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accumulated profits that were actually used in the business of the appellant during the relevant period of assessment.

Appeal dismissed with costs.

Solicitors for the appellant, *J. M. Smith & Emmerton.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

FLETCHER . . . . . APPELLANT;
COMPLAINANT,

AND

A. H. McDONALD & COMPANY PROPRIETARY LIMITED . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 10.

SYDNEY, *April* 12.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Industrial Arbitration — Award — Interpretation — Apprentices — Wages — Whether award applies to those apprenticed before award.

By an award of the Commonwealth Court of Conciliation and Arbitration, which came into operation on 1st January 1925, it was provided that apprentices might be allowed in certain trades, that only a limited number of apprentices might be taken by any respondent to the award and that the term of apprenticeship should be five years. It was also provided that "the minimum rate of wages to be paid by any respondent to apprentices shall be" during each of the five years of apprenticeship a certain sum per week.

Held, by *Knox* C.J., *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that the provision as to the minimum rate of wages applied only to apprenticeships entered into after the award came into operation.

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

APPEAL from the Supreme Court of Victoria.

On 5th September 1922 an indenture of apprenticeship was entered into between A. H. McDonald & Co. Pty. Ltd. as employer, Edward Gordon Fletcher (who was then fourteen years of age) as apprentice, and Walter Thomas Fletcher as parent or guardian, whereby the Company agreed (*inter alia*) to take the apprentice as its apprentice for the full term of six years from 5th September 1922, to teach and instruct him in the process, trade or business of mechanical engineer, and to pay him wages at the following rates: 9s. per week for the first year, 13s. 6d. per week for the second year, 17s. 6d. per week for the third year, 22s. per week for the fourth year, 30s. per week for the fifth year and 41s. 6d. per week for the sixth year. On 22nd December 1924 an award was made by the President of the Commonwealth Court of Conciliation and Arbitration in a dispute between the Amalgamated Engineering Union and certain respondents including the Company. The award, except as to certain provisions which are not material, was to be operative from midnight on 1st January 1925. The provisions of the award were, so far as is material, as follows:—

2. (a) Apprentices may be allowed to any of the following trades: blacksmith, brassmoulder, brassfinisher, coppersmith, motor-cycle mechanic, die-sinker, electrical fitter, electrical or oxy-acetylene welder, electroplater, fitter, locksmith, motor mechanic, first class machinists, patternmaker, plumber, scientific-instrument maker, scale maker, safe maker and/or turner.

(b) The number of apprentices that may be taken by any respondent for any of the said trades shall not exceed one for every three journeymen employed by him in the trade, and for any surplus of journeymen over three or its multiple. But this limitation of apprentices may be altered in the case of any particular respondent with the written consent of the claimant organization or of the appropriate Board of Reference. The number of journeymen employed in the trade at any time shall be treated as being the average number employed regularly for the preceding six months (that is to say) the integer which is nearest to that average. Any employer who works as a tradesman in his own undertaking may be

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counted as if he were a journeyman employed in the trade at which he works.

(c) Lads may be taken on probation for a period not exceeding three months before being apprenticed, but they shall be counted as apprentices in reckoning the number of apprentices, and the period of probation shall be treated as part of the term of apprenticeship.

(d) The term of apprenticeship shall be for five years.

(e) The minimum rates of wages to be paid by any respondent to apprentices shall be as follows:—First year, 17s. 6d. per week; second year, 23s. per week; third year, 37s. per week; fourth year, 55s. per week; fifth year, 70s. per week. But to apprentices to patternmaking 2s. 6d. per week more each year.

(f) No employer shall require or accept a premium or other monetary consideration for taking an apprentice.

(g) (1) No apprentice under nineteen years of age shall be required against his wish to work overtime. (2) For any overtime worked by an apprentice he shall be paid, on ordinary days, at the rate of time and a half for the first four hours, and double time thereafter, and on Sundays and holidays at the rate of double time. (3) No apprentice shall be allowed by his employer to work overtime unless he is working with a journeyman.

(h) No apprentice shall be required against his wish to work night shifts.

(i) (1) Each apprentice shall be permitted by his employer to absent himself during ordinary working hours for four hours every week for the purpose of attending a suitable technical school.

(j) Notwithstanding anything contained in this clause and sub-clauses, the only provisions applicable to the New South Wales respondents are those contained in sub-clauses (d), (e), and (f), if and when the New South Wales Board of Trade regulations as to apprentices apply to the apprentices employed by them at present or in the future. As to apprentices at present employed by them to which the Board of Trade's regulations do not apply, if any, the New South Wales respondents shall observe all the conditions as to apprentices set out in clause 2 and sub-clauses.

15. (a) "Apprentice," so far as the number of apprentices to be employed is concerned, means a lad, whether he is a member of the

claimant organization or not, employed under a suitable indenture, the indenture binding the employer to teach the lad one or more of the trades mentioned in clause 2 (a). And under the trade of "brassfinisher" or the trade of "fitter" or the trade of "turner" is included the use of the principal machines appropriate to *the trade of the employer* as well as the use of tools of the trade. "Apprentice," so far as wages and conditions of work are concerned, means a lad a member of the claimant union under indenture as above.

(v) "First-class machinist" includes a miller, general or universal, gear cutter using milling machine, driller using cutter-bar, lapper or grinder using the same precision tools as fitters or turners, planers, shapers, slotters, and borers.

16. (a) No member of the Amalgamated Engineering Union shall be entitled to any benefit under this award against any employer, unless within seven days of his employment notice in writing is given to his employer or to his representative at the works, either by the employee himself or by the local representative of his union, that such employee is a member of the Amalgamated Engineering Union. If such notice is given, the employee will be entitled to the benefits of the award from the date of his employment.

17. Where an employer bound by this award has made a payment, which payment purports to be a payment of the wages payable to the employee for any period, such employer shall not be liable to pay to the employee any further sums prescribed by this award in respect of any services rendered to such employer during such period, unless within a period of three months after the last day of such period a demand in writing of such further sum claimed has been given to the employer by the employee or some person on his behalf and/or if proceedings to recover the amount claimed are not taken within six months.

On 20th March 1925 a variation of the award was made which was as follows:—"(1) The following sub-clause is added to follow sub-clause (j) of clause 2 of the award: (k) This award shall in no way apply to apprentices who were indentured prior to the first day of January 1921 or to any employee under twenty-one years of age who was in the employ of any respondent on the said first day of January 1921 and who became bound as an apprentice

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under a suitable indenture under the appropriate State laws prior to the twenty-eighth day of July 1921. (2) This variation applies to the respondents whose names are set out in Schedule A to this variation. (3) This variation shall take effect as and from the date the award came into operation."

On 8th November 1924 Edward Gordon Fletcher joined the Amalgamated Engineering Union, and on or before 5th June 1925 gave notice of that fact to the Company.

On 11th June 1926, before the Court of Petty Sessions at Richmond, a complaint was heard whereby Edward Gordon Fletcher (by his next friend Nicholas Roberts) sought to recover from the Company the sum of £50, which was alleged to be due for the balance of wages due to the complainant for work and labour done as an apprentice. The sum claimed was alleged to be the difference between the amount of wages which the complainant had been paid since 5th June 1925 under the indenture of apprenticeship and the amount to which he alleged that he was entitled for that period under the award. The defences stated at the hearing of the complaint were: (a) that the award as a matter of law and upon a proper construction of its terms did not apply to an apprentice in the position of the complainant; (b) alternatively, that notice of membership of the Union was not in fact given by the complainant as required by clause 16 of the award; and (c) alternatively, that under clause 17 of the award the amount of arrears of wages, if any, which the complainant could recover was limited to a period of three months. The Police Magistrate having given judgment for the complainant for the amount claimed, with costs, the defendant obtained an order nisi to review the decision on the grounds: (1) that the Police Magistrate was wrong in law in holding that the award applied to the complainant, who was indentured as an apprentice prior to the award coming into operation; (2) that the Police Magistrate was wrong in law in holding that the award applied to the complainant, who was not a member of the Amalgamated Engineering Union at the time of his entering into the indenture of apprenticeship; (3) that the Police Magistrate was wrong, on the facts appearing in evidence before him and on the proper construction of the award, in holding that the complainant was entitled to the benefits of the

award; (4) alternatively, that the amount of wages recoverable by the complainant from the defendant is, under clause 17 of the award, limited to a period of three months.

The order nisi was heard by *Irvine* C.J., who made it absolute and discharged the order of the Court of Petty Sessions with costs. In delivering his judgment the learned Chief Justice said:—"No question is raised in this case that the defendant is bound by the award, but it is contended that the defendant is not, on the proper interpretation of the award, liable to pay the sum claimed. The first ground on which this contention is based is that the award has no application to apprentices who were indentured as apprentices before the award came into operation. I am of opinion that this defence must be given effect to. It is unnecessary for me, in the view I take of the award, to enter upon the difficult question arising on the construction of the relevant sections of the Constitution and of the *Commonwealth Conciliation and Arbitration Act* as to whether the power to settle disputes by arbitration makes it competent to the Court to cancel or vary existing contracts particularly where persons (like the father of the apprentice in this case) not being directly or indirectly parties to the dispute, which is the foundation of the Court's jurisdiction, are parties to the contract. I think that, if there be such a power, the intention to exercise it should appear in clear language in the award itself, and I do not find it so expressed in the award before me. The provisions of the award dealing with apprentices are to be found in clause 2 and the definition clause 15. Clause 2 (a) states that apprentices may be allowed in certain specified trades. Clause 2 (b) provides that the number of apprentices 'that may be taken' shall not exceed a certain proportion of the journeymen employed. These words, read literally, would appear to make the limitations apply only to apprentices 'taken' after the award, those actually indentured to any respondent at the time of the award not being counted in the proportion prescribed. But I think, having regard to the very inartificial character of the language of the award generally, they may be capable of the meaning that no more apprentices shall be taken than with the existing apprentices would not exceed the prescribed proportion. I do not think, however, that with the most indulgent interpretation they can be read as

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meaning that a respondent who has at the date of the award under indenture to him a number of apprentices larger than is prescribed in proportion to the journeymen employed by him, is on a proper reading of the clause obliged either to employ a larger number of journeymen whether his business can support that extra charge or not, or to break his indentures. The clause goes on to provide that the number of journeymen employed is to be treated as the average number employed for the preceding six months. This has a definite meaning when applied to the employer's duty when taking new apprentices, but is very difficult of application if the clause has a retrospective effect. Sub-clause (d) provides that the term of apprenticeship shall be five years. This clearly only applies to indentures entered into after the award. Sub-clause (e) is the provision under which the complainant's claim was made. This sub-clause, taken with the definition of 'apprentice' in clause 15, may be capable of the wider interpretation if read by itself. Several of the succeeding sub-clauses make provisions as to overtime, night shifts, working hours and other matters which may differ from and, in some cases, be inconsistent with the provisions of the indenture of apprenticeship relating to the same subject matter. Take, for instance, the provisions in the indenture of apprenticeship under consideration, which prescribes that the employer shall pay such rates of overtime as may be fixed by the Engineers and Brass-workers (Skilled) Board. Is it reasonable to suppose that the different provision for overtime made by sub-clause 2 was intended to substitute this new stipulation for that which formed part of the contract of apprenticeship? Or to put it another way—since the provisions of the award are only for the benefit of those workers who are or may become members of the Union, is it reasonable to suppose it was intended that the contract contained in the indenture was to remain in full force in all its provisions unless and until the apprentice should choose to join the Union, and that then a new contract should be substituted for the former one at the apprentice's volition? These questions should, I think, be answered in the negative, and lead to the conclusion I have already expressed, namely, that no clear intention appears from the language of the award, to extend

its operative effect to indentures of apprenticeship entered into before the date of the award."

From that decision the complainant now appealed to the High Court.

Other material facts appear in the judgments hereunder.

Blackburn, for the appellant.

Robert Menzies (with him *Campbell*), for the respondent.

Cur. adv. vult.

April 12.

The following written judgments were delivered :—

KNOX C.J., RICH AND STARKE JJ. The question in this case is whether certain minimum rates of wages prescribed by an award of the Commonwealth Court of Conciliation and Arbitration apply to apprentices indentured before the award came into operation.

It depends upon the proper construction of an award obtained by the Amalgamated Engineering Union dated the 22nd December 1924 and operating as to apprentices from midnight on 1st January 1925. The award prescribes that apprentices may be allowed in certain trades, and the number that may be taken by any respondent to the award. These provisions in their primary and natural meaning apply only to the doing of acts after the award comes into operation. Again, the provision that the term of apprenticeship shall be five years applies only to indentures entered into after the award comes into operation, and that is true also of the clause prohibiting the acceptance of a premium or other monetary consideration for taking an apprentice. But the critical clause in this case is that relating to wages : " The minimum rate of wages to be paid by any respondent to apprentices shall be as follows :—First year, 17s. 6d. per week ; second year, 23s per week ; third year, 37s. per week ; fourth year, 55s. per week ; fifth year, 70s. per week."

Apprentices are defined in a later clause as follows :—" ' Apprentice,' so far as the number of apprentices to be employed is concerned, means a lad, whether he is a member of the " Engineering Union " or

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not, employed under a suitable indenture, the indenture binding the employer to teach the lad one or more of " certain trades specified in the award. "' Apprentice,' so far as wages and conditions of work are concerned, means a lad, a member of the Union under indenture as above."

In the case now under consideration the apprentice was indentured on 5th September 1922 for the full term of six years from 5th September 1922, and it was stipulated that he should receive the wages at the following rates per week of forty-eight hours: first year, 9s.; second year, 13s. 6d.; third year, 17s. 6d.; fourth year, 22s.; fifth year, 30s.; sixth year 41s. 6d. The apprentice was in his third year when the award came into operation, and the suggestion is that the award rates apply during the third, fourth and fifth years, and that in his sixth year he reverts to the indenture rate of 41s. 6d. It is a strange result, and we agree with the learned Chief Justice of the Supreme Court that it is not the proper interpretation of the award.

The rates of wages are directly connected, in our opinion, with the apprenticeship and the term of the apprenticeship contemplated and provided for by the award, that is, an apprenticeship for five years entered into after the award comes into operation. The clause in the award relating to apprentices in New South Wales must also be considered, for all parts of the award must be taken together. That clause assumes that apprentices employed in New South Wales before or after the coming into operation of the award would be subject to its terms, and then proceeds to make special provisions. But it cannot control the construction of the award or alter the meaning of what is otherwise clear and explicit, and the meaning of the clause as to wages coupled with the other clauses to which we have referred appears to us abundantly plain. It is quite possible in this loosely drawn award that the clause as to apprentices in New South Wales was inserted to ease the difficulties of employers subject to Federal and State industrial legislation or awards.

We have also been referred to certain clauses in the award relating to overtime. They do not throw much light on the wages clause and, in any case, it is better to withhold our opinion upon the effect and application of those clauses until a case arises which calls for

decision upon them. Further, we were referred to a variation in March 1925 of the main award. The following sub-clause was added to the clauses in the main award relating to apprentices: "This award shall in no way apply to apprentices who were indentured prior to the first day of January 1921 or to any employee under twenty-one years of age who was in the employ of any respondent on the said first day of January 1921 and who became bound as an apprentice under a suitable indenture under the appropriate State laws prior to the twenty-eighth day of July 1921." The clause assumes that the award applied to apprentices in the circumstances stated and then purports to make an exception. But if the assumption were erroneous in point of law, the variation does not operate to enlarge the award. It may show that the Arbitration Court mistook the legal effect of its own award and failed to carry out its intention in making it; but that is all. It is the duty of this Court to construe the award, with its variations, as a whole; but still the plain meaning of the award as to wages is to attach them to the indentures of apprenticeship contemplated by the award, namely, those made after it comes into operation.

Finally, we desire to subscribe to the view of the learned Chief Justice of the Supreme Court of Victoria that, if the Arbitration Court intended to cancel or vary existing indentures of apprenticeship, then it should have done so in clear and precise language and not by implication founded upon exceptions to the award.

In our opinion, the judgment below is right and ought to be affirmed.

ISAACS J. The appellant is an apprentice of the respondent Company. He sued his employer in the Court of Petty Sessions for £50, claimed as the balance of wages due by virtue of a Federal award dated December 1924 and operative as to wages as from 27th October 1924. The Police Magistrate, Mr. Conlon, made an order in favour of the complainant. Pursuant to the requirements of the *Justices Act* 1915, three points were stated for the defence. The first only is material, because it is based on the correct assumption that an "apprentice" is not included in the term "employee" as used in the award. The other two points are based on the alternative

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Isaacs J.

incorrect assumption that " employee " covers " apprentice." They may, therefore, be disregarded. The first point was this: " that the award as a matter of law and upon a proper construction of its terms did not apply to an apprentice in the position of complainant." What was meant by " an apprentice in the position of complainant " ? That was vague in itself, but the defendant interpreted it very practically in the conduct of the case.

No objection was made that the apprentice was not in any of the trades enumerated in clause 2 of the award. Not a word was said to lead anyone, either the plaintiff or the Magistrate, to believe that by " position " was meant occupation. The case was conducted by the defendant so as to indicate that by " position " was meant position as an apprentice indentured before the award was made. So the Magistrate understood it, because in his judgment he said: " It would be extraordinary if the award intended that a boy in Fletcher's position should get less than a younger apprentice who was a member at the date of his indentures."

I am distinctly of opinion that there was no intention to raise the question of fact as to whether the complainant fell within any of the trades mentioned in clause 2. That was not raised, and therefore could not be raised afterwards. But further, when the employer appealed to the Supreme Court, though the third ground in the order nisi was large enough to have included a defence such as indicated, the conduct before that tribunal also showed that no such defence was contemplated. It was not argued; it was not decided. If raisable there, it was tacitly abandoned. Before us, in consequence of a chance observation, the point was seized on, and debated for some considerable time. In any case the interests of justice and fair play require, and established precedents too well known to need or justify citation, settle the rule that a point which, if good, was easily curable by evidence should not be allowed to be taken in a final Court of appeal, unless the truth is incontrovertible. To ascertain that, I asked both sides the question whether the lad came within clause 2. Neither side was prepared to answer—showing conclusively that the point was never thought of, but his inclusion was assumed. This I assume also, and pass to the law of

the case, which was fought, and, from its importance, was worthy of contest. It concerns many employers and apprentices.

I would say one word as to the individual merits of the appellant. It appears to be true that the respondent distinctly warned the appellant that he did not intend, and could not afford, to pay Federal wages, but merely State rates. But, in the first place, that was before this award, and everyone knows that a Federal award may override existing contracts. In the next place, the decision is not confined in its effects to this particular case, but will govern all cases of apprenticeship in trades affected by the award.

I should like to acknowledge the great assistance I received from learned counsel on both sides in expounding the somewhat intricate provisions of the award. But the conclusion I arrive at is that the Magistrate's decision was correct and should be restored. The view taken by the Supreme Court is shortly this : Although par. (e) of clause 1, read by itself, would apply to all apprentices during the currency of the award, yet when some other paragraphs in clause 1 are looked at, it is seen that they refer to future apprentices only, and therefore so does par. (e). It is not unimportant to notice that the newly-sprung objection as to clause 2 assumes that it applies also to apprentices who were such at the date of the award. But, passing by that inconsistency in the respondent's contention, it is not, I think, open to serious doubt that par. (e) on a fair construction applies to all apprentices for the time being.

In the first place, the award does not expressly exclude apprentices already indentured, it may be the day before ; and, not expressly excluding them, leaves it in the highest degree improbable—so far as any *a priori* reason is concerned—that wages conditions, which for new apprentices are thought to provide *the minimum sufficiency of normal physical existence*, should be denied to a fellow-apprentice whose only misfortune was to be indentured a day before the award was made. There is, therefore, no reason—certainly no humane reason—for excluding the earlier apprentices from the general words of par. (e).

The same thing may be said of pars. (g), (h) and (i). Par. (g) protects an apprentice under nineteen from working overtime against his wish. And if he does work overtime he is to get higher

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Isaacs J.

pay. It says: "*No apprentice* under nineteen years shall be required," &c. Par. (a) similarly protects him against working night shifts against his will. It says: "*No apprentice*" shall be so required against his will. Par. (i) makes provision for "*each apprentice*" to attend a technical school. The contention is that "*no apprentice*" and "*each apprentice*" are expressions that do not mean what they say, but must be altered to "no (new) apprentice" and "each (new) apprentice." I decline to accede to that view.

But there are two express provisions which seem to me to exclude doubt. They are par. (j) of clause 1 and also par. (k), added to clause 2 as from its original date of operation by the variation made in March 1925. I will deal with those paragraphs separately. Par. (j) would be meaningless unless some of the paragraphs in clause 2 applied to apprentices indentured at the date of the award. If so, par. (e) must be one of the paragraphs so applying. Par. (k) might as well never have been made, unless clause 2 applied, where consistent with the words of the sub-clauses read severally, to their present, as to future, apprentices.

These considerations leave me with no doubt whatever that the appellant should succeed. In my opinion the appeal should be allowed and the decision of the Police Magistrate restored.

HIGGINS J. In my opinion, the variation made in the award of 1924 by the learned President on 20th March 1925 establishes beyond doubt that the wages prescribed by the award were to be paid to this apprentice indentured on 5th September 1922. This variation though put in evidence is not referred to by the Chief Justice of Victoria, and probably his attention was not called to it.

The indenture of apprenticeship is dated 5th September 1922, and is for a term of six years. The lad joined the Union on 8th November 1924, and gave notice of the fact to his employer on or before 5th June 1925. But since that act he has been paid 14s. per week less than the award rate for 17 weeks, and 25s. per week less than the award rate for 32 weeks; and he has filed a complaint, 5th June 1926, for the deficiency.

By clause 2 (e) of the award of 1924, made by President *Powers* on 22nd December 1924, it was provided under the head of

"apprentices": "The minimum rates of wages to be paid by any respondent to apprentices shall be as follows:—First year, 17s. 6d. per week; second year, 23s. per week; third year, 37s. per week; fourth year, 55s. per week; fifth year, 70s. per week." But, at the instance of employers, who were respondents in the dispute, a variation was made in the award on 20th March 1925, by the President, as follows:—"(1) The following sub-clause is added to follow sub-clause (j) of clause 2 of the award: (k) This award shall in no way apply to apprentices who were indentured prior to the first day of January 1921 or to any employee under twenty-one years of age who was in the employ of any respondent on the said first day of January 1921 and who became bound as an apprentice under a suitable indenture under the appropriate State laws prior to the twenty-eighth day of July 1921. (2) This variation applies to the respondents whose names are set out in Schedule A to this variation. (3) This variation shall take effect as and from the date the award came into operation" (1st January 1925).

As the Chief Justice of Victoria said in making the order to review absolute, defendant is unquestionably bound by the award; indeed, the fact was admitted by the defendant's counsel. The explanation of the variation is set out at length in the President's reasons for judgment given on 20th March 1925; but this Court has to concern itself only with the operative words of the award itself as varied. The variation shows that the award, from its date of operation (1st January 1925) applied to apprentices indentured previously, provided that they were not indentured before 1st January 1921. The apprentice in this case was indentured after 1st January 1921. The claim for the extra wages is as from 5th June 1925.

The only question is as to the proper interpretation of the award —the award as it stood on and after 20th March 1925; and whatever doubts might have arisen as to the award being applicable to apprentices indentured before the award have been cleared away by the words of the variation. The provision that apprentices indentured *before* 1st January 1921 were not covered by the award is idle and unmeaning if apprentices subsequently indentured are not covered: *expressio unius exclusio alterius.*

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Higgins J.

I am therefore of opinion that the decision of the Magistrate in favour of the complainant is right, if the complainant comes within the definition of "apprentice" in the award; and this point—that he does not come within that definition—though not dealt with below, has yet to be decided. For this point the appellant refers to clauses 2 (a) and 15 (a) of the award. Clause 15 (a) says: "Apprentice," so far as wages and conditions of work are concerned means a lad a member of the claimant union *under indenture as above.*

Now, "under indenture as above" means, apparently, under an indenture binding the employer to teach the lad one or more of the trades mentioned in clause 2 (a); and when we turn to clause 2 (a) we find that it says: "Apprentices may be allowed to any of the following trades: blacksmith, ironmoulder, brassfinisher, coppersmith, motor-cycle mechanic, die-sinker, electrical fitter, electrical or oxy-acetylene welder, electroplater, fitter, locksmith, motor mechanic, first class machinists, patternmaker, plumber, scientific-instrument maker, scale maker, safe maker and/or turner." It so happens that the indenture of apprenticeship in this case was drawn up in the form prescribed by the Engineers and Brass Workers (Skilled) Board of Victoria; and the trade in which this lad is to be instructed is that of "mechanical engineer," no particular kind of mechanical engineer being mentioned. But according to the determination of the Board, the Special Board was appointed as to the trade of brass founder or brass finisher, &c., and also as to the trade of "mechanical engineer," including (1) a pattern maker, (2) an iron and brass turner, (3) a fitter, (4) a blacksmith, (5) a coppersmith, (6) a planer, (7) a slotter, (8) a borer, (9) a milling machiner. According to the definitions in the award, clause 15, planers, slotters, borers, milling machiners, are all included under "first class machinists"; and all the trades mentioned in the determination are included in the list of trades in the award. But it is urged that the indenture of apprenticeship does not show on its face to which particular trade this lad is apprenticed under the term "mechanical engineer." The award gives an option as to *all* the trades mentioned in the determination of the Special Board, and more trades; so that

this lad's apprenticeship seems to me to satisfy the words of the definition in the award.

Even if I am wrong in this view, it is very doubtful whether under the Victorian law as to orders to review, such an objection, however noble, can be entertained by this Court. In pursuance of sec. 88 (3) of the *Justices Act* 1915, at the close of the opening of the complainant's case and before any evidence was taken, the defendant's counsel gave a concise statement of his defence, and of the points on which he relied; and the provision of the Act is that he shall not be at liberty to enter or rely upon or give evidence as to any other matter than those included in the defence and points so stated. The main defence or point was "that the award as a matter of law and upon a proper construction of its terms did not apply to an apprentice in the position of the complainant." The words "in the position of the complainant" are vague; but they were further defined by defendant's counsel before the complainant's evidence was closed, as meaning merely that the award was not intended to apply to an apprentice who at the date of the execution of his indenture was not a member of the Union. There was no suggestion of any kind that the complainant was not an apprentice at all (within the award). In view of the defence and points stated, the complainant was absolved from proving his case except so far as necessary to meet the defence and points submitted (*Tibbits & Co.* v. *Holt* (1)).

But, at all events, it would be shocking if under such circumstances the complainant were not allowed to fill in the gap which is said to exist in the proof. The complainant offers to prove that he was apprenticed in fact to learn one of the trades mentioned in the determination of the Special Board under "mechanical engineer." Under sec. 155 of the *Justices Act* the Court or Judge has power on the return of the order to review to take further evidence, or to remit the case to Petty Sessions; and, as the Court of appeal, we should see to it that such a power be exercised.

As to the alternative ground taken by the order nisi, that the amount of arrears of wages must be limited to a period of three months because of clause 17 of the award, I am of opinion that that clause does not apply to apprentices at all. Clause 17 applies

(1) (1890) 16 V.L.R. 714; 12 A.L.T. 102.

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only to "employees"; and under the definitions in clause 15, the word "employee" means "an *adult* employee who is a member of the Amalgamated Engineering Union, but this does not apply to apprentices."

Appeal dismissed with costs.

Solicitors for the appellant, *Maurice Blackburn & Co.*

Solicitors for the respondent, *Haden Smith & Fitchett.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . APPELLANT;
RESPONDENT,

AND

WEATHERLY . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1927. MELBOURNE, *Mar.* 8. SYDNEY, *April* 13. Knox C.J., Isaacs, Higgins Rich and Starke JJ.

Income Tax—Assessment—Income—Sale of trading stock—Live-stock used for breeding purposes—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *sec.* 17*.

The respondent, a pastoralist, sold about one-half of his station and that sale made it necessary for him to sell a large number of his stock. He therefore held a special sale of stock. The stock sold included sheep and cattle which the respondent alleged would not have been sold except for the necessity of reducing the numbers brought about by the sale of land, and of these some

* Sec. 17 of the *Income Tax Assessment Act* 1922-1925 provides that "(1) The proceeds derived from the sale of the whole or part of the trading stock of any business after the thirtieth day of June one thousand nine hundred and twenty-one (whether on the sale of a business as a going concern or in any other manner for the purpose of discontinuing the business) shall be assessable income. . . . (4) In this section—(*a*) the expression 'trading stock' does not include live-stock which in the opinion of the Commissioner . . . were ordinarily used by the vendor . . . for breeding purposes."