1928
*Oct. 23.
*Oct. 29.

INTERNATIONAL TIMBER COMPANY (DEFENDANT) ..... } APPELLANT;

AND

H. E. FIELD (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Labour—Wages—Regulation under statute—Male Minimum Wage Act, B.C., 1925, c. 32—Functions thereunder of Board of Adjustment—Invalidity of Board's order fixing minimum wage "for all employees in the lumbering industry."

The Board of Adjustment (constituted under the *Hours of Work Act, 1923*, c. 22, B.C.) made an order, dated September 29, 1926, under the *Male Minimum Wage Act* (B.C., 1925, c. 32) fixing 40 cents per hour as the "minimum wage for all employees in the lumbering industry," and defining "lumbering industry" to include "all operations in or incidental to the carrying on of" logging camps, certain kinds of factories, etc.

Held: The order was *ultra vires* and invalid; it was apparent on its face that the Board had misconceived the nature and scope of its functions under the *Male Minimum Wage Act*, which dealt, not with the industries or businesses of employers as such, but with the occupations of employees. The same business or industry might include many different occupations. The Board, in its order, had regard rather to the general nature of the industries in the carrying on of which the employees covered by it were engaged, than to the particular occupations therein of such employees. What the Act contemplated was that the Board, in fixing minimum wages, would take account of the nature of the employee's work rather than the general character of the industry or business in the carrying on of which the work would be done. The ascertainment of an employee's connection with a particular industry would not suffice to determine what would be for him a proper minimum wage.

Judgment of the Court of Appeal for British Columbia ([1928] 2 W.W.R. 1) allowing plaintiff's claim for wages as a "dish washer" and waiter in defendant's logging camp, based on said order, reversed.

Rex v. *Robertson & Hackett Sawmills Ltd.* (38 B.C. Rep. 222) and *Compton* v. *Allen Thrasher Lumber Co.* (39 B.C. Rep. 70), so far as they are inconsistent herewith, overruled.

APPEAL by the defendant, by special leave, from the judgment of the Court of Appeal for British Columbia (1) which (reversing the judgment of Cayley C.C.J.) held in favour of the plaintiff's claim. The plaintiff had been em-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) [1928] 2 W.W.R. 1.

ployed as a "dish-washer" and, later, as a waiter or "flunkey" in the defendant's logging camp, and had been paid by defendant at certain contract wages per day for his work, but he claimed that he was entitled to payment at the rate of 40 cents per hour, as being the minimum wage fixed by order of the Board of Adjustment dated September 29, 1926, and made under the *Male Minimum Wage Act* (Statutes of British Columbia, 1925, c. 32), and on the basis of having worked 13 hours per day.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was allowed, on the ground of invalidity of the said order of the Board of Adjustment.

J. W. de B. Farris K.C. for the appellant.

A. C. Boyce K.C. and *Alexis Martin* for the respondent (and also for the Attorney General of British Columbia).

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff (respondent) was engaged by the defendant company in its logging camp at Campbell River, British Columbia, for two periods during the year, 1927,—first as a "dish-washer" at $3.20 per day and afterwards as a waiter, or "flunkey," at first at the same wage and later at $3.45 a day. He appears to have been treated by his employers as liable to contribute to the Workmen's Compensation Fund a percentage of these wages. R.S.B.C., 1924, c. 278, s. 33.

By an Order of the Board of Adjustment (constituted under the *Hours of Work Act, 1923*) dated the 29th of September, 1926, and made under the *Male Minimum Wage Act* (B.C. Statutes, 1925, c. 32) the "minimum wage for all employees in the lumbering industry" was fixed at "forty cents per hour." "Lumbering industry" was by the Order defined to include

> all operations in or incidental to the carrying on of logging camps, shingle mills, saw-mills, planing-mills, lath-mills, sash and door factories, box factories, barrel factories, veneer factories, and pulp and paper mills, and all operations in or incidental to the driving, rafting and booming of logs.

Alleging that he was an employee in the "lumbering industry" of the defendants, the plaintiff sued in the County Court to recover the difference between the amounts paid

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him at the contract prices above stated and 40 cents per hour on the basis of having worked 13 hours per day.

"Employee" is defined by the Act to mean

Every adult male person to whom this Act applies who is in receipt of or entitled to any compensation for labour or services performed for another.

but, by section 13, the Act is declared inapplicable to the occupations of "farm labourers, fruit-pickers, fruit-packers, fruit and vegetable canners, and domestic servants."

The County Court Judge found that the working time of the plaintiff amounted in all to only 10 hours per day and that from that time must be deducted 1½ hours to cover meal times, leaving only 8½ hours as the actual working day to which the 40 cent rate per hour could apply. He also held, however, that the plaintiff was a "domestic servant" within section 13 and, accordingly, dismissed the action.

The Court of Appeal for British Columbia reversed this judgment, holding that the plaintiff's working time was 13 hours per day and that he was not a "domestic servant" within section 13. Judgment was, accordingly, directed to be entered for the plaintiff for the sum of $187.30 with costs throughout.

Subsequently special leave to appeal to this Court was obtained by the defendant company on the terms of its paying the costs of the Attorney General and of the plaintiff of the proposed appeal in any event thereof.

As the foundation of his action the plaintiff prefers the Order of the Board of Adjustment and it is obvious that validity of that Order is essential to his success.

We are, with respect, of the opinion that it is apparent on the face of the Order of the 29th of September, 1926, that, in making it, the Board misconceived the nature and scope of its functions under the *Male Minimum Wage Act* and that the Order, as made, is *ultra vires* and invalid.

The following portions of the statute indicate the powers and duties of the Board, so far as presently material:

3. It shall be the duty of the Board to ascertain the wages paid to employees in the various occupations to which this Act applies, and to fix a minimum wage for such employees in the manner provided in this Act.

5. (1) After inquiry the Board may by order establish a minimum wage for employees, and may establish a different minimum wage for different conditions and times of employment.

* * * *

13. This Act shall apply to all occupations other than those of farm-labourers, fruit-pickers, fruit-packers, fruit and vegetable canners, and domestic servants.

It is apparent that the Act deals not with the industries or businesses of employers as such, but with the occupations of employees. The same business or industry may include many different occupations: thus, a bread-making establishment may employ bread-makers, drivers of distributing wagons, book-keepers, shop assistants, etc.; and of such employees each of the classes mentioned would have a different occupation. A fruit rancher may employ fruit-cultivators, fruit-pickers, fruit-packers, fruit-canners, book-keepers, drivers, etc.; yet, while the fruit-cultivator and the driver and the book keeper have occupations which may bring them within the Act, the occupations of the fruit-picker, fruit-packer and fruit-canner exclude them from its operation. These illustrations suffice to make it apparent that, the occupation of the employee being what the Act is concerned with, the ascertainment of his connection with a particular industry or business does not suffice to determine what will be for him a proper minimum wage.

The enumeration in the Board's Order of the activities included by it in the "lumbering industry" makes it abundantly clear that in making its Order, it had regard rather to the general nature of the industries in the carrying on of which the employees covered by it were engaged than to the particular occupations therein of such employees. The carpenter or painter is not the less engaged each in a different occupation because both happen to be employed in connection with erecting a factory, the one to build it and the other to paint it. The occupation of the driver of a team of horses and that of the river driver are not the less distinct because both may happen to be engaged in handling logs. The pursuits of the stationary engineer and the mill-hand do not cease to be separate and distinct occupations because each is employed in the same sash and door factory. Moreover, for men the nature of whose employment requires them to be continuously "on call" during long hours, though not actually at work (e.g., messengers and watchmen), the same minimum wage per hour of employment is scarcely appropriate as that which would be fixed for men whose employment consists of continual physical work during stated, but comparatively

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shorter hours (e.g., woodsmen, or factory hands). That the Provincial Legislature was alive to the difference in regard to the nature and hours of employment between men engaged in actual industrial work and persons employed in incidental work connected with industries, such as office clerks, boarding-house and bunk-house assistants, is manifest from s. 2 of the *Labour Regulation Act*, R.S.B.C., 1924, c. 126.

In a word, what, in our opinion, the *Male Minimum Wage Act* contemplates is that the Board in fixing minimum wages will take account of the nature of the employee's work, will consider how exacting it may be, what mental and physical effort it may entail and the conditions under which it is performed, such as the inconvenience, hardship and risk incidental to it, rather than the general character of the industry or business in the carrying on of which the work will be done or services rendered.

Just as s. 3 requires the Board to deal separately with each kind of occupation, i.e., taking an illustration from the concrete case before us, to distinguish between such entirely different occupations as that of the woodsman and of the dining room waiter, so s. 5 contemplates that it will classify and establish different rates of minimum wages for men pursuing the same trade or calling under different conditions and hours of employment, some entailing greater hardships and inconveniences than others—as, for instance, again using the concrete case before us by way of illustration, between the waiter in the town restaurant and the waiter, or "flunkey," in the distant lumber camp.

That such considerations did not influence the Board in making its Order of the 29th of September, 1926, but that, on the contrary, it grouped indiscriminately in that Order all employees engaged in the manufacture or handling of wood products and fixed for all the same minimum wage without regard to the particular occupation of each class of employee, seems to us so clear on the face of the Order that its invalidity is beyond doubt. A contrary view was taken by the British Columbia Court of Appeal in *Rex* v. *Robertson & Hackett Sawmills, Ltd.* (1). That decision has been carefully considered. In so far as it is inconsist-

(1) (1926) 38 B.C. Rep., 222.

ent with this judgment it must be overruled, as must also *Compton* v. *Allen Thrasher Lumber Co.* (1).

The appeal will, therefore, be allowed and the action dismissed. Pursuant to the undertaking given, the appellant will pay the costs in this court of the Attorney General and of the respondent. There will be no costs to either party in the provincial courts.

Appeal allowed.

Solicitors for the appellant: *Pattullo & Tobin.*
Solicitor for the respondent: *Mark Cosgrove.*
Solicitor for the Attorney General of British Columbia: *Alexis Martin.*