(S.A.) OF 1954 No 17

IN THE HIGH COURT OF AUSTRALIA

.....BRAITLING.....

V.

.....BOWES.....

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MEL

on....18th July 1955....

Original

BRAITLING v. BOWES

ORDER

Appeal allowed with costs. Judgment of Local Court set aside and judgment entered in the action for the defendant with costs.

BRAITLING

V.

BOWES

JUDGMENT

DIXON C.J.
WEBB J.
KITTO J.
TAYLOR J.

BRAITLING v. BOWES

The respondent to this appeal was the plaintiff, and the appellant was the defendant, in an action in the Local Court of Alice Springs, exercising jurisdiction under the Local Court Ordinance, No. 6 of 1941. The action was heard by Kriewaldt J., who gave judgment for the plaintiff for the sum of £165. From that judgment this appeal is brought pursuant to ss. 54 and 56 of the Ordinance.

The action was for the recovery of wages to which the plaintiff claimed to be entitled in respect of services rendered to the defendant as a cook at the homestead on the defendant's pastoral property during the period from 6th February 1952 to 7th October 1952. The property, known as Mount Doreen Station, is in the Northern Territory, on the main road from Alice Springs to Wyndham.

Mount Doreen is a cattle station, and it includes some mining leases comprising wolfram-bearing country. At the time when the events began with which the action was concerned, the plaintiff's husband, Robert Bowes, was working a wolfram mine on an adjoining mining lease held by the defendant's wife. The plaintiff and their two young children were living with him there. One Balzer had been working a more profitable mine on one of the defendant's leases, but he had recently gone away and failed to return. On 5th February 1952 a conversation took place between Bowes and the defendant, and they agreed that Bowes should work the mine which Balzer had left. The terms agreed upon were that the defendant should provide the lease and the plant, that Bowes should do the mining with the assistance of native labour, and that they should divide equally the working expenses of the mine and the proceeds of the sale of wolfram.

The defendant gave evidence at the trial to the

effect that he and Bowes agreed that the plaintiff should do the cooking for the homestead without remuneration, as part of the consideration for Bowes' receiving half of the proceeds of the wolfram. Bowes, on the other hand, swore that there was no mention of the plaintiff's undertaking the cooking, until after the mining agreement had been concluded. The learned judge accepted the evidence of Bowes on this point. His Honour found that the cooking was not discussed until a second conversation between Bowes and the defendant on the same day. Bowes' evidence as to this conversation was that the defendant asked him whether the plaintiff would be prepared to do the cooking for the station, and said that as a matter of convenience they could live at the station. It was mentioned, according to Bowes, that it would be more convenient for him to feed the blacks if he were living at the station than if he were living at his own camp. Bowes conferred with his wife and accepted the proposition. No conversation on the subject took place between the plaintiff and the defendant, and even between Bowes and the defendant no mention was made of wages. On 6th February 1952, the plaintiff with her husband and children moved into the homestead. There they occupied two rooms until they parted company with the defendant on 7th October of the same year. Throughout the intervening period, except during absences totalling twelve or fourteen days, the plaintiff did substantially the whole of the cooking for the establishment, except the bread-baking which was done by an aboriginal. The defendant's wife was away, and even when she returned after some months had passed she did little of the cooking. The number of persons to be cooked for varied considerably. There were four in the plaintiff's own family, and the station staff included, in addition to the defendant, a book-keeper named Lloyd and a man named Bradford. At some stage the defendant's son arrived on the property, and there were also some casuals, namely three half-castes, Cusack, Wilson and Whiting and a man named Moyle. There were also guests to meals from time to time.

In most circumstances, it would be natural to infer a promise to pay reasonable wages from the fact that at the request of a station owner a woman is found to have taken up residence in the homestead and performed the duties of a cook. The circumstances in this case, however, were unusual. The plaintiff was not a cook by occupation, and she was not seeking employment. Her husband was not an employee of the defendant; he was engaged in a joint enterprise with him which was likely to be, and in fact proved to be, highly remunerative to both of them. They had made their bargain, complete in all its terms, at their first conversation on 5th February 1952, and it left them to conduct entirely separate domestic establishments, the defendant to live in his homestead and the Bowes family in their own camp. Under the arrangement made at the second conversation, however, the two establishments were to be merged. Not only the plaintiff but also her husband and her two children left their camp and moved into the homestead, and two rooms were set apart for their accommodation there. All the food, except baby food and some of the vegetables, was supplied by the defendant, and even for the vegetables he paid the freight. He made no charge at any time to the plaintiff or her husband for accommodation or for board.

As has already been mentioned, at the second conversation on 5th February 1952 there was no discussion as to any amount to be paid to the plaintiff as wages. The learned judge thought it quite likely that the reason why the defendant made no mention of wages was that he thought that Bowes was familiar with the terms of the arrangement which had formerly existed between the defendant and Balzer and under which Mrs. Balzer did the cooking without pay; and his Honour thought that Bowes, who in fact was not aware of Balzer's arrangement, omitted to refer to his wife's wages because he assumed that, under the industrial award covering station cooks, wages at a fixed rate would be payable. This explanation of the silence of Bowes and the defendant on the subject of the plaintiff's wages was made the basis of a submission before us that there was no consensus ad idem, and therefore no contract

upon which the plaintiff could be entitled to sue for wages. The submission must be rejected, because the question whether there was consensus ad idem is to be decided upon a consideration of what was said and done, and not upon an examination into states of mind. It should be said here that in reaching the conclusion that his explanation was the probable one his Honour was influenced by some evidence which the plaintiff had been allowed to give, though only de bene esse, as to what was said between her husband and herself when he consulted her about the defendant's proposal that they should go to live in the homestead and that she should undertake the cooking. This evidence was plainly inadmissible, for Bowes was clearly not the defendant's agent at the conversation.

If there were nothing more in the case than has been mentioned, it would be a matter of some difficulty to decide whether the case was one of a contract for the employment of the plaintiff by the defendant or simply one of an arrangement between the heads of two households for a form of co-operation for their mutual advantage, entailing no liability on the part of the defendant to make any payment to the plaintiff. But there are additional features of the case which seem to point convincingly to the latter as the true conclusion. For eight months the plaintiff cooked for all who ate at the homestead, and from first to last not one word about wages was ever said to the defendant either by her or by her husband. She knew that the defendant was keeping a running account as between himself and her husband, charging therein the price of goods obtained from the station store; and she knew that he kept no such account as against her. At no time did she ask for anything on account of pay, and her superficially reasonable explanation, that there was no need to do so as there was nothing on which to spend money out at Mount Doreen, lost much of its force when she admitted that on one occasion she made a trip to Alice Springs but got the money she required for the trip from her husband. She accounted for this by saying that she thought it

would be better to let her wages mount up; but if this had really been in her mind she would almost certainly have demanded the accumulated sum when she finally left Mount Doreen. In fact she did not even then make the slightest reference to the subject.

Bowes and the defendant parted on or about 7th October 1952 in consequence of a dispute. Like his wife, Bowes had not mentioned her wages while relations were harmonious. But he had been asking the defendant and his book-keeper for a statement of his own account, and one was supplied about 30th September 1952. In his evidence in chief he said that when he got this statement he spoke to the defendant about his wife's wages; but under cross-examination he withdrew this assertion. There were matters about which he and the defendant argued, but the plaintiff's wages was not one of them. Then he went to Alice Springs, and consulted a solicitor. On his return to Mount Doreen he was given an amended statement, and, according to his evidence, he then "said something" to the defendant about his wife's wages. The defendant answered, "There are none". He then replied, "You will have to pay her wages"; and in response to the defendant's question, "Are you going to go on with it?", he said "Certainly". Not until February 1953, however, did the defendant hear any more of the matter. Then Bowes for the first time instructed a solicitor on his wife's behalf to make a claim against the defendant for wages. The solicitor's letter of demand based the claim upon the Cattle Industry Award, and included not only wages for the entire period worked but also an amount for pay in lieu of annual leave. At the trial, Bowes attempted to support the claim on the basis of the award by swearing that in the second conversation between the defendant and himself on 5th February 1952 the award had been mentioned, both parties saying that they did not know what the award was, i.e. what was the amount of the award wage. This, however, the trial judge disbelieved. The solicitor's demand was rejected by a letter from the defendant's solicitor dated 17th March 1953, which drew

pointed attention to the fact that the plaintiff had not asked the defendant for any money either during her time at Mount Doreen or when she left. This evoked no answer. There was silence for another ten months; but eventually on 28th January 1954, the plaintiff commenced proceedings in the Local Court, making the claim which her husband's solicitor had stated in his letter.

The award was held by the trial judge, and is now conceded to be inapplicable to this case, for the reasons, first, that the number of the station employees for whom the plaintiff cooked was less than the minimum number required to attract a fixed rate under the award, and, secondly, that the plaintiff was not a member of any union which was a party to the award. The plaintiff, however, was held to be entitled to judgment on the ground that her work as a cook at Mount Doreen was done for the defendant under a contract of employment in which, there being no agreement as to remuneration, the law would imply a promise by the defendant to pay a reasonable sum. The amount which the learned judge considered a reasonable sum was £5 a week for the relevant period (less two weeks during which the plaintiff was absent or ill), subject to a deduction in respect of the value of quarters and food supplied by the defendant to the plaintiff and her family. No fault could be found with the judgment thus arrived at, if its initial proposition were to be accepted that a contract of employment was in fact made between the parties. But the choice of findings which the evidence presented does not seem to have been fully considered, probably because the defendant's evidence had invited the Court to treat as the crucial issue the question whether the plaintiff's work was done in pursuance of an express agreement, made at the first conversation on 5th February 1952, that she and her husband should step into the shoes of the Balzers. The learned judge did not advert in his reasons for judgment to the absence of any mention of wages between the plaintiff and the defendant, and between Bowes and the defendant, during the period

of the Bowes' residence at Mount Doreen, or to the conduct of the plaintiff and Bowes with respect to wages after the quarrel with the defendant and the termination of their relationship with him. These matters provide very strong ground indeed for inferring that until Bowes' interview with his solicitor the idea of the plaintiff's being paid for the cooking she did for the combined household had not occurred either to her mind or to her husband's. On the evidence as a whole we feel little doubt that when the plaintiff commenced her work at the homestead she knew perfectly well that she was not an employee of the defendant and was not cooking for wages.

The most probable view of the case, on the basis of the evidence which the learned judge believed, is that the plaintiff and Bowes, in working over the injustice which they considered the husband had suffered at the hands of the defendant, came also to think that it would be right to make a claim in respect of so much of the plaintiff's cooking as was not for her own family. Indeed the plaintiff herself said almost as much in her evidence. "It was not my husband", she said, "who suggested I take this action against Mr. Braitling. I felt that I should be compensated for my work at Mount Doreen. My husband was putting in a claim with Mr. Braitling about the same time as I was putting in mine." Notwithstanding the first sentence of this passage, it seems clear that the plaintiff's claim against the defendant had its origin in Bowes' consultation with his solicitor. He himself said, "I accept responsibility for my wife's instituting these proceedings against Mr. Braitling." And then he added what may be considered a significant echo of the plaintiff's own statement: "It is because I think she should be compensated for her work as a station cook."

All these considerations weigh the scales down heavily in favour of the conclusion that there was no

relationship of employment between the plaintiff and the defendant, and that for that reason the judgment for the plaintiff ought not to stand.

The appeal should be allowed with costs, the judgment of the Local Court should be set aside, and judgment should be entered in the action for the defendant.