but, owing to the decision that the Court of Conciliation could not judicially enforce its own awards, the power was transferred to the High Court, Supreme Court and Local Courts. An order made by the Local Court (or by the High Court or Supreme Court) does not in itself involve fine or imprisonment. It merely means that if, after written notice of the order, served on the employer, the employer disobey it, an application can be made for a penalty limited to £100, or imprisonment to a limit of three months, as if for contempt of the Local Court (or High Court or Supreme Court) in addition to contempt of the Court of Conciliation.

I regret to find that I must differ in this matter from my learned colleagues; but, in my opinion, the decision of the Local Court is right, and should be affirmed, in Whittaker Bros.' Case.

Lewis & Reid's Case.—In this case there is an affidavit to the same effect as in Whittaker Bros.' Case, that the nine men concerned were in the employment of Lewis & Reid Ltd. "during" the period from which the said award was to be operative; and, in my opinion, the decision should be affirmed, on the same grounds as in Whittaker Bros.' Case.

Port & Co.'s Case.—The appeal of Port & Co. Ltd. raises directly the question what employees are entitled to the benefit of the award so far as regards retrospective pay.

We are told that wages and conditions set forth for employers named in Schedule H apply to all the employees in respect of whom this application is made. The award prescribes:—"The minimum rate of wages per week to be paid by the respondents set forth in Schedule H to members of the said Union in the employ of the employers shall be as follows" (setting out the classes of employees and the wages). "The wages and working conditions . . . shall come into operation on the 1st day of August 1920" (clause 39). "Retrospective pay shall be paid to adults . . . on the basis of existing margins . . . for all work performed from the 3rd day of February 1919 to the 1st day of August 1920" (clause 40). The words "in the employ of the employers" mean, *primâ facie*, in the employ at the present time, not those who have been in the employment; and as the award comes into operation, speaks as

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from 1st August 1920, it seems that all those who are in the employment on 1st August 1920 and afterwards are entitled to the benefit of the retrospective pay for all work performed from 3rd February 1919 onwards. There would probably have been no constitutional objection to the granting of retrospective pay to all employees who worked for the firm from 3rd February 1919 or such previous time as the dispute began—the dispute which was settled by the award. But the question is, what does the award give by its terms?

There is no affidavit here that the five men, Hindle and four others, the subject of this order, were in the employ of Port & Co. on or after 1st August 1920, the date from which the award operates. There is an affidavit that Hindle worked for the firm from 13th April 1918 to 8th December 1919; and that King worked for the firm till 30th April 1919. The dates that the other three men (Mudie, Mackenzie and Godiva) worked are not stated; but it is clear that none of the five worked for the firm on 18th December 1920. There is no affidavit such as in Whittaker Bros.' Case that the men were in the firm's employment "during the period from which the said award was to be operative."

Under these circumstances, I think that this order against Port & Co. cannot be upheld. If the award does not in this respect carry out the real intention of the parties, it is a fault in the drafting. This drafting was done by the parties who appeared, after conferences which the Court encouraged them to hold; and the Court adopted in its award, by request, the words to which the parties appearing had agreed, so that these parties who had not agreed might be put on the same terms as those who had agreed.

The appeal should, in my opinion, be allowed in this case, but without costs, as the point on which the appeal succeeds was not presented by the appellant.

Appeals allowed. Orders of Local Court discharged. Respondent to pay the costs of the proceedings in Local Court and of this appeal.

Solicitors for the appellants, *Parker & Parker.*

Solicitors for the respondent, *Dwyer, Durack & Dunphy.*