[HIGH COURT OF AUSTRALIA.]

THE KING

against

COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION;

Ex parte OZONE THEATRES (AUST.) LTD.

H. C. of A. 1949.

MELBOURNE, *May* 24-27, 30; SYDNEY, *August* 9.

Latham C.J., Rich, Dixon McTiernan and Webb JJ.

Industrial Arbitration (Cth.)—Commonwealth Court of Conciliation and Arbitration—Jurisdiction—"Altering . . . the basic wage or the principles upon which it is computed"—What constitutes such alteration—Mandamus commanding court to hear application—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (xxxv.) 75 (v.)—*Commonwealth Conciliation and Arbitration Act* 1904-1948 (*No.* 13 *of* 1904—*No.* 65 *of* 1948), *ss.* 13, 25.

An award under the *Commonwealth Conciliation and Arbitration Act* relating to employment in the theatrical industry in South Australia and Western Australia prescribed a minimum wage for an adult male unskilled worker. The method by which the amount was arrived at was to compute a "needs basic wage" and to add to it certain "loadings"; then provision was made for its periodical adjustment in accordance with a flat rate depending on index numbers relating to the cost of living in the six capital cities of Australia. A log of claims served by the employees on the employers and not acceded to created a new dispute in the industry. The employers in South Australia and Western Australia took out a summons in the Commonwealth Court of Conciliation and Arbitration applying for what the summons described as an order or award altering the basic wage applying in those States in the industry concerned in the dispute and/or the principles upon which such basic wage was computed. Particulars given in the summons asked that the figures to be applied for purposes of adjustment in the States concerned should be figures relating to variations in costs of living in Adelaide and Perth respectively—i.e., that the award should apply differential rates instead of the flat rate in the current award. It was also asked that wages in provincial districts in the States concerned should be 3s. below the rates in Adelaide

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and Perth respectively. The court refused the application on the ground that it had no power to entertain it under s. 25 (*b*) of the Act.

Held that the application was within s. 25 (*b*) and that a writ of mandamus should issue out of the High Court commanding the Commonwealth Court of Conciliation and Arbitration and the judges who constituted the court to hear and determine the application.

ORDER NISI for mandamus.

In January 1948 the Australian Theatrical and Amusement Employees Association (hereinafter called the respondent association), as representing its members employed in the theatrical industry, served a log of claims relating to terms and conditions of employment in the industry on Ozone Theatres (Aust.) Ltd. (hereinafter called the prosecutor) and other employers engaged in the industry in various States. The employers did not accede to the claims. An industrial dispute was thereby constituted, and it was numbered 98 of 1948 in the Principal Registry of the Commonwealth Court of Conciliation and Arbitration. This dispute came for settlement before Mr. Blakeley, Conciliation Commissioner, and, on behalf of the prosecutor, which was engaged in the industry in South Australia, and other employers in that State and also employers in Western Australia, claims were made for the fixing of wages substantially as appears in the summons hereinafter mentioned. The respondent association did not accede to these claims. At this time the employers, parties to the dispute in South Australia and Western Australia, were bound by an award (as varied from time to time) made by Mr. Mooney, Conciliation Commissioner, in relation to the industry in those States in February 1943. By this award (as varied) rates of pay were prescribed on a "flat-rate" principle; that is to say, they were uniform for any given occupation irrespective of the State or place in which the work was done and were uniformly adjustable periodically according to fluctuations in the Arbitration Court's retail price index numbers for the six capital cities (weighted average). (This method is more fully explained in the judgment hereunder.) A further award purporting to bind employers in South Australia and Western Australia was made on 25th February 1948, but, in the course of the proceedings the subject of this report, it was discovered that this award did not comply with s. 48 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1947 and was, therefore, invalid.

On 25th February 1948 Mr. Blakeley made an award in connection with dispute No. 98 of 1948 for South Australia and Western Australia.

On the same day the prosecutor and other employers in South Australia and Western Australia took out a summons in the Arbitration Court, headed in the matter of dispute No. 98 of 1948 and directed to the respondent association, making the following application :—

1. That the court should in settlement of the above-mentioned dispute make an order or award altering the basic wage applying in the States of South Australia and Western Australia in the industry concerned in such dispute, and/or the principles on which such basic wage is computed—

PARTICULARS—

That by such alteration the court should—

(*a*) discontinue the " flat-rate " system of basic wage fixation and adjustment ;

(*b*) prescribe needs basic wages for Adelaide and Perth upon the basis of the court's retail price index numbers for those cities respectively, with a constant loading of 4/- per week ;

(*c*) prescribe for provincial districts in the said States basic wages 3/- per week less than the contemporaneous basic wages for Adelaide and Perth respectively ;

(*d*) provide for the quarterly adjustment of such needs basic wages, and of rates of pay based thereon, according to the court's retail price index numbers for Adelaide and Perth respectively.

2. That the court should make such further or other order or orders as may be necessary to implement any order or award made pursuant to par. 1 hereof, or to effectuate any alterations in rates of pay consequential thereto, or which otherwise shall to the court seem meet.

The court by a majority (Judges *Foster* and *Kirby*) (Chief Judge *Kelly* dissenting) held that it had no jurisdiction to determine the application under s. 25 (*b*) of the *Commonwealth Conciliation and Arbitration Act*.

The prosecutor obtained in the High Court an order nisi calling on the Commonwealth Court of Conciliation and Arbitration and the judges who heard the application and also the respondent association to show cause why a writ of mandamus should not issue commanding the court and the judges to hear the application.

Sholl K.C. and *S. C. G. Wright*, for the prosecutor.

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Sholl K.C. Mandamus will lie in this case to the Arbitration Court and/or its judges. The High Court is given original jurisdiction in any matter in which the writ is sought against an officer of the Commonwealth (*The Constitution*, s. 75 (v.)). Parliament cannot derogate from this grant (*R.* v. *Commonwealth Court of Conciliation and Arbitration and the President thereof and the Boot Trade Employes Federation*; *Ex parte Whybrow & Co.* (1); *R.* v. *The Commonwealth Court of Conciliation and Arbitration and the President thereof and the Australian Tramway Employees Association*; *Ex parte The Brisbane Tramways Co. Ltd.*; *Ex parte The Municipal Tramways Trust, Adelaide* [*No.* 1] (2); *R.* v. *Commonwealth Court of Conciliation and Arbitration and the President thereof and the Australian Builders' Labourers' Federation*; *Ex parte Jones*; *Ex parte Cooper & Sons* (3)). The judges of the court are officers of the Commonwealth (*Whybrow's Case* (4); *Tramways Case* [*No.* 1] (2); *Builders' Labourers' Case* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte The State of Victoria*; *State of Victoria* v. *Foster* (5); *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd* (6)). This is a case in which such officers have explicitly refused (by majority) to exercise a statutory jurisdiction which it is their duty to exercise. Section 25 of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 is not merely permissive; but, even if it is, the matter must still be heard and determined (Act, ss. 38 and 13). The duty of the court to hear and determine may be enforced by mandamus (*Halsbury's Laws of England*, 2nd ed., vol. 9, pp. 756, 762; also pp. 529, 530). There is nothing in the Act which entitles the court to decide conclusively the extent of its own jurisdiction. If s. 17 (3) of the Act purports to take away the High Court's jurisdiction to grant mandamus, it is to that extent *ultra vires*; it cannot import into Australia the considerations as to the applicability of mandamus which have been applied in England or in New Zealand: see *Short and Mellor's Crown Practice*, 2nd ed., p. 202; *New Zealand Waterside Workers Federation Industrial Association of Workers* v. *Fraser* (7). If s. 32 (1) was otherwise capable of barring the High Court's jurisdiction, it would not affect the question here. The present refusal of the Arbitration Court is not a judgment, order or award within s. 32 (1); it is not " in any proceedings under " the Act; it is not

(1) (1910) 11 C.L.R. 1, particularly at pp. 21, 22.
(2) (1914) 18 C.L.R. 54.
(3) (1914) 18 C.L.R. 224.
(4) (1910) 11 C.L.R. 1.
(5) (1944) 68 C.L.R. 485.
(6) (1945) 70 C.L.R. 405.
(7) (1924) N.Z.L.R. 689, particularly at pp. 706, 707, and also at pp. 701, 702.

in settlement of any dispute ; it is not in the exercise of any jurisdiction given by the Act ; it does not purport to be an exercise of discretion (if any) under s. 25 or s. 40 (*d*). The Act gave no authority to the Arbitration Court to determine this matter judicially. Even if the court's refusal is a judgment, order or award within s. 32 (1), nevertheless the sub-section is not a bar to the High Court's jurisdiction here. If it purported so to operate, it would be invalid (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson Ltd.* ; *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Gilchrist, Watt and Sanderson Ltd.* (1) ; *R.* v. *Hibble* ; *Ex parte Broken Hill Pty. Co. Ltd.* (2) ; *R.* v. *Hickman* ; *Ex parte Fox* ; *R.* v. *Hickman* ; *Ex parte Clinton* (3) ; *R.* v. *Commonwealth Rent Controller* ; *Ex parte National Mutual Life Association of Australasia Ltd.* (4) ; *R.* v. *Central Reference Board* ; *Ex parte Thiess (Repairs) Pty. Ltd.* (5)), but it does not purport so to operate. It does not purport to enable the Arbitration Court to assume or refuse jurisdiction entirely at its own discretion without reference to the limits of the statute which creates it ; it is limited to judgments &c. given in accordance with the limits of the statutory jurisdiction. The court has no judicial power to exclude from its consideration a matter committed to it alone by the Act (*Caledonian Collieries Ltd.* v. *The Australasian Coal and Shale Employees' Federation* [*No.* 1] (6)).

S. C. G. Wright. The application now in question was within the jurisdiction of the Arbitration Court under s. 25 (*b*) of the Act. The alterations sought were alterations both of the basic wage and of the principles upon which it was computed. The " basic wage " is the wage fixed *by an award* for the adult male unskilled labourer in a given industry (*Australian Workers' Union* v. *Commonwealth Railways Commissioner* (7)). There can be no uniform or single basic wage in gross, no common-rule basic wage. When the court conducts a " general " inquiry as to " the basic wage," it has before it a number of industrial disputes, and its decision can only be made effective by incorporation in an award in each of the disputes. For present purposes it is immaterial whether the basic wage is regarded as the foundational amount fixed by the award or that amount plus such additions as the " war loading " and the " prosperity loading." The alterations sought here would alter the

(1) (1924) 34 C.L.R. 482.
(2) (1921) 28 C.L.R. 456.
(3) (1945) 70 C.L.R. 598.
(4) (1947) 75 C.L.R. 361, at pp. 368, 369, 376.
(5) (1948) 77 C.L.R. 123.
(6) (1930) 42 C.L.R. 527, at pp. 546, 556.
(7) (1933) 49 C.L.R. 589, at pp. 590, 596, 597, 603, 604-606.

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foundational amount (the " needs basic wage ") and the method of its computation and, therefore, in either view, would alter the basic wage. Anything is within s. 25 (*b*) which has the effect of altering the amount prescribed by an award for the lowest paid adult male worker in a particular place at a particular time. At present the foundational rate is a flat rate fixed by relation to index figures as to the cost of living in the six capital cities. The summons asks for differential rates by relation to the cost of living in Adelaide and Perth and asks for a lower wage in provincial districts than in Adelaide or Perth, as the case may be. These alterations are all within s. 25 (*b*), and the application was therefore within the jurisdiction of the Arbitration Court, which, under s. 38 of the Act, was under a duty to determine it.

There was no appearance for the respondent court or judges.

Gowans (*S. Lewis* K.C. with him), for the respondent association It is conceded that the High Court's jurisdiction under s. 75 (v.) of the Constitution cannot be taken away by a Commonwealth statute and also that the judges of the Arbitration Court are officers of the Commonwealth within s. 75 (v.), but not that the court itself is such an officer. It is submitted that the discretionary remedy of mandamus ought not to be granted where the Arbitration Court has given consideration to the question whether an alteration of the basic wage is involved in an application before it and has determined that question. On behalf of the prosecutor authorities on the issue of the writ of prohibition to restrain an excess of jurisdiction have been cited on the assumption that prohibition and mandamus are correlative remedies, dependent on similar considerations. This is not so. The courts have always been more ready to prohibit an excess of jurisdiction than to intervene where there has been merely a refusal to exercise jurisdiction, because an excess of jurisdiction is a usurpation of the Royal prerogative. Mandamus is entirely a matter for the discretion of the court (*Short and Mellor, Crown Practice*, 10th ed., p. 14; *R. on the Prosecution of the Public Works Loan Commissioners* v. *The Church Wardens of All Saints, Wigan* (1); *R.* v. *Lambourn Valley Railway Co.* (2); *Commissioner for Local Government Lands and Settlement* v. *Kaderbhai* (3); *James* v. *South Western Railway Co.* (4)).

[DIXON J. referred to *Tapping* on *Mandamus*, pp. 105, 106; *R.* v. *Beecham & Co.*; *Ex parte Cameron & Co.* (5).]

(1) (1876) 1 App. Cas. 611, at pp 620, 622.
(2) (1888) 22 Q.B.D. 463, at p. 466.
(3) (1931) A.C. 652, at p. 660.
(4) (1872) L.R. 7 Ex. 287, at p. 290.
(5) (1910) V.L.R. 204.

When s. 38 of the Act is read with ss. 39 and 40 (and, in particular, s. 40 (*d*)), it is clear that it is not mandatory, as was suggested by the prosecutor; it confers a power but not an absolute duty. There are many considerations to be found in the Act suggesting that the intention of the legislature was that it was for the Arbitration Court to determine whether an application made to it was within its jurisdiction. [He referred to *R.* v. *Commissioners for Special Purposes of the Income Tax* (1); *R.* v. *Murray*; *Ex parte Proctor* (2).] The grant of power in s. 25 is in respect of subject matter which is described in terms current only in the industrial-arbitration jurisdiction. The concepts described in the section are concepts that the Arbitration Court itself has created, and that is a basis for an inference that the legislature intended that court to be the tribunal to interpret the language used. It is significant also that the court was created a superior court of record at the same time that s. 25 was enacted; that is to say, when for the first time the question of the delimitation of the powers of the court and the conciliation commissioners arose. When the court is called on to determine whether a matter is within s. 25, it is called on to determine pre-existing rights and, therefore, it is submitted, to exercise its judicial, and not merely its arbitral, powers. That being so, it is important that the court has been created a superior court of record. It is not suggested that s. 32 (1) can exclude the jurisdiction of the High Court, but the sub-section should not be treated as wholly invalid; some effect can be given to it by making the tribunal free of prerogative writs in cases in which it makes a bona-fide attempt to deal with the limits of its jurisdiction. If the intention is that the Arbitration Court shall interpret the words on which its jurisdiction depends and the court in fact applies itself to that question, then, in the absence of mala fides, it discharges the duty imposed on it. At all events, s. 32 (1) is an indication of the legislature's intention that, so far as it was possible to achieve it, there should be a channelling of proceedings to the Arbitration Court in matters involving the interpretation of the Act. Another reason why, as a matter of discretion, mandamus should not go in this case is that the material on which the summons was based was unsatisfactory; it did not put the facts of the case clearly before the court. It is submitted, also, that it is proper for this Court to examine the question whether the Arbitration Court had any jurisdiction at all in the matter of the summons, and it is submitted that the court had no jurisdiction because there was no existing

(1) (1888) 21 Q.B.D. 313, at pp. 319, 320.

(2) (1949) 77 C.L.R. 387.

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dispute between the prosecutor and the respondent as to alteration of the basic wage. The only dispute was that arising out of the log served by this respondent. There was no counter-log. The ambit of the dispute was, therefore, between the highest rates claimed in the respondent's log and zero. The dispute could have been settled by the award of any rate in between without any question of alteration of the basic wage. It is true that the matters mentioned in the summons were mentioned in argument in the proceedings before the conciliation commissioner, but that did not alter the ambit of the dispute. Moreover, the dispute No. 98 of 1948 was settled by the award of Mr. Blakeley announced on the day on which the prosecutor's summons was taken out. It is further submitted that the decision of the Arbitration Court was correct because no basic wage was fixed by the relevant award, whether it be that of 25th February 1948—which now appears to be invalid—or that of 1943. The respondent accepts the prosecutor's view that the basic wage must be found in an award made in settlement of a dispute, but does not accept the view that all you have to do is to find the lowest rate fixed in an award. It is submitted that, unless a wage is expressly fixed by award as the basic wage in an industry to which it relates, then there is no basic wage in that industry to which s. 25 (*b*) can apply, and that is the case here. Moreover, the alterations sought by the summons do not involve any departure from the principles on which the Arbitration Court has acted in fixing a basic wage and are, therefore, not within the second branch of s. 25 (*b*). The view of the majority in the Arbitration Court was, it is submitted, correct on this point.

Sholl K.C., in reply. There is no sufficient indication in the Act of an intention on the part of the legislature that the Arbitration Court should have power to determine the limits of its own jurisdiction or should be at liberty to refuse to determine a matter which is within s. 25. Where, as in this case, it declines jurisdiction, the power of the conciliation commissioners is not thereby enlarged and the result would be that a matter of great public importance must be left undetermined. It is not to be supposed that the legislature intended such a result. The *Commonwealth Railways Case* (1) leaves no room for the argument that the operative award here did not contain a basic wage. As to the argument that an alteration of the basic wage or the principles upon which it was computed was not within the ambit of any existing dispute, a dispute

(1) (1933) 49 C.L.R. 589.

necessarily arose out of the prosecutor's claims when they were not acceded to by the respondent association.

Cur. adv. vult.

The Court delivered the following written judgment:—

Return of order nisi for a writ of mandamus directed to the Commonwealth Court of Conciliation and Arbitration and their Honours the Judges of that Court and the Australian Theatrical and Amusement Employees' Association, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1948, directing the hearing and determination of an application made by the prosecutor Ozone Theatres (Aust.) Limited and other persons in proceedings No. 98 of 1948 in that Court. Section 25 of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 provides that the court may, for the purpose of preventing or settling an industrial dispute, make an order or award altering, *inter alia*,—"(*b*) the basic wage or the principles upon which it is computed." Section 13 of the Act provides that a conciliation commissioner shall not be empowered to make an order or award altering, *inter alia*, "(*b*) the basic wage or the principles upon which it is computed." Thus the court has jurisdiction to make an order or award altering the basic wage or the principles upon which it is computed and a conciliation commissioner has no such jurisdiction. The court has held that the application is not an application for such an alteration and that it has no jurisdiction to entertain it.

The application of the prosecutor and other persons was an application that in settlement of dispute No. 98 of 1948 the court should make an "order or award altering the basic wage applying to the States of South Australia and Western Australia in the industry concerned in the dispute and/or the principles upon which such basic wage is computed." The description by the applicant of the application in these terms does not determine the question whether the application is truly so described. Particulars of the alteration which was sought were stated in the summons in the following words:—

"(*a*) discontinue the 'flat rate' system of basic wage fixation and adjustment;

(*b*) prescribe needs basic wages for Adelaide and Perth upon the basis of the Court's retail price index numbers for those Cities respectively, with a constant loading of 4/- per week;

(*c*) prescribe for Provincial districts in the said States basic wages 3/- per week less than the contemporaneous basic wages for Adelaide and Perth respectively;

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(*d*) provide for the quarterly adjustment of such needs basic wages, and of rates of pay based thereon, according to the Court's retail price index numbers for Adelaide and Perth respectively."

The substantial question is whether such alterations would be alterations of the basic wage or of the principles upon which it is computed.

An alteration within the meaning of s. 25 (*b*) may be made by the court by either an order or an award, i.e. an order varying the terms of an existing award or an award for the prevention or settlement of a dispute. Section 49 of the Act is as follows:— "The Court may, with respect to a matter referred to in section twenty-five of this Act, and a Conciliation Commissioner may, subject to section thirteen of this Act, if for any reason it or he considers it desirable to do so—

(*a*) set aside an award or any of the terms of an award; or

(*b*) vary any of the terms of an award."

It is immaterial whether the present application is regarded as an application for a variation of an existing award or for the inclusion of a term in a new award, because in either case only the court and not the conciliation commissioner would have power to make an order or award with respect to a matter falling within s. 25.

Section 25 gives jurisdiction to the Arbitration Court to make an order or award altering the basic wage or the principles upon which it is computed. The word which is used in s. 25 is "may," but s. 38 provides that, in the absence of agreement, the court or conciliation commissioner shall determine a dispute. Therefore, in so far as an alteration of the basic wage is involved in the determination of a dispute, it is expressly provided that the court shall exercise the jurisdiction which that section vests in it. Apart, however, from this imperative requirement, what s. 25 does is to create a jurisdiction in the court, and where such a jurisdiction is created for the public benefit or for the purpose of conferring rights or benefits upon persons the court upon an application properly made is under a duty to exercise its jurisdiction and is not at liberty to refuse to deal with the matter: *R.* v. *The Tithe Commissioner for England and Wales* (*In the Matter of Great Hale Tithes*) (1); *Julius* v. *The Right Rev. The Lord Bishop of Oxford* (2). Where a court or a public officer wrongly refuses jurisdiction the exercise of the jurisdiction can be commanded by a writ of mandamus. The writ may issue whenever there is a specific legal right to require

(1) (1849) 14 Q.B. 459 [117 E.R. 179].

(2) (1880) 5 App. Cas. 214.

the performance of a statutory duty, and no specific legal remedy is provided for enforcing that right: *R.* v. *The Commissioners of Inland Revenue*; *In re Nathan* (1). The writ goes only in order to compel the performance of a public duty and, in the case of a court or other body which is under a duty to hear and determine a matter, the tenor of the writ will require the hearing and determination of the matter, and not the decision of the matter in any particular manner. The Arbitration Court in determining a dispute is not exercising a judicial power, but it is performing a public duty imposed upon it by statute.

The court is a statutory tribunal the jurisdiction of which is defined by statute. It is not such a superior court within the meaning of the proposition that all matters are within its jurisdiction unless the contrary is shown. This is the mark of a superior court as distinguished from an inferior court: *Halsbury's Laws of England*, 2nd ed., vol. 8, p. 530. Mandamus will not go to such a superior court: *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 762. Section 17 (3) of the *Commonwealth Conciliation and Arbitration Act* 1904-1948 provides that the Arbitration Court shall be a superior Court of Record. But for the reason stated, this provision does not remove the court or its judges from the area of application of the writ of mandamus. Further, s. 75 of the Commonwealth Constitution provides that the High Court shall have original jurisdiction in all matters in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth. The judges of the court are, it has been decided (see *R.* v. *The Commonwealth Court of Conciliation and Arbitration and the President thereof and the Boot Trade Employes Federation*; *Ex parte Whybrow & Co.* (2); *R.* v. *The Commonwealth Court of Conciliation and Arbitration and the President thereof and the Australian Builders' Labourers' Federation*; *Ex parte Jones*; *Ex parte Cooper & Sons* (3)), officers of the Commonwealth within the meaning of s. 75 (v). The provision contained in s. 17 (3) of the Act does not remove the judges of the court from the category of officers of the Commonwealth. Their duties and powers are not so extensive now as they were under the Act before 1947, but they are of the same character. The application which is said by the prosecutor to come within the jurisdiction vested in the court by s. 25 is not an application for the exercise of any judicial power. It seeks action by the court in its arbitral jurisdiction, and, in this connection, it is not material whether or not the court, when acting in its judicial character, is in any sense a superior court.

(1) (1884) 12 Q.B.D. 461.
(2) (1910) 11 C.L.R. 1.
(3) (1914) 18 C.L.R. 224.

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Therefore this court has a constitutional jurisdiction to issue the writ sought notwithstanding the statutory provision in s. 32 of the Act that a judgment, order or award of the court (even if a refusal to exercise jurisdiction is a judgment &c.) shall not be subject to mandamus: *Australian Coal & Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd.* (1). The writ of mandamus is not a writ of right nor is it issued as of course. There are well recognized grounds upon which the court may, in its discretion, withhold the remedy.

For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld. The question whether there are any grounds for refusing the remedy will be discussed after the question of the jurisdiction of the Court of Conciliation and Arbitration has been considered.

The Arbitration Court (their Honours Judges *Foster* and *Kirby*, Chief Judge *Kelly* dissenting) has held that it has no jurisdiction to consider the application because in the opinion of the majority of the court the application is not an application for the alteration of the basic wage or the principles upon which it is computed. It has been argued for the respondent organization that it is within the jurisdiction of the Arbitration Court to determine conclusively and exclusively the limits of its jurisdiction, and that the court accordingly has exercised a power which it possesses in holding that it has no jurisdiction to consider the application made by the prosecutor and other persons. If this is the case the court has fully performed its duty, and there should be no mandamus.

This argument is sufficiently answered by the nature and form of s. 13 and s. 25.

They are based on a division of jurisdiction between the court and the conciliation commissioner which is mutually exclusive. It is not an allocation of jurisdiction which excludes the commissioners from certain subjects and otherwise makes the jurisdiction of the Court of Conciliation and Arbitration paramount. If the commissioners exceed their jurisdiction and invade the jurisdiction of the court, what they do can have no legal operation; and the converse

(1) (1942) 66 C.L.R. 161, at p. 166—*see* cases cited at p. 176.

must also be true. Otherwise there would or might be inconsistent duties imposed by conflicting awards with no legal means of resolving the conflict.

Correspondingly, if the Court of Conciliation and Arbitration declines jurisdiction erroneously, the error can confer no jurisdiction on the conciliation commissioners. The principle on which the Act proceeds is that each tribunal must confine itself to the jurisdiction allotted to it but must, subject to and in accordance with the particular provisions of the Act, exercise that jurisdiction when it is invoked.

Accordingly, we proceed to consider whether or not the application made to the court was an application for an order or award altering the basic wage or the principles upon which it is computed. Consideration of this question must begin with the proposition that the limits of possible jurisdiction of the Arbitration Court are determined by s. 51 (xxxv.) of the Constitution, which gives power to the Commonwealth Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The power conferred upon the Commonwealth Parliament by this paragraph of the Constitution does not enable the Commonwealth Parliament to make laws with respect to industry or to industrial matters or to all industrial disputes, but only with respect to conciliation and arbitration for the prevention and settlement of certain industrial disputes, namely, industrial disputes extending beyond the limits of any one State. The laws cannot be laws simply for the prevention and settlement of such industrial disputes; they must be laws for the prevention and settlement thereof by means of conciliation and arbitration. Accordingly the court has no power to declare a common rule in industry, that is, to prescribe a provision applying to industry generally or to any specified branch or branches of industry (*Whybrow's Case* (1)). The power of the court is constitutionally limited by the word "disputes." The court can make orders or awards in relation to particular disputes, but cannot independently of disputes prescribe a system of industrial regulation. An order or award of the court in its arbitral jurisdiction must be an award or order directed to the prevention or settlement of some particular industrial dispute.

It follows that, when s. 25 refers to "the basic wage or the principles upon which it is computed," the reference cannot (if the provision is valid) be to a generally declared basic wage or to generally declared principles of computation. If any effect is to be given to

(1) (1910) 11 C.L.R. 1.

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the provision the reference must be taken to be a reference to a basic wage to be discovered in an award or awards as a wage or element in a wage or wages payable to persons entitled to the benefit of the award and to the principles upon which that wage or element in the award is computed. In the present case there are current awards applying to the relevant industry, namely, the theatrical industry, and therefore we do not pause to consider what the position may be in relation to an industry which is not regulated by any law in respect of wages, where there might or might not be a basic wage determined by custom. Where there are relevant awards (as in the present case), if they prescribe a basic wage, that basic wage and the principles upon which it is computed may be altered by the court, but not otherwise.

These propositions are not in any way inconsistent with the practice of the Arbitration Court in holding from time to time what is regarded as a general inquiry into the amount of the basic wage or into the principles according to which it is to be computed. These inquiries consist in hearing together a number of applications in relation to the basic wage as prescribed in a number of separate awards, each made in settlement of some particular dispute.

The term " basic wage " is sometimes used as if it were equivalent to " minimum wage " or " living wage." When an industrial tribunal determines that the basic wage shall be an amount which is prescribed because it is a living wage, and also that no lower amount shall be paid by way of wages, the basic wage, the living wage and the minimum wage are all identical in amount. But the meaning of the terms is nevertheless not the same. The basic wage is a wage which is basic in that it forms the basis or foundation of a wage structure. Where there is an applicable award and a wage is prescribed for a male adult unskilled labourer to which additions are made to remunerate skill or otherwise to differentiate between workers, that wage is the basic wage as determined by that award. This was decided by the Court in *Australian Workers' Union* v. *The Commonwealth Railways Commissioner* (1), where the court interpreted s. 18A of the *Commonwealth Conciliation and Arbitration Act* 1904-1930. Section 18A provided that the court should not have jurisdiction to make an award " altering the basic wage or the principles upon which it is computed " (the words which now appear in s. 25 (*b*)) unless the question were heard by the Chief Judge and not less than two other judges and the alteration were approved by a majority of the members of the court by whom the question was heard. The award applying to the railway

(1) (1933) 49 C.L.R. 589.

industry in question contained a clause providing for the payment of a certain amount as a minimum wage to a male unskilled labourer. This amount was adjusted in accordance with certain figures showing variations in the cost of living. A single judge of the court made an award providing for the application for this purpose of tables which were on a different basis in relation to prices of commodities from those which were previously applicable. The result of this alteration was to " reduce the wage which, if the old award had remained in force, would have been payable under its provisions as the primary wage to the unskilled labourer, the wage payable for skilled labour being assessed on the basis of that primary wage " : see (1). Accordingly, it was held that the new award altered the amount of the basic wage. Since the decision was given in that case the Act has been amended on several occasions, but no amendment has been made which makes that decision, so far as it goes, inapplicable. We do not refer to the cases in which the Full Court of the Arbitration Court dealt with matters affecting the basic wage under s. 18A (4) of the Act before the 1947 amendment, because there was then no such separation of jurisdiction between the court and conciliation commissioners as is now effected by ss. 13 and 25, and there was no doubt as to the power of the court to deal with any part of any industrial dispute to which the Act applied.

Several awards have been made in recent years relating to the theatrical industry. The last award purporting to bind the South Australian and Western Australian employers who were applicants in this matter before the Arbitration Court was made by Mr. A. Blakeley, Conciliation Commissioner, on 25th February 1948. This award, however, fails to specify a period during which it is to continue in force, and therefore does not satisfy the requirement of s. 48 (1) of the Act and is invalid : *R.* v. *Foster* ; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (2). The award applying to South Australian and Western Australian employers in the industry is an award made by Mr. G. A. Mooney, Conciliation Commissioner, on 18th and 22nd February 1943 and subsequently varied by an addition to the basic wage made on 21st February 1947 and in respect of male employees at Whyalla and Iron Knob in South Australia on 11th November 1947. The award as varied on 21st February 1947 prescribes weekly, hourly, and performance rates of pay to be adjusted in relation to the " Court's Retail Price Index Numbers (Second Series)." It is provided that " adjustment is to be based on the equating of Index No. 87.0 with 87s., the amount assessed upon that number of the Court's needs basic wage per week."

(1) (1933) 49 C.L.R., at p. 598. (2) (1945) 70 C.L.R. 405.

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The "Retail Price Index Numbers (Second Series)" is a table showing price variations based upon index figures published by the Commonwealth statistician. The meaning of the adjustment clause is that if for any particular period when an adjustment is due (the award provides for periodical adjustments) the statistician's index number is 1000, then the court's index number would be 87.0 (any figure between 86.5 and 87.4 is taken as 87.0 for the purpose of adjustment): when the court's index number is 87.0 what is called the "needs basic wage" is 87s. per week, and each change to the next index number means an increase or a decrease, as the case may be, of 1s. per week in that adjustable part of the wage payable.

The principal award (February 1943) contains a provision for unskilled labour not elsewhere provided for. (It is not necessary in this case to consider questions raised in argument as to the identification of the basic wage where there is no provision applying to unskilled labour.) In the case of males the weekly wage was £5 1s. This sum includes not only the "needs basic wage" adjusted in accordance with price index numbers, but also certain loadings which have been prescribed for various reasons. There have been a war loading (a special provision made to meet war conditions), a prosperity loading in 1937 (an increase in wages designed to give employees something more than a bare minimum and to allow them to share in the general prosperity of the community) and industry loadings (special additions regarded as appropriate by reason of the conditions of work in particular industries). The adult male unskilled labourer, therefore, receives under the award as varied an amount consisting of the total sum of the needs basic wage with such of these additions as have been preserved. No lower wage can under the award be paid to such a worker. It has been argued that some or all of the loadings are not part of the basic wage, and that only the "needs basic wage" or, at most, the amount of the "needs basic wage" together with the amount of the prosperity loading, constitutes the real basic wage under the award. It is, however, unnecessary in the present case to deal with this specific question because it is not disputed that if the application submitted to the Arbitration Court were granted the amounts of the "needs basic wage," and therefore of any greater amount which could be described as the total basic wage, would both be reduced. The applicants ask that the figures to be applied for purposes of adjustment in South Australia and Western Australia should be figures relating to variations in costs of living in Adelaide and Perth, i.e. that the award should apply differential rates, and

not the flat rate depending upon the index numbers for the six capital cities as at present. The adoption of the Adelaide and Perth basis would result in a reduction of the amount payable to the male adult unskilled labourer in South Australia and Western Australia. Further, the applicants ask that wages in provincial districts in South Australia and Western Australia should be 3s. below the rates in Adelaide and Perth respectively. This is a claim for reduction in the basic wage in those districts. Thus the application is an application for the reduction of the basic wage as that term has been interpreted in *Australian Workers' Union* v. *The Commonwealth Railways Commissioner* (1).

Section 25 (*b*) refers to an alteration of the amount of the basic wage. The reference is plainly to an amount of money payable as a basic wage. An adjustable basic wage is not altered when the wage is adjusted in accordance with the terms of an existing award. But an alteration in an award which makes the basic wage less or greater in amount than the amount which would be payable under the award as unaltered is an alteration of the amount of that wage. Any alteration of that amount, upon whatever grounds the alteration is made, is an alteration within the meaning of the section. It may be the case that an alteration is made in the amount for the purpose of securing that the wage-earner receives the same quantity of goods and of food, accommodation, clothing, &c., as before, but an alteration in amount designed to preserve stability in the real value of the basic wage would nevertheless be an alteration in the amount of the basic wage itself.

The learned judges constituting the majority in the Arbitration Court based their decision upon the proposition that the basic wage represents what was described as a " market basket " of goods and services, so that an alteration of an award which still secured to a wage-earner only the same quantity of goods and services as he was able to obtain for an already existing basic wage would leave the basic wage unchanged and would not bring about an alteration in his wage. The basic wage may be altered by an alteration in the composition of the goods and services or in the values assigned to any of the elements they include. There would be such an alteration if it was decided that instead of including figures relating to e.g. rents of four and five roomed houses in the index numbers, it were decided to substitute or to add six roomed houses—or if it were directed that prices of commodities not hitherto taken into account should be taken into account in calculating price index figures. Any such change would be an alteration in the standard of

(1) (1933) 49 C.L.R. 589.

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living in relation to which the basic wage was computed and would be an alteration in the principles of such computation. In the present case it does not appear whether or not the granting of the application would alter the basic wage in this sense if a comparison were made between the relevant " cost of living " at the time when the applicable provision was included in the award and that cost at the time of the application. The basic wage must be expressed in money. To translate the goods and services into money some place or places must be selected and it must be done as at a given time. To prescribe the variations from one place to another or from one time to another, if such variations are adopted, are necessarily as much part of the process of fixing a basic wage as the choice of the original place or places and the specification of the time. If, however, the amount is uniform for all or a number of places, this in itself is an adoption of the wage for all those places. If a change is made in any of these steps it is an alteration of the basic wage. The application of the South Australian and Western Australian employers was an application for an alteration in the amount of the basic wage because it sought an alteration in the variations previously prescribed.

Alterations in the amount of the basic wage may be made by means other than alterations determined in relation to the amount of commodities &c. purchaseable by a certain amount of money. Any alteration in the amount of money payable under an award to a worker in respect of the basic wage at a particular time and in a particular place is an alteration in that amount. The application in this case asks for such an alteration.

Further, the application was an application also for an alteration in the principles upon which the basic wage was computed. Various principles have been applied by the Arbitration Court for the purpose of determining what wage as the wage of the male adult unskilled labourer should be adopted as the basis upon which margins for skill and other special allowances not generally applicable to all employees governed by the award should be founded. The first principle laid down by *Higgins* J. as the President of the Court was that the lowest wage to be paid should provide for the normal needs of an average employee regarded as a human being living in a civilized community. In fixing that wage the court made provision for what was then (1907) regarded as an average family, namely, a man and wife and three children. In later years, however, the court, while not abandoning the principle stated as being a minimum standard, has applied the principle that industry should

pay the highest basic wage that can be afforded so that, for example, wage-earners should share in any general accession of prosperity to the community as a whole. Thus a " prosperity loading " was added in 1937. In 1946 the " needs portion " of the basic wage then current was increased by 7s. a week. This increase was brought about by equating to the base (1923-1927) index number of the court series index a sum of 87s. instead of 81s. These changes are examples of alteration of the principles upon which the computation of the basic wage is made. The word " computation " refers to a process of calculation. The principles of the computation are not the rules of arithmetic applied in making the calculation, which are the same at all times. They are the principles adopted which determine the elements with respect to which the arithmetical calculation is to be made. The substitution, as a basis of adjustment, of figures based upon variations in cost of living in Adelaide and Perth for figures representing such variations in the six capital cities of the Commonwealth is in our opinion an alteration in the principles upon which the basic wage in the relevant award is computed. Thus, in our opinion, upon this ground also it should be held that the application made to the Arbitration Court came within its jurisdiction under s. 25 (*b*) of the Act.

It is now necessary to return to the question of the court's discretion in determining whether to direct the issue of a writ of mandamus. It has been urged that in the exercise of its discretion the court should abstain from issuing the writ in the present case because it was intended by Parliament that the Arbitration court itself should deal with such a matter as that which is now before the court. It is of course true that the Arbitration Court, like every other tribunal or body upon which a statutory duty rests, must accept the responsibility of deciding whether a given occasion calls for the exercise of the function. But if this proposition is properly understood it supports strongly the claim of the prosecutor. That claim is that the Arbitration Court should deal with the matter and should not decline to deal with it. If the writ were refused in the present case by an exercise of discretion the position would be that that court would not deal with the application. If the application were then renewed before a conciliation commissioner, the conciliation commissioner would be placed in the position of having to choose between the decision of the Arbitration Court and the decision of this Court as to whether the application was an application falling within s. 13 (*b*) and s. 25 (*b*). If he followed the decision of the Arbitration Court and proceeded to deal with the application, then,

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consistently with the decision of this Court in this case, the applicants could obtain a writ of prohibition : see *R.* v. *Galvin* ; *Ex parte Metal Trades Employees' Association* (1). The result would be that the questions raised upon the application could never be decided in any jurisdiction. If, on the other hand, the commissioner followed the decision of this Court he would decline to deal with the application. The Arbitration Court, maintaining (in the supposed case of a discretionary refusal of mandamus by this Court), its decision as already given, would also decline jurisdiction, and no decision would be given by either the court or the commissioner. Where an alteration of the basic wage or of the principles upon which it is computed is an element in a dispute, or where such an alteration is sought by way of variation in an existing award, the matter must be determined, if at all, by the Arbitration Court. Unless the High Court uses the instrument of a writ of mandamus in such a case there would be a gap in the whole system of industrial arbitration which would be unfortunate from every point of view. There is no ground upon which the court can, as a matter of discretion, withhold the writ. On the contrary the strongest reasons exist for its issue.

When the application was made to the Court of Arbitration his Honour Judge *Kirby* was the Chairman of the Stevedoring Industry Commission established under the *Stevedoring Industry Act* 1947. He is also a Judge of the Arbitration Court and he acted as such judge in deciding that the court had no jurisdiction to hear the application of the prosecutor and others. The *Stevedoring Industry Act*, s. 7, provides that the Chairman shall not, except as otherwise provided by the Act or with his consent, be required to perform any duties as a judge of the court or as a conciliation commissioner as the case may be. It may be suggested that therefore mandamus cannot go to a judge, who is also the Chairman of the Commission, commanding him to perform any duties under the *Commonwealth Conciliation and Arbitration Act*. But if the Chairman does enter upon the performance of duties as a judge of the court he is, in relation to the performance of those duties in a matter in which he has consented to act, in the same position as any other judge of the court. Therefore s. 7 does not constitute an obstacle to the issue of a writ of mandamus in the present case where his Honour did consent to act as a judge of the court.

For the reasons which we have stated, in our opinion, the Court should exercise its discretion by holding that the prosecutor is

(1) (1949) 77 C.L.R. 432.

entitled to the issue of a writ of mandamus and the order nisi should be made absolute.

Order absolute. The respondent association to pay the costs of the prosecutor.

Solicitors for the prosecutor: *Baker, McEwin, Millhouse & Wright*, Adelaide, by *Moule, Hamilton & Derham.*

Solicitors for the respondent association: *Ridgeway & Pearce.*

E. F. H.