[HIGH COURT OF AUSTRALIA.]

AMALGAMATED COLLIERIES OF W.A. LTD. APPELLANT; DEFENDANT,

AND

TRUE . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *Feb.* 28.

SYDNEY, *April* 4.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration—Award—Basic wage—Mining—Day wages—Tonnage rates—Automatic adjustment of basic wage—Basic wage decreased—Reduction not applicable to tonnage rates—Statutory right to wages prescribed in award—Limitation of time for recovery of wages—Contract to pay wages—Limitation of time applicable to recovery of wages due under contract or under statutory right—Industrial Arbitration Act 1912-1935 (*W.A.*) (*No.* 57 *of* 1912—*No.* 6 *of* 1935), *secs.* 83, 92, 121, 123, 124, 176 (2).

The *Industrial Arbitration Act* 1912-1935 (W.A.) provided for a periodical ascertainment of the basic wage (sec. 121), required that awards of the Court of Arbitration should prescribe and distinguish separately (*a*) the basic wage, and (*b*) other wages or allowances and/or additional remuneration (sec. 123), and provided that the basic wage prescribed in every award of the court should, "from time to time, automatically become increased or decreased so that it conforms to and is in parity with the basic wage as last determined by the court" (sec. 124).

An award applying to the coal-mining industry declared, under the heading "Day Wages," that the rates of wages fixed by it were based upon the basic wage fixed by the Court of Arbitration at a date specified, being a minimum of 13s. 10d. for a shift of eight hours; it then declared minimum wages by stating the "margin" for skill which was to be added to the basic wage; under the heading "Tonnage Rates," it declared that miners working on tonnage rates should be paid a specified sum per ton. The plaintiff was employed by the defendant under a verbal contract to work as a miner at tonnage rates in accordance with the terms of the award.

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Held, by the whole court, that the provision of sec. 124 of the Act for the automatic readjustment of the basic wage applied only to the day wages fixed by the award, and not to the tonnage rates; accordingly, the plaintiff was entitled to be paid the full amount of the tonnage rates stated in the award, notwithstanding that there had been a decrease in day wages because of a readjustment of the basic wage.

The Act also provided that an award should be a common rule in the industry to which it applied (sec. 83), and that every worker should be entitled to be paid by his employer in accordance with any award which was applicable, "notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose" (sec. 176 (2)).

Held, by *Latham* C.J., *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that an action by the plaintiff, based on his contract, to recover an amount which the defendant, his employer, had wrongly deducted from the full tonnage rates fixed by the award was an action to recover as wages an amount which the plaintiff was entitled to be paid by his employer in accordance with the award; accordingly, sec. 176 (2) of the Act applied, and the plaintiff could not recover any amount which had become due more than twelve months before the commencement of the action.

Decision of the Supreme Court of Western Australia (Full Court) varied.

APPEAL from the Supreme Court of Western Australia.

In an action commenced on 12th April 1937 Gwyn A. True sued Amalgamated Collieries of W.A. Ltd. in the Local Court at Collie, Western Australia. The facts were agreed upon between the parties in substantially the following terms:—

The plaintiff was verbally engaged by the defendant to work for it as a miner at tonnage rates and not at day wages at its Proprietary Colliery, Collie, upon the terms and conditions of award No. 32 of 1934 of the Court of Arbitration of Western Australia. The relevant terms of the award sufficiently appear in the judgments hereunder. Pursuant to such engagement the plaintiff worked for the defendant during the period of one year preceding 26th September 1936. During the said period of one year the plaintiff's earnings in such employment, at the tonnage rates prescribed by the award, amounted to the sum of £319 8s. 10d. The defendant paid the plaintiff sums totalling £311 7s. 1d. only, claiming that owing to reductions from time to time in the basic wage it was entitled to deduct and did deduct from

the plaintiff's earnings sums totalling in the period £8 1s. 9d. The plaintiff claimed the sum of £8 1s. 9d. as being the balance of the wages earned by him and payable to him by the defendant for the said period pursuant to his contract of service.

The court dismissed the claim. The plaintiff then appealed to the Supreme Court of Western Australia, which ordered that judgment be entered for the plaintiff for the full amount claimed.

From that decision the defendant company, by special leave, appealed to the High Court.

Lappin, for the appellant. The basic-wage rate being reduced, the tonnage rate should be reduced correspondingly, but in no case should it come below the minimum limit. In any event, sec. 176 (2) of the *Industrial Arbitration Act* 1912-1935 applies to all claims more than twelve months old. No wages more than twelve months old are recoverable, whether based on contract or on the award.

Seaton, for the respondent. It is competent to the parties to make a contract on terms equally as good as or better than the award. The parties can agree on an amount less than the award and can carry out the agreement, but, if they have to come to the court to enforce it, the court will refuse to do so. The tonnage rates are not reduced because the basic wage is reduced. The period of limitation of actions applies only where the action is based on the statute; if the claim is based on an independent contract, the claimant is left to the ordinary period of limitation.

Lappin, in reply. There is no distinction between a worker who is employed on award terms and conditions and one who is employed without the mention of any terms or conditions.

Cur. adv. vult.

April 4.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of Western Australia allowing an appeal from the Local Court at Collie.

The plaintiff (the respondent upon this appeal) sued for wages claimed to be due to him from the defendant. The facts, agreed upon

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by the parties, were that the plaintiff was verbally engaged by the defendant company to work for it as a miner, at tonnage rates and not at wages, at its Proprietary Colliery upon the terms and conditions of a certain award. He sued for wages for work done during a period of about one year ending on 26th September 1936. The amount payable to him at the tonnage rates prescribed by the award was £319 8s. 10d., but the defendant paid to him £8 1s. 9d. less than this amount. The defendant claimed that it was entitled to deduct this sum by reason of decreases made from time to time in the basic wage. The plaintiff challenged the right of the respondent to make any deduction on this account. The magistrate dismissed the claim. The Full Court, upon appeal, ordered that judgment be entered for the plaintiff for the full amount claimed.

The *Industrial Arbitration Act* 1912-1935 provides, in sec. 121 (1), for an annual ascertainment of a basic wage to be determined by reference to the needs and obligations of workers. Sec. 123 provides that awards shall prescribe and distinguish separately "(*a*) the basic wage; and (*b*) other wages or allowances, and/or additional remuneration; and (*c*) any deductions therefrom."

Sec. 124 is the section which requires particular consideration in this case. Subject to an exception and a proviso which are immaterial in this case, this section provides that "the basic wage prescribed in every award and industrial agreement shall, from time to time, automatically become increased or decreased so that it conforms to and is in parity with the basic wage as last determined by the court."

The question is whether the tonnage rates (in this case, 2s. 7½d. per ton) prescribed by the relevant award should be increased or decreased in some manner so as to correspond with increases or decreases in the basic wage.

Before examining this question it is desirable to refer to sec. 92 (2), which is as follows: "No minimum rate of wages or other remuneration shall be prescribed which is less than the basic wage determined under this Act or, if there is no such determination applicable, which is not sufficient to enable the average worker to whom it applies to live in reasonable comfort, having regard to any domestic obligations to which such average worker would be ordinarily subject." This section shows that there may be a case in which,

though an award prescribes a remuneration, there is no determination of a basic wage which is applicable. In such a case this remuneration would be "other wages or allowances, and/or additional remuneration" within the meaning of sec. 123 (*b*). Sec. 92 (2) requires the court to fix such "other remuneration" with regard to the standard specified in the latter portion of the section. The court doubtless paid attention to this direction when it fixed the tonnage rates.

The award prescribes certain day wages, fixed per shift of eight hours, with a proportional reduction for shifts of seven hours in accordance with an agreement between the parties to the award which is recognized and adopted by the award. These provisions, which are to be found in clause 4 (*c*) of the award, first specify a margin for skill and then a total wage. It will be found that in each case the total wage is reached by adding the same amount, namely, 13s. 10d. for a shift of eight hours, to the amount which is set out as the margin for skill. The award, in clause 4 (*b*), states that "the rates are based upon the basic wage as fixed by the Court of Arbitration on the 18th day of August, 1931, namely, at the weekly rate of £3 16s., being a minimum of thirteen shillings and ten pence (13s. 10d.) for any shift for an adult worker." Thus, in the case of day wages, the automatic adjustment which sec. 124 provides can readily be made. If the sum of 13s. 10d. (for eight hours) is increased by 6d. a shift, the day wages (for eight hours) are increased by 6d. per shift. In the same way a reduction in the basic wage can be automatically applied to the provisions dealing with day wages.

The defendant has made a deduction from the tonnage rates by calculating the number of shifts in fact worked by the plaintiff and making the same reduction in respect of each shift as if the plaintiff's total remuneration had included an amount representing the basic wage. In fact the plaintiff was not paid per shift; he was paid per ton. In my opinion the Act does not justify this procedure.

Clause 31 of the award provides that a party of miners, and miners working singly on tonnage rates, shall be paid, at the Proprietary mine, 2s. 7½d. per ton. It is, in my opinion, not possible to make any alteration in the figures of 2s. 7½d. per ton by reference

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to any alteration of the basic wage. The basic wage has been fixed by the Court of Arbitration by reference to time. The tonnage rates are fixed, not by reference to time, but by reference to the quantity of coal mined. No change in the figure of 13s. 10d. as the basic wage can automatically bring about a change in the figure of 2s. 7½d. per ton, though it can obviously bring about a change automatically in day wages in which the amount of 13s. 10d. is expressly incorporated.

Sec. 124 in its terms relates to "the basic wage prescribed in every award." The operation of sec. 124 accordingly affects only such a wage so prescribed. It is the wage so prescribed which "shall, from time to time, automatically become increased or decreased." In the present award that wage is 13s. 10d. per shift of eight hours. When a variation in the basic wage is made, that figure of 13s. 10d. must be varied accordingly, with consequential results in the case of every wage in which the amount of 13s. 10d. is included. When, however, this has been done, the operation of sec. 124 is exhausted. Thus, a change in the basic wage, whether it be an increase or a decrease, cannot affect the tonnage rates prescribed by the award. Accordingly, in my opinion, the judgment of the Full Court upon this question was right and should be affirmed.

The second question which arises upon this appeal depends upon the true construction of sec. 176 of the Act. Sub-sec. 1 of this section prohibits contracting out of an award and avoids any contract in so far as it purports to annul or vary an award. Sub-sec. 2 is as follows: "Every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared to be entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose."

In this case the summons was issued on 12th April 1937. The claim related to wages alleged to be due from the fortnight ended 5th October 1935 to the fortnight ended 5th September 1936. The

amount claimed was £8 1s. If the section applies so as to limit the amount recoverable by the plaintiff, then the amount for which judgment should be entered would be £3 8s. 10d.

When any person is employed to do work to which an award applies, the parties are bound by a contract. Their legal relations are in part determined by the contract between them and in part by the award. The award governs their relations as to all matters with which it deals. This result is produced by secs. 83 and 176. Sec. 83 provides that an award is to be a common rule and that it shall be binding on all employers and workers engaged in the industry to which it applies. Sec. 176 (1) avoids contracts so far as they purport to annul or vary the terms of an award, and sec. 176 (2) provides that every worker shall be entitled to be paid by an employer in accordance with any relevant award, notwithstanding any contract to the contrary. Thus, the award controls the relations of the parties as to all matters to which it applies.

But an award never deals with all the matters which affect the relations of any particular employer and any particular employee. The creation of the relation of employer and employee depends upon an agreement between them and not upon any award. Thus, the existence of the obligations under an award in relation to a particular employer and employee always depends on the existence of a contract between them. So, also, there are terms of their relationship which do not depend upon any award. For example, the employee must always obey the lawful orders of his employer, but awards do not commonly include a term to that effect. In my opinion, however, it is unnecessary in this case to work out in detail the basis of the relations created by employment under an award. For the purposes of this case it is sufficient to refer to what was said in a unanimous judgment of this court in *Mallinson* v. *Scottish Australian Investment Co. Ltd.* (1): " Apart from the Act " (the *Commonwealth Conciliation and Arbitration 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

(1) (1920) 28 C.L.R. 66, at p. 73.

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the Act has done in this respect is to substitute another method of determining the amount of the remuneration."

It is urged that the object of sec. 176 is to prevent the evasion of awards by imposing a disability upon an employee who has made a contract contrary to an award—the disability consisting in limiting his right of recovery for wages in such cases (but only in such cases) to a period of twelve months from the time when his right of action arises. Reference was made in argument to cases decided upon somewhat similar sections in New South Wales and Victoria. The words of those sections were, however, different from those to be found in sec. 176, and in this case the task of the court is to construe that section.

The section may be written out in the following paraphrase: (1) Every worker is entitled to be paid in accordance with any applicable industrial award; (2) every worker must be so paid notwithstanding any contract to the contrary; (3) every worker may recover as wages in any competent court the amount to which the section declares that he is entitled; (4) but any action for the recovery of such amount must be commenced within twelve months from the time when the cause of action arises.

This analysis of the section helps to show, I think, that the effect of the particular section is to impose the limitation contained in par. 4 in the case of any action brought for the recovery of the amount mentioned in par. 1. This proceeding is such an action. Even if it be said that the plaintiff is also entitled to the amount claimed by virtue of a contract as distinct from an award, it is still true that the amount for which he sues is an amount to which the section declares that he is entitled, and therefore the limitation set out in par. 4 applies.

As I have said, an employee to whom an award is applicable only becomes an employee by virtue of his employment, that is, by virtue of a contract of employment between himself and his employer. Thus, in every case where an award is applicable it can be said, as in this case, that the worker is entitled to the wages prescribed in the award by reason of the existence of a contract. Every claim for wages has, in this sense, a common-law basis. If the fact that a worker has to establish a contract as part of his case

when he sues for wages is sufficient to exclude the application of the section, then the section would never apply in any case.

I am, therefore, of opinion that the concluding words of the section are not limited to cases of evasion by contract or pretended contract and that they apply in the present case. This court (*Latham* C.J., *Dixon* and *McTiernan* JJ.), in the case of *McKerlie* v. *Lake View and Star Ltd.* (1), considered sec. 176 when it appeared in an earlier statute. In that case a worker sued for a balance of wages alleged to be due, and the facts would have supported a contention that there was a settled account between the worker and his employer. Such a defence was excluded by the section. The particular point which calls for decision in the present case (whether the section is limited to cases of evasion by a contract or pretended contract) was not decided in *McKerlie's Case* (2), but the view which I have taken is consistent with the reasoning in the judgments in that case.

In my opinion the appeal should be allowed in relation to the question arising upon sec. 176 and judgment should be entered for the plaintiff for the amount of £3 8s. 10d. In accordance with the undertaking given by the defendant appellant upon the application for special leave to appeal the appellant should pay the respondent's costs of the appeal to this court.

STARKE J. Appeal by special leave from a judgment of the Supreme Court of Western Australia.

The *Industrial Arbitration Act* 1912 of Western Australia and its amendments require the Court of Arbitration constituted under that Act to determine annually a basic wage to be paid to male and female workers (sec. 121), and it provides by sec. 92 (2) that no minimum rate of wage or other remuneration shall be prescribed which is less than the basic wage determined under this Act or, if there is no such determination applicable, which is not sufficient to enable the average worker to whom it applies to live in reasonable comfort having regard to any domestic obligation to which such average worker would be ordinarily subject and that awards of the court shall prescribe and distinguish separately (*a*) the basic wage,

(1) (1937) 58 C.L.R. 396.

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and (*b*) other wages or allowances and/or additional remuneration, and (*c*) any deduction therefrom (sec. 123).

It also provides (sec. 124) that the basic wage prescribed in every award shall from time to time automatically become increased or decreased so that it conforms to and is in parity with the basic wage as last determined by the court.

In 1934 the court made an award in relation to workers in the coal-mining industry in the South-west Land Division of Western Australia. Under Part I. of the award, "General Conditions," clause 4, "Day Wages," it was declared that the rates were based upon the basic wage fixed by the court, namely, at a weekly rate of £3 16s., being a minimum of 13s. 10d. for any shift for an adult worker. It then proceeded to award that workers of the age of 21 years and upwards should not be paid less than the several amounts set forth per shift of seven hours. It further awarded, under Part II. of the award, "tonnage rates," that is, rates at so much per ton mined in respect of machine-cut coal and pick-won coal.

The basic wage which was in force when the award was promulgated was decreased, and Amalgamated Collieries Ltd.—the appellant here—claimed that the tonnage rates payable under the award were automatically reduced. It accordingly deducted a sum of £8 1s. 9d. from the wages of the respondent, True, who was a miner in its employ. True then took proceedings to recover that sum, being the balance of wages earned by him as a miner whilst in the employ of the appellant and payable to the respondent by the appellant in respect of the period of one year ending 26th September 1936. Judgment was given in favour of the appellant by the local magistrate, but his decision was reversed in the Supreme Court. It held that the tonnage rates fixed by the award were not automatically decreased by force of sec. 124 of the Act.

In my opinion the Supreme Court was right in so deciding. The award, as the court said, "simply prescribes so much per ton, and the earnings of the piece-worker do not, as do the earnings of the time worker, depend in fact upon the current basic-wage rate, but entirely upon the amount of work done by him." It cannot be ascertained from the award how far, if at all, the basic wage is reflected in the fixation of these tonnage rates: indeed, the award

itself only purports to base the day wages upon the basic wage (See clause 4 (*b*)).

The amount deducted by the appellant was not, as I understood counsel for the appellant, from any basic wage prescribed as to tonnage rates but at the rate of 9d. per shift worked, which conformed to and was in parity with the reduced basic wage for a shift of seven hours. But the tonnage rates are not based upon shifts worked, but upon coal mined. The method does not follow the provisions of sec. 124 decreasing any basic wage prescribed as to tonnage rates, but substitutes what was regarded as an equivalent method producing the same result. It is unjustified by anything contained in sec. 124.

The appellant next contended that in any case the wages recoverable by the respondent were limited by the provisions of sec. 176 (2): "Every worker shall be entitled to be paid by his employer in accordance with any . . . award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose."

An award whilst in force is a common rule of the industry to which it applies and is binding on all employers and workers engaged at any time during its currency in that industry within the State (Act, sec. 83).

It was said that the respondent was not suing upon the award but upon a verbal agreement whereby he was engaged by the appellant to work for it as a miner at tonnage rates, and not at day wages, upon the terms and conditions of the award. The Act does not provide that actions for the recovery of wages founded upon an award shall be commenced within twelve months but that actions for the recovery of wages the amount of which the worker is entitled to be paid in accordance with any award shall be so commenced. An action based upon an agreement to pay wages, whether tonnage rates or day wages, fixed by award is clearly, I think, within the words of sec. 176 (2). Any other construction would render the section inoperative, for it would be open to a worker in every case

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to found his action in form upon an agreement, express or implied, and not upon an award. But the sum recoverable would be the same and for the same services, and also would be in accordance with the award, which is a common rule of the industry. In my opinion the decision of the Supreme Court to the contrary cannot be sustained. The judgment below should therefore be reduced to £3 8s. 10d., the deductions made by the appellant which are not within the limitation provided by sec. 176 (2).

DIXON J. The chief question for consideration upon this appeal is whether in certain coal mines in Western Australia the rate of remuneration of men working at tonnage rates in mining machine-cut coal rises and falls with changes in the basic wage. The matter is governed by an award of the Court of Arbitration of Western Australia as affected by the provisions of the *Industrial Arbitration Act* 1912-1935 of that State. It is to be noticed that it is not a question whether miners remunerated at the tonnage rates are entitled to a minimum wage below which their earnings as piece-workers may not sink, or whether, if they are so entitled, that minimum varies with the changes in the basic wage. It is a question as to the fixity or variation of their remuneration when calculated by reference to the tonnage rates. It arises in relation to a clause which says simply: "Tonnage Rates.—Parties of miners, and miners working singly on tonnage rates, shall be paid, at the under-mentioned mines, the following rates, while existing conditions as to boring are observed"; then are set out the names of certain mines and, in shillings and pence, the rates per ton respectively payable therein.

The statute provides for the yearly determination and declaration of a basic wage (sec. 121). It also authorizes a quarterly adjustment of the basic wage so declared to accord with variations in the cost of living reported by the government statistician (sec. 124A (1)). It requires that awards and industrial agreements shall prescribe and distinguish separately the basic wage and other wages allowances or additional remuneration and any deductions (sec. 123). Then the statute automatically increases or decreases the basic

wage prescribed in all awards and agreements so that it shall conform and be in parity with the basic wage as last determined or adjusted (sec. 124 and sec. 124A (3)).

The general provisions of the coal-mining award under consideration do specify a basic wage and do distinguish between that wage and additional remuneration for skill: an addition set out under the heading "Margin." But this is all in relation to shift work of so many hours. No doubt, in fixing the tonnage rates, the Arbitration Court was guided by its estimate of the amount that a piece-worker could earn, and, no doubt, it took the basic wage as an element, if not a starting point, in determining the rates. But the amounts fixed by the award as tonnage rates are in fact no more than inseparable money sums per ton worked. Their relation to the basic wage is not disclosed: they do not show that the amount of the basic wage is an element in their composition and it is impossible to say whether any arithmetical relation exists.

In my opinion, the basic wage is not a part or proportion of the tonnage rates liable to the variation directed by sec. 124 and the tonnage rates remain fixed and unaffected by alterations of or adjustments in the declared basic wage.

This conclusion raises a subsidiary question. The respondent is a miner to whom tonnage rates were paid according to a calculation which made a deduction because of a decrease in the declared basic wage. He sued for the underpayments over a period of a year ending 26th September 1936. His action was instituted in the Local Court on 12th April 1937. Under sec. 176 there is a limitation of twelve months upon actions for the recovery of amounts to which workers are entitled in accordance with an industrial agreement or award. Thus, there arises a question whether the respondent could recover for underpayments of tonnage rates due before 12th April 1936. If he could not, his claim is reduced by £4 12s. 11d., that is, from £8 1s. 9d. to £3 8s. 10d. The facts were not proved by evidence but were agreed between the parties, and the admission which they concurred in making states that the respondent was verbally engaged by the appellant company to work for it as a miner at tonnage rates, and not at day wages, upon the terms and conditions of the award.

According to this statement of fact, the appellant contracted to

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pay tonnage rates pursuant to the terms of the award. The respondent contends that he has thus a contractual right to payment of the award rates and that he need not rely upon the statutory obligation which the *Industrial Arbitration Act* imposes upon the appellant. In other words, there are, he says, two separate and independent obligations binding the appellant to pay the award rates, first, the obligation arising from the respondent's agreement to employ him on the terms of the award, and, second, the statutory obligation. He contends that, under sec. 176 (2), the limitation of twelve months applies to the statutory obligation only.

In New South Wales an analogous, but by no means identical, provision has been construed as relating only to the special statutory obligations imposed independently of the contract of employment and in derogation of any inconsistent terms which that contract might include (See the judgment of *Ferguson* J. in *Drury* v. *Dulhunty* (1), and of *Jordan* C.J. in *Fagan* v. *Public Trustee* (2); see, too, *Ex parte Brandt* (3) and *Josephson* v. *Walker* (4)).

The Western Australian section has had a history and development somewhat different from that of the New South Wales provision. Early in the history of the legislation it was decided that a police court had no jurisdiction to order the payment of wages due under an award (*Swaney* v. *Wheatley* (5); cf. *Turnbull* v. *Forbes* (6)). In providing that the worker might recover in any court of competent jurisdiction the amount which he is entitled to be paid by his employer in accordance with an award or industrial agreement, the purpose of the legislation appears to have been to overcome objections to the jurisdiction of the police court and presumably other courts.

As sec. 176 (2) now stands, it declares that every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award notwithstanding any contract to the contrary, and then proceeds: " and such worker may recover as wages the amount to which he is hereby declared entitled in

(1) (1921) 21 S.R. (N.S.W.) 514; 38 W.N. (N.S.W.) 174.
(2) (1934) 34 S.R. (N.S.W.) 189; 51 W.N. (N.S.W.) 99.
(3) (1912) 12 S.R. (N.S.W.) 105; 29 W.N. (N.S.W.) 15.
(4) (1914) 18 C.L.R. 691.
(5) (1906) 8 W.A.L.R. 199.
(6) (1923) 26 W.A.L.R. 59.

any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose."

Contracts of employment may, at any rate in theory, provide for wages in excess of the minimum rates which are at any given time prescribed by an award. They may provide for wages at those rates and for wages below those rates. In the first case, the full wages can be recovered only upon the express contract; and sub-sec. 2 of sec. 176 has no application to an action to recover them. But, in the second and third cases, the award rates are recoverable upon the statute. In the second case, it may be that they are also recoverable upon the express promise. In that case, however, the same sum is due under the statute, and payment discharges that statutory obligation. It is one sum of money, and, whether the court whose jurisdiction is invoked has, as the Local Court has, jurisdiction over personal actions arising on a statute, or whether its jurisdiction is limited to contract, the statute authorizes the worker to sue in that court for the amount. The right to payment of award wages is really a term imported by statute into the contract of employment, and imported independently of the intention of the parties. The point involved appears to me to lie in the generality of the words and the positive form in which the limitation is expressed, viz., " but every action for the recovery of any such amount must be commenced within twelve months." Why is not an action on the express promise to pay award wages " an action for the recovery of such amount " ? The distinction between express promise and obligation imputed by statute relates only to the juristic source of the obligation. It does not touch the character of the sum sued for nor the purpose of the proceeding. The words are equally apt to cover both obligations, and I see no reason to imply any restriction or qualification which would exclude one of them. In my opinion the limitation is applicable and the respondent is entitled to recover only in respect of underpayments during the twelve months preceding his plaint.

This means that the appeal should be allowed in part and that the amount of the judgment which the Supreme Court ordered to

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be entered should be reduced to £3 8s. 10d. The costs of the appeal are payable by the appellant company under the order granting special leave.

EVATT J. This is an appeal by special leave from the Supreme Court of Western Australia.

The respondent was employed in the appellant's colliery, having been verbally engaged to work as a miner at the tonnage rates prescribed in an award of the Industrial Court. The employer deducted from the earnings of the respondent certain sums of money and claimed to be entitled to do so by virtue of sec. 124 of the *Industrial Arbitration Act* 1912-1935.

What sec. 124 does is to provide that the " basic wage " prescribed in an award shall from time to time automatically rise or fall so as to conform to and be in parity with the basic wage as determined by the Industrial Court. The " basic wage " is fixed by the Industrial Court by reference to the average worker's needs as distinct from the value of the work he performs (sec. 121). The fixation of a " basic wage " does not give every person in the State the rights to be paid such wage, but, in making any award, the Industrial Court is prohibited from prescribing any lesser wage than the basic wage, except for certain special types of workers (sec. 121 (*b*)).

The agreement between the plaintiff and appellant was for employment, not at day wages or at weekly wages, but at tonnage rates. A reference to the award shows that there is express provision for day wages in clause 4. As the appellant's mine was one where tonnage rates were in operation, the men could be employed at day wages only in a few places (clause 32 (*a*)).

A miner employed at day wages has to be paid a minimum rate, which is made up of the basic wage plus a marginal allowance for skill (clause 4 (*c*)). The employer contends that by sec. 124 the basic wage mentioned in clause 4 (*b*) is automatically reduced, so that the total minimum applicable to the miner and prescribed in clause 4 (*c*) is also reduced automatically. Undoubtedly this part of the argument is sound, the object of sec. 124 being to prevent individual applications to the Industrial Court and to alter directly the basic wage in each award by the amount of the rise or fall.

But all this has nothing to do with the tonnage rates prescribed in clause 31 of the award. No basic-wage declaration has been made which affects or can affect such rates. Throughout the coal-mining industry of Australia, the accepted practice has been to pay miners upon a contract basis, the working party usually consisting of two. Clause 31 of the award prescribes the actual contract rate of pay which is applicable. Clause 31 has nothing whatever to do with the basic wage provision which is applicable to men on day wages. The two things are quite disparate. If clause 4 was deemed applicable to miners working on tonnage rates, then presumably each miner in the party working on contract would have to be paid the "basic wage," which is determined by needs only, not by value of work done. But, if, contrary to my view, clause 4 (*c*) was applicable to men on tonnage rates so that each contract miner has to be regarded as being entitled to the basic wage, all that clause 4 (*c*) does is to prescribe a *minimum* rate, whereas clause 31 lays down an actual contract rate, so that a reduction in the minimum has no operation to reduce the amount owing under clause 31. For it is quite appropriate that a worker who is guaranteed a minimum remuneration by one clause of an award shall receive remuneration at piece-work rates while still enjoying the benefit of the minimum if earnings at piece-work should fall below it.

So far, the matter has been treated as though the employer is entitled to treat the appellant as having been engaged without any special reference to tonnage rates. But there was such a reference, and it would be a strange result of such a bargain if, without any contractual or direct statutory authority for reducing the contract rate, the employer was to find the rate reduced by doubtful inferences from an award. In any event, this part of the appeal fails, and the respondent was not called upon to argue it.

As the matter developed, the second part of the appeal has become of vast importance to many hundreds of thousands of workers and employers. For the appellant contends that sec. 176 (2) of the *Industrial Arbitration Act* precludes the respondent worker from recovering portion of the remuneration admittedly owing, on the ground that the action was not brought within twelve months from the time when the cause of action arose. The importance of the

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case is not only that sec. 176 (2) is typical of many provisions to be found in similar Australian legislation but the entire basis of the contractual relationship between employee and employer has been called into question by the novel theory that where there is an industrial award in existence there is no room for contractual liability.

Sec. 176 (1) prohibits contracting out of the obligation of an industrial award, and sec. 176 (2) provides that, notwithstanding any contract to the contrary, every worker shall be entitled to be paid in accordance with any award binding on his employer. It may at once be conceded that, if the worker has to enforce the right given by sec. 176 (2), he must commence his action within twelve months; in other words, as sec. 176 (2) creates a statutory right to the remuneration in accordance with an award, the enforcement of the right is made subject to the condition of limitation of actions.

But abstract statements must be illustrated. Various types of dispute may occur. Suppose that the award prescribed £4 as a minimum weekly wage, but the employer and worker agree that the latter shall be paid only £3 a week? In such a case sec. 176 (2) enables the worker to recover the minimum wage irrespective of his contract, but he must bring action within the statutory period. The employee has been as much at fault as his employer in accepting a standard lower than the award minimum.

But, if, in the case of the same award, the employer has agreed to pay the employee £5 a week, the latter must sue upon the contract. Why should he not? The contract when made was perfectly lawful, being outside the scope of the agreements invalidated by sec. 176. In such a case, the employee could not possibly recover merely by suing upon sec. 176 (2) plus the award. In other words, he recovers on the contract or not at all.

Similarly, in regard to an agreement to pay the actual wage which by the award is prescribed as the minimum wage. In such a case also there has been no disobedience of the award, and it is impossible to understand why the contract between the parties should not be enforced quite irrespective of sec. 176 (2). If so, it follows here as in the second example that the limitations provision can have no application.

In the particular case before us the agreement was that the plaintiff should be employed at the tonnage rates prescribed by the award. One has to look at the award to ascertain what those tonnage rates were, just as one might have to look at any other document referred to in an agreement. Here, also, the worker does not call in aid sec. 176 (2) but merely seeks to enforce a contract which was quite lawfully entered into and is not avoided by anything contained in the statute.

While the industrial laws of the several States are not always drafted in precisely the same way as sec. 176, the general question of principle already discussed has frequently arisen, and it has been resolved in favour of the view adopted by the Supreme Court of Western Australia.

First of all, there is the case of *Ex parte Brandt* (1). Under the New South Wales legislation of 1908 a worker was given the right to obtain from the special Industrial Court an order for the payment of the full amount of any balance due in respect of the remuneration fixed by the industrial award, " notwithstanding any smaller payment of any express or implied agreement to the contrary " (Act No. 3 of 1908, sec. 41 (2)).

The Supreme Court held that this statutory right did not prevent the ordinary courts of common law from determining actions in which the same balance was sued for by the worker, with the result that the three-months' period of limitation established by sec. 41 (2) was in effect avoided by suing before the ordinary courts. To-day the actual decision in this case cannot perhaps be accepted as correct, but the statement by *Cullen* C.J., that the fixation of minimum rates by the New South Wales awards did not prevent the parties concerned from entering into contracts for the payment of amounts in excess of the minimum, has always been asserted.

Ex parte Brandt (1) has to be considered in conjunction with *Josephson* v. *Walker* (2), which came before this court. There an employee attempted to use the common-law jurisdiction of the Supreme Court of New South Wales for the purpose of direct enforcement of the terms of an award. The High Court held that, under

(1) (1912) 12 S.R. (N.S.W.) 105; 29 W.N. (N.S.W.) 15.
(2) (1914) 18 C.L.R. 691.

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sec. 49 of the New South Wales amending *Industrial Act* 1912, the specified mode of enforcing what was a statutory obligation was the exclusive mode, so that an order for payment " in full " of the award wages could be made only by the tribunals set up by sec. 49 (2) and (3) of the Act of 1912. *Griffith* C.J. said of the obligations sought to be enforced : " The obligation created by it does not depend upon any agreement of the parties expressed or implied, and may arise without their knowledge " (1). *Isaacs* J. said :—

> " The unpaid balance is claimed as due by virtue, not of a common-law contract, but of the statutory obligation which subsists notwithstanding any agreement to the contrary—no man being capable under the statute of contracting himself out of his rights or obligations in this respect. The right claimed is a new right. It is a right which was unknown before to the law : a right to receive from an employer more than was bargained for. Parliament has on the ground of public policy found that that is a just and a necessary right. But it is a new one. And in the same section we find that Parliament has also enacted a new and special mode of enforcing that right " (2).

Under the 1912 Act the number of tribunals which could enforce the award was greatly increased, so that strong ground existed for the argument that the legislature intended to deprive the ordinary courts of jurisdiction to determine the question of an employer's liability to pay a " balance " in conformity with an award. But *Isaacs* J. left open the question whether an employee may not always sue at law on his contract, even although an award has, by its own binding force, attached to the contract a specific rate of remuneration.

In *Mallinson* v. *Scottish Australian Investment Co. Ltd.* (3) the High Court held that, although the Commonwealth *Conciliation and Arbitration Act* authorizing the Federal Arbitration Court to prescribe a minimum rate of wages or remuneration (Cf. sec. 92 (1) (*a*), *Industrial Arbitration Act* of Western Australia) conferred upon an employee affected the right to receive the rate so prescribed, the Act did not prevent such employee from maintaining an action in any competent court to recover the amount so payable. In the judgment of the court (of which *Isaacs* J. was a member) it was stated :

> " 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

(1) (1914) 18 C.L.R., at p. 696. (2) (1914) 18 C.L.R., at p. 700.
(3) (1920) 28 C.L.R. 66.

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 " (1).

Next, in *Burn* v. *Baziuros* (2), *Hood* J., dealing with the claim of an employee to recover from his employer the wages fixed as the minimum by a Victorian wages board, held that the written demand within two months required by sec. 225 of the *Factories Act* 1915 had no application. That section, corresponding to the New South Wales legislation of 1908 and 1912, gave an employee the right to recover the minimum rate, " any smaller payment or any express or implied agreement to the contrary notwithstanding." *Hood* J. held that the section had nothing to do with the ordinary case of a man employed, not in contravention of, but in conformity with, the terms of an award, where the employer had failed to pay wages in accordance with the agreement of service." " The section " said *Hood* J. " applies to the case where the employer is trying to evade the minimum amount fixed by the board. And in that case the agreement comes within the section, and is disregarded altogether. He must pay the minimum fixed by the board, notwithstanding any agreement to the contrary. The complainant swears he was engaged at 66s. a week, and is suing for it " (3).

In *Drury* v. *Dulhunty* (4) the difference of opinion between members of the New South Wales Full Court turned upon the form of the pleading. Therefore, although *Ferguson* J. dissented, his opinion upon the general principles involved did not differ from that of the other members of the court. *Ferguson* J. dealt with the case of an award fixing a minimum wage of £4 a week, saying: " It might be that the plaintiff was employed on an express contract that he should be paid £4 a week, and in that case it is admitted that the common-law courts still have, as they always had, jurisdiction to entertain his claim if the money has not been paid." " Then," he said, " there is another possible case—where the award had fixed £4 and the parties had agreed that the wage should be £3. Now we come to a new obligation that is created by the statute, that is, an obligation to pay the full £4. As far as the £3 is concerned, that

(1) (1920) 28 C.L.R., at p. 73.
(2) (1920) V.L.R. 357; 42 A.L.T. 32.
(3) (1920) V.L.R., at pp. 359, 360; 42 A.L.T., at p. 33.
(4) (1921) 21 S.R. (N.S.W.) 514; 38 W.N. (N.S.W.) 174.

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could still, I think, be recovered in an action in the common-law court; as far as the remaining £1 is concerned, the only way in which it could be recovered would be by having recourse to the statute. That is the case with which the High Court dealt in *Josephson* v. *Walker* (1)" (2).

The last case to which a reference is required is *Fagan* v. *Public Trustee* (3). There the plaintiff sued in the ordinary common-law courts for work and labour done, although the work performed was work for which the rate had been fixed by an industrial award. It was held that the action would lie in the ordinary courts and that the six-months' limitation contained in the "balance" provision of the Industrial Act was not applicable. *Halse Rogers* J. pointed out that, under sec. 49 of the *Industrial Arbitration Act* of 1912, the balance there contemplated was the balance between the rate paid by agreement and the full amount prescribed as the award minimum rate. He said:

> "There is nothing in *Josephson* v. *Walker* (4) to suggest that where it is not such a balance that is sought to be recovered, that an action at common law will not lie; and I think it is perfectly clear that what Sir *William Cullen* said in the earliest case of *Ex parte Brandt* (5)—that the statutory remedy is given in respect of the statutory right which is given—that is to get up to a certain amount—still holds good to the present day" (6).

The result of the cases is that, even assuming *Ex parte Brandt* (5) to have been wrongly decided, the only possible type of action for recovery of wages which is excluded from the jurisdiction of the ordinary courts by such industrial-arbitration or wages-board legislation as is contained in the *Industrial Arbitration Act* of New South Wales, the *Factories and Shops Act* of Victoria, the *Commonwealth Conciliation and Arbitration Act* and also the Western Australian *Industrial Arbitration Act*, is an action in which the employee *requires* or *calls in aid* the statute in order to establish a right to be paid the remuneration fixed by the industrial award. In such a case, the scheme of the particular Act may be found to give a remedy which is hedged round by certain conditions and limitations affecting the period of bringing an action. But, under every Act, it has been

(1) (1914) 18 C.L.R. 691.
(2) (1921) 21 S.R. (N.S.W.), at pp. 520, 521.
(3) (1934) 34 S.R. (N.S.W.) 189; 51 W.N. (N.S.W.) 99.
(4) (1914) 18 C.L.R. 691
(5) (1912) 12 S.R. (N.S.W.) 105; 29 W.N. (N.S.W.) 15.
(6) (1934) 34 S.R. (N.S.W.), at p. 193.

invariably recognized that the employee is always at liberty to bring an action in the ordinary courts in order to recover under the terms of his contract of employment so long as such contract is not void or unlawful or inconsistent with the terms of the appropriate award. A recent illustration of the principle is *Kilminister* v. *Sun Newspapers Ltd.* (1), where this court held that there was no inconsistency between a Federal award providing for a minimum notice for termination of employment and a contract providing for a greater period and the employee was deemed entitled to enforce his contract in the ordinary courts. Similarly, an employee like the present respondent is entitled to sue upon his contract of employment. Under his contract he is entitled to be paid the contract rates mentioned in the award, and inconsistency cannot possibly arise. The reason for the principle adopted has been variously stated, but in substance it merely affirms that, before a common-law right to enforce a valid contract in the ordinary courts can be regarded as divested, clear words should be used in the statute.

Therefore, in spite of the differences of verbiage between the various industrial statutes, the general principle which should be decisive of this case has always been accepted in Australia, and no doubt, it was for this reason that the Full Court of Western Australia, with considerable experience in such matters, did not elaborate upon what they regarded as a very plain case.

In my opinion the appeal should be dismissed with costs.

McTiernan J. The appellant and the respondent agreed for the purposes of the action that the respondent was verbally engaged by the appellant to work for it as a miner at tonnage rates and not at day wages at its proprietary colliery, Collie, upon the terms and conditions of an award of the Court of Arbitration of Western Australia, No. 32 of 1934. After the making of the agreement the court, acting under its statutory powers, declared a basic wage which was less than that in force when the respondent was engaged by the appellant. Sec. 124 of the *Industrial Arbitration Act* 1912-1935 of Western Australia provides that " the basic wage prescribed in every award and industrial agreement shall from time to time

(1) (1931) 46 C.L.R. 284.

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automatically become increased or decreased so that it conforms to and is in parity with the basic wage as last determined by the court." The appellant claimed to make a reduction in the tonnage rate prescribed by the award equivalent to what was estimated to be the decrease in the basic wage. In the courts below and on the argument before us the legality of the reduction was made to depend entirely on the question whether sec. 124 operated to cut down the tonnage rate prescribed by the award. No point was taken that the agreement between the parties was that they contracted by reference to the then-existing terms and conditions of the award. In my opinion the respondent is entitled to succeed on the ground taken. The application of sec. 124 to an amount per ton or a tonnage rate for work done is not obvious. The tonnage rate is not the basic wage. But it is said that the basic ingredient of the tonnage rate is fixed by reference to the basic wage and its other ingredient is the excess which the Court of Arbitration saw fit to prescribe. Indeed, it is said that it must be presumed that the tonnage rate is composed of these two ascertainable ingredients, for this presumption is necessary to make the award valid under sec. 123 of the Act. That section says that awards and industrial agreements shall prescribe and distinguish separately (*a*) the basic wage, and (*b*) other wages or allowances and/or additional remuneration and (*c*) any deduction therefrom. It may be a just and convenient practice for the court to make the basic wage the foundation upon which to build the rates of pay which it prescribes by an award. But the section expressly distinguishes between " the basic wage " and " other wages and allowances." All that is required is that these two classes of remuneration shall be distinguished separately. It does not require that the " other wages or remuneration " must be prescribed as the addition of two separate sums, the basic wage and an added sum. Where the basic wage and additional remuneration are separately prescribed, the total wage prescribed being the aggregate of these two amounts, it may well be that the element consisting of the basic wage is liable to be increased or decreased by the operation of sec. 124 just as if it had been prescribed by the award as the minimum wage without any addition. But in the present case the tonnage rate is not the basic wage nor is it stated

to be the aggregate of the basic wage and some separately prescribed remuneration. The Court of Arbitration may have kept the basic wage in mind as a standard in fixing the tonnage rate, but, as I read the award, the tonnage rate falls within the description of "other wages" mentioned in sec. 123 (*b*) and is to be distinguished from the basic wage. It follows that the appellant's contention on the first question should fail.

The next question, which arises under sec. 176 (2), is whether the respondent's right to recover the deductions erroneously made by the appellant is limited to the period of twelve months before action. The answer to this question depends entirely on the construction of the sub-section. The sub-section begins with the declaration that "every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary." So far, this enactment gives the worker a statutory right to the wage prescribed by an award although he agreed to accept a lower rate of wages for the work performed by him. This is the creation of a new right, and the intention of the rest of the sub-section is to regulate its enforcement. The sub-section continues in these words: "and such worker may recover as wages the amount to which he is hereby declared entitled in any court of competent jurisdiction, but every action for the recovery of any such amount must be commenced within twelve months from the time when the cause of action arose." The antecedent of the words "such worker" is a worker who has made a contract to be paid less than the rate of wages prescribed by an award or industrial agreement. It is that worker who is intended to be the object of the relief given by the sub-section. He is given the right to sue for the amount to which he is entitled under an award or industrial agreement applicable to the work performed by him, "as wages." The limitation with which the sub-section concludes is created expressly as a qualification of the worker's right to enforce by action his claim for that amount. In the present case the respondent did not sue to recover the difference between the award and the contract rate. There was no contract between the parties providing for a rate of pay less than that prescribed by

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the award applicable to the work performed by the respondent. In my opinion the sub-section has no application to the case. As *Northmore* C.J. said, " his claim is for sums wrongly deducted from his earnings by his employer, and to enforce that claim he has no need to pray in aid sec. 176 (2) and is not limited, as are claims under that section, to a period of twelve months."

In my opinion the appeal should be dismissed.

Order of Supreme Court varied by substituting for the words "the sum of £8 1*s.* 9*d.*" *the following words:* "*the sum of* £3 8*s.* 10*d.*" *Order otherwise affirmed. Appellant to pay respondent's costs of appeal to High Court.*

Solicitors for the appellant, *Dwyer & Thomas.*

Solicitors for the respondent, *Lavan Walsh & Seaton.*

H. D. W.