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Supreme Court of New South Wales

Commission for Children and Young People v V [2002] NSWSC 949 (23 October 2002)

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NEW SOUTH WALES SUPREME COURT

CITATION: Commission for Children and Young People v V [2002] NSWSC 949

CURRENT JURISDICTION: Common Law Divison

FILE NUMBER(S): 13869/01

HEARING DATE{S): 18/09/02 [then written submissions]

JUDGMENT DATE: 23/10/2002

PARTIES:

Commission for Children and Young People (P)

V (D1)

Administrative Decisions Tribunal (D2)

JUDGMENT OF: Young CJ in Eq

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

P Singleton (P)

M Dudhee (D1)

SOLICITORS:

I V Knight (Crown Solicitor) (P)

CATCHWORDS:

FAMILY LAW & CHILD WELFARE [163]- Child welfare- Prohibited person seeking declaration that prohibition not apply to him- Factors to be considered.

ACTS CITED:

Child Protection (Prohibited Employment) Act 1998, ss 5, 9

Commission for Children and Young People Act 1998, ss 9 and 10, Pt 7

DECISION:

Appeal dismissed

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

YOUNG CJ in EQ

Wednesday 23 October 2002

13869/01 – COMMISSION FOR CHILDREN AND YOUNG PEOPLE v V

JUDGMENT

1 **HIS HONOUR**: This is an appeal by the plaintiff against part of the decision of the Administrative Decisions Tribunal holden before Deputy President Hennessy. The Tribunal was hearing an application by the first defendant for a declaration under Part 3 of the Child Protection (Prohibited Employment) Act 1998 ("The Act").

2 The first defendant, V, is now a married man aged about 38. He has five children ranging in age from 7 to 18. He has 9 nieces and nephews who at various times have been in his care and home often for extended periods.

3 He has coached a boys' soccer team for the past 8 years and has also been involved with his son's school chess club and with being responsible for transporting his son and other young boys to and from sporting fixtures organised by the school.

4 In about 1980, V was convicted of carnal knowledge. He was 17 years old at the time and the girl involved was about 15. It would appear that this was a case where V and the woman concerned were in a close emotional relationship. Whilst those facts might suggest that the offence was not the most serious case of carnal knowledge, it must be pointed out that V did not marry the woman in question and that there is some suggestion that she was a vulnerable person at the time.

5 That conviction amounted to a conviction for a serious sex offence within the meaning of s 5(3) of the Act.

6 The consequence is that under s 5(1) of the Act, V is a prohibited person unless there is in force an order under s 9 of the Act declaring that the Act is not to apply to him.

7 V accordingly made the application for an order declaring that the Act not apply to him. Under s 9(2) of the Act, the application is made to the Industrial Relations Tribunal if the applicant is an employee or otherwise the Administrative Decisions Tribunal. V thus applied to the Tribunal.

8 The section provides in sub-section (4) that the Tribunal:

"is not to make an order under this section unless it considers that the person the subject of the proposed order does not pose a risk to the safety of children."

Sub-section (5) provides that:

"In deciding whether or not to make an order under this section in relation to a person, a relevant tribunal is to take into account the following: ...".

9 Six matters are then set out in sub-section (5), viz:

"(a) the seriousness of the offences with respect to which the person is a prohibited person,

(b) the age of the person at the time those offences were committed,

(c) the age of each victim of the offences at the time they were committed,

(d) the difference in age between the prohibited person and each such victim,

(e) the seriousness of the prohibited person's total criminal record,

(f) such other matters as the tribunal considers relevant."

10 Sub-section (9) says "Orders under this section may be made subject to conditions". Other parts of the section which should be mentioned are that sub-section 8 means that if an order is refused, no fresh application could be made for five years unless the Tribunal otherwise orders at the time of refusal, and sub-section 11 which says that an appeal lies on a question of law to the Supreme Court by any party to the proceedings.

11 The Act requires that the Commission for Children and Young People is to be a party to any proceedings for an order under s 9 (s 9(7)). The Commission was constituted by the Commission for Children and Young People Act 1998 as a corporation. Under the Commission's Act s 10, the safety, welfare and well-being of children are the paramount considerations for the Commission. Under Part 7 of the Commission's Act, it is to protect children by means of employment screening for any employment that involves direct contact with children for the purpose of protecting children from child abuse. The Act sets out a very draconian regime with respect to screening potential operators and employees of enterprises providing services for children including a provision for notification of any relevant disciplinary proceedings that might be taken at any time against an employee in such enterprises.

12 The evidence before the Tribunal was that V, apart from his conviction for carnal knowledge, had six other convictions, the latest of which was 25 July 1988. Four of these were for stealing, and two (one involving three incidents) for being near buildings with intent to peep and pry. None of these are serious sex offences within the meaning of the Act.

13 The Tribunal ordered that the Act is not to apply to V on condition that V "not engage in any child-related employment ... involving females between the ages of 12 and 18 years."

14 The Commission appeals on five grounds which can be summarised as follows:

(1) The Tribunal appeared to take the view that it was a matter for the Commission to show that an applicant under s 9 does pose a risk to children on the **Briginshaw** standard, whereas the proper construction of the section is that it is for the applicant on the **Briginshaw** standard to show that he does not pose a risk to children.

(2) That as the Tribunal had come to the conclusion that the applicant posed a risk to some children, it should not have made any order at all in his favour.

(3) That the Tribunal erred in holding that the test contained in sub-section (4) was not a condition precedent to making an order under s 9.

(4) That the Tribunal was in error in holding that the test in sub-section (4) could be met by taking into account any conditions the Tribunal intended to impose pursuant to sub-section (9); and

(5) That the condition imposed did not in fact address the risk which the Tribunal had assessed.

15 On the appeal, Mr P Singleton of counsel appeared for the appellant, and Ms M Dudhee for the respondent.

16 There has been very little judicial consideration of s 9 of the Act because of its relative newness. Wright P, in the Industrial Commission, considered interim orders in **A v Commission for Children and Young People (No 2)** (2000) 104 IR 119, but there is little in his Honour's reasoning which is of assistance in the instant case. There have also been various unreported decisions in the Industrial Commisson such as **G v J & H** [2001] NSWIR Comm 69, a decision of Kavanagh J and **L v Commission for Children and Young People** [2001] NSWIR Comm 134, a decision of Petersen J.

17 In that case Petersen J said of s 9(4):

"This test raises a question the answer to which in a given case may not readily appear. Risk is a concept the parameters of which may vary from the perspective of the assessor, but more particularly will also vary according to the known facts. On one view of it, the exposure of children to adults, even in the usually supremely safe context

of child and parent, will always contain the possibility of a risk to the safety of a child. However, in the absence of some indication of actual risk, for example from a parent, the position will be that the child is to be regarded as not at risk. Risk in the context of the Act does not seem to me to be concerned with what may be mere possibilities, but rather an exposure to a situation which involves a recognisable potential for harm. The existence of that potential will require some foundation in fact. The absence of that recognisable potential, it being that absence which by the Act by its negative expression of the test in s 9(4) requires before an order can be made will depend on the tribunal finding some factual basis for the view that there exists no risk. What will amount to a sufficient basis for such a view must, I think, remain an issue for each case, given the wide-ranging variations in circumstances which may present."

18 The most important of the cases to which I have been referred is the decision of Haylen J in **R v Commission for Children and Young People** [2002] NSWIR Comm 101. That is a 97 page judgment delivered on 16 May 2002 in which his Honour thoroughly considered the Act and the role of the Industrial Commission in making orders under s 9.

19 Before I analyse his Honour's judgment I should note that many of the submissions that were made by Mr Singleton to me were fairly close to those put to Haylen J and soundly rejected by him in **R's case**.

20 These submissions were:

(A) That sub-section (4) involves a threshold test. If the threshold is not passed, that is an end to the matter. If it is passed, then the Tribunal's discretion comes in examining the factors set out in sub-section (5).

(B) If, within sub-section (4) a person presents a risk to some sections of children, he poses a risk to the safety of children and no order can be made.

(C) It is not possible to say that a condition of the order can remove a person from being a risk to children to being no risk to children.

(D) There is no warrant for reading the word "acceptable" before "risk" in sub-section (4) as no risk is acceptable. A minimal risk is still a risk so long as the risk is a real risk and not a fanciful or theoretical risk. The risk, however, does not have to be substantial; cf **Prince Jefri Bolkiah v KPMG** [1998] UKHL 52; [1999] 2 AC 222, 236-7.

21 At [100], Haylen J said:

"I am not able to accept the submission for the respondent Commission that, so long as there is any risk however minimal, an applicant may reoffend and therefore pose a risk to the safety of children, then an order and declaration of s 9(4) cannot be made."

His Honour said this because he was of the view that Parliament could not have intended to set up a statutory right to make an application if the only people who could make the application were, because of their previous convictions for a serious sexual offence, denied any ability to obtain an order because they were by definition some risk, see [101]. His Honour examined the Second Reading Speech in the Lower House that the purpose of the screening related policies and procedures were to reduce unacceptable risks of people working with children. Furthermore, in the Legislative Council the Attorney-General had said that the object of the series of Bills, including the Bill for the present Act and the Commission for Children and Young People Act was "to achieve a balance between protecting employees and protecting children from abuse. It is important that we protect reasonable civil liberties." His Honour also referred to the fact that the Wood Royal Commission from which the legislation had its genesis referred to an "unacceptable risk certificate".

22 His Honour then referred to s 34 of the Commission for Children and Young People Act which is part of the employment screening provisions and which speaks in terms of employment screening having as its purpose "An assessment of the risk to children involved ... arising from anything disclosed by such a check, having regard to all the circumstances of the case." His Honour thus said that what 9(4) was focused on was "not a mere theoretical or possible risk arising from the fact of a previous conviction, but it is a reference to an unacceptable risk, a real risk, a likelihood of harm or a recognisable potential having regard to the need to jointly protect children and employees and to preserve reasonable civil rights." [104]

23 His Honour then went on to say that "It might well be that by the imposition of conditions under s 9(9), the operation of the Act is not to apply to a prohibited person so long as that person undertakes a particular type of employment" [105].

24 His Honour concluded that the applicant bore the onus of establishing that he was not a risk and that was "to a high standard" [130]. However, he rejected the idea that there was a two-stage procedure, the applicant first establishing that he was not a risk to children, and if he overcomes that threshold, whether or not the Tribunal was prepared to exercise its discretion in his favour. He also rejected the submission that it was not permissible to impose conditions in order to lift the applicant over the threshold of risk. His Honour said that given that the legislation takes away a fundamental human right to work, it is very unlikely that the legislature intended to place additional barriers in the way of an applicant other than the ultimate and understandable requirement to meet the test set out in 9(4). He virtually said that the construction urged on the Industrial Commission by the present plaintiff involved an applicant having to face "artificial barriers constructed by a convoluted approach to statutory construction". The purpose of the Act was not to impose additional punishment on a person, but to eliminate possible risks "That purpose is not achieved by adopting an approach to statutory construction which places unwarranted barriers in the way of an applicant additional to those found in the combination of s 9(4) and s 9(5)." [96]

25 Finally, his Honour said that it should be noted that the power to impose conditions in sub-section (9) applies both at the stage of making an interim stay order under sub-section (6) as well as the making of a final order which suggests that conditions have a more important and wider role than suggested by the present plaintiff.

26 Mr Singleton, respectfully as he could, submitted that the decision of Haylen J was simply wrong and should not be followed.

27 I should now deal with the decision of Deputy President Hennessy. With great respect to the learned Deputy President, her judgment contains errors and inconsistencies, but some of these cancel each other out. The decision was made on 6 June 2001 so that the Deputy President did not have access to **R's case**.

28 The Deputy President found that the onus was on the present plaintiff to show that the applicant was a risk to children. That is clearly wrong. The onus is on the applicant on the **Briginshaw** standard to show that he is not a risk to children. However, although the Deputy President found that that was the test she had to apply, she came to the conclusion that on the **Briginshaw** standard, the plaintiff had established that the respondent was a risk to children. However, in doing so she applied the test that a risk, however minimal, was a risk within the meaning of s 9(4).

29 The Deputy President spent some considerable time in her judgment in assessing whether s 9(4) constituted a jurisdictional fact or condition precedent to the exercise of the Tribunal's discretion. She analysed **Enfield Corp v Development Assessment Commission** [2000] HCA 5; (2000) 199 CLR 135 and **Project Blue Sky v Australian**

Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 and came to the view that s 9(4) did not constitute a jurisdictional fact but was a matter which is incidental to the exercise of the Tribunal's discretion. Part of her reasoning was that otherwise s 9(9) was otiose.

30 As I have said, Mr Singleton criticises this view, but it is consistent with the view reached by Haylen J.

31 In this background it seems to me I must address a series of questions which I will set out shortly. However, before I do so I should state one other matter which is a matter of concern.

32 In modern litigation it is axiomatic that expert evidence should be independent and the expert should virtually be the Court's expert to assist the Court in reaching the truth. In the present case, the Tribunal heard evidence from a Ms Howell who appears to be a psychologist closely linked to the plaintiff. Her exact relationship to the plaintiff does not appear. Ms Howell wrote three reports. Her report was changed on three occasions. Counsel for V put to Ms Howell that there were three reasons for that: (a) she was incompetent; (b) she changed her report to assist the plaintiff's case in the hope that she would obtain ongoing work from the plaintiff; and (c) that she was manipulated into substituting her original conclusion for a totally inconsistent conclusion.

33 The Deputy President said that she accepted that Ms Howell was telling the truth when she gave evidence about the reasons for changing her report and that she did not change her report because she was manipulated or because she wanted to please the Commission in order to obtain more work.

34 This is a finding of fact with which I am not asked to interfere, nor could I even if I were asked to interfere. Nor do I know the facts and circumstances in which V's counsel alleged that the witness had been manipulated. However, I should take the opportunity of saying that the modern approach to expert evidence is that the expert should be beyond criticism of bias. If an applicant sees a psychologist who is paid for by the Commission then it is quite understandable that (as is the situation in the present case) the applicant feels that he is denied justice when an initial favourable report to him is amended to an unfavourable report with no further input from him but with some apparent input from officers of the plaintiff.

35 I agree with Campbell J in **Kirch Communications Pty Ltd v Gene Engineering Pty Ltd** [2002] NSWSC 485 that even the failure to comply with Part 36 Rule 13C of the

Supreme Court Rules is not a ground for rejecting so-called expert evidence. However, the Court's stand on ensuring as much as it can that expert evidence is as free from suspicion as possible must be backed up by the profession.

36 I now turn to the questions that need to be addressed. These are:

(1) Is the right to work of any, and if so what, significance, when construing s 9 of the Child Protection (Prohibited Employment) Act 1998?

(2) What is the meaning of "risk" in s 9(4) of that Act?

(3) Does s 9(4) of the Act impose a two-tier decision-making process on the Tribunal?

(4) What is the significance of s 9(9) of the Act?

(5) What orders should be made in the instant case?

I will deal with each of these matters in turn.

37 (1) I have stated this question first because it seems to me that its answer may provide a clue to the general approach that one must take to the section.

38 As I have already noted, Haylen J in **R**, placed considerable emphasis on the right to work. In addition to his reference to the fundamental nature of the right and its protection by United Nations protocols, his Honour also drew attention to the fact that there is a dichotomy between situations where the prohibited person may lose his or her job because of the statute and other situations. His Honour says that this can only be because there is a balancing exercise to be carried out an assessment of risk to children on the one hand and the right to work on the other.

39 The present case does not deal with a person in paid employment so that the direct consideration of the right to work does not enter into the case. However, his Honour's point still remains, why would the Industrial Commission be given jurisdiction to deal with an application under s 9 of the Act unless it involved some assessment of the right to work over the risk to children?

40 I cannot see any reason to gainsay his Honour's thought processes. Moreover, what his Honour says is reinforced by reference to the Minister's Second Reading Speeches about acceptable risks and that there must be a balancing of protecting employees, protecting children from abuse, and protecting reasonable civil liberties.

41 It follows that when approaching the construction of s 9 one must not approach the matter on the basis that the sole criterion is to protect children from any possibility of abuse from a person who has been convicted of a serious sex offence.

42 (2) It almost follows, from what I have just said, that one does not define risk as meaning minimal risk. One would in any case as Mr Singleton has submitted, exclude fanciful or theoretical risks, but what one is looking for is whether, in all the circumstances, there is a real and appreciable risk in the sense of a risk that is greater than the risk of any adult preying on a child. One, however, must link the word "risk" with the words that follow, namely, "to the safety of children". The approach of the plaintiff is to say that children must be read as children generally, and if there is a risk to a section of children which is constituted by a large number of children, then there is a risk to children generally. So that, if in the present case it be said that Mr V is a risk to female teenage children, then he is a risk to children generally.

43 I very much wonder whether that is a proper construction of the Act. If it is to be read so as to preserve a balancing exercise, I would have thought a more balanced view of the section is a risk to the safety of children bearing in mind all the circumstances in which the prohibited person is likely to be employed. If a person is only going to be employed amongst boy children, then the fact that he might be a risk to girl children may be quite irrelevant.

44 As against this, there is the fact that under the section a prohibited person is either declared to be a person to whom the Act does not apply, or else no declaration is made. The answer which Ms Dudhee gives to this is that the power under s 9(9) can be brought into play. That is, for instance, a declaration can be made subject, for instance to the condition that the declaration will cease to have effect if the person changes his or her current employment or if he or she commences to work with different types of children.

45 (3) I think the answer to this question is Yes and No. There is a two-tier decision-making process in the sense that the Tribunal making the decision must have two foci. Dealing with these foci in no particular order, one focus is the serious sex offence and its circumstances, the second is the current danger, if any, posed by the applicant to children. Sub-section (5) deals mainly with the first focus, that is, that the Tribunal must evaluate the seriousness of the offences taking into account the age of the applicant when the offences were committed, the age of the "victim" at the time and the difference in ages. The second involves the assessment of the applicant's character now which includes the seriousness of the prohibited person's total criminal record, a matter mentioned by (5)(e) and any other matter which the Tribunal considers relevant. Sub-section (5) then deals partly with one focus and partly with the other. Although the Tribunal has to focus its attention on (a) the original crime; and (b) the applicant's current character, all these matters must come together when the Tribunal is making a decision as to whether to exempt the person from the effect of the Act. The decision is then made in the light of all these matters as to whether the person does or does not pose a risk to the safety of children. If the person establishes that he or she does not pose a risk to the safety of children, then the Tribunal has a discretion as to whether or not it will make an order. In view of the right to work, however, that discretion would ordinarily be exercised in favour of an applicant unless there was a good reason not to so exercise it.

46 (4) Again I cannot see the warrant for limiting the power to make orders subject to conditions. It is right to observe, as it has been observed in the Industrial Commission, that conditional orders apply to any order made under the section, including applications to stay. Indeed, sub-sections (4) and (5) also apply to stay applications. It is almost reading the power to make orders subject to conditions out of the Act to say that one cannot by imposing conditions on a declaration, make an applicant who may pose some risk to children into an applicant who does not pose a real acceptable risk to children. When one considers the purpose of the Act and the balancing exercise required, such a submission should not be acceded to.

47 (5) It follows that although there are errors and inconsistencies in the judgment of the Deputy President, she reached the right result and accordingly the appeal should be dismissed.

48 So far as costs are concerned, the normal order is that when an appeal is dismissed, the unsuccessful appellant pays the successful respondent's costs. That

provisional view is reinforced in the instant case by two factors, (a) a principal purpose of this appeal was to obtain a definitive construction of the Act for the purpose of the plaintiff Commission; and (b) the points had already been decided against the Commission on almost identical arguments in **R** decided on 16 May 2002.

49 I fully accept what Mr Singleton says that he personally was unaware of the decision of **Re R** when the oral argument took place and only obtained it from the Industrial Commission's website shortly after the oral argument. He dutifully alerted me immediately to its existence and made submissions that it was distinguishable or wrong.

50 However, the plaintiff Commission must have known of the existence of the judgment. It had a solicitor from the Crown Solicitor's Office appearing for it and must have been made aware of this significant judgment, yet it proceeded to instruct counsel to run the appeal without alerting him to the existence of the judgment.

51 It may be that I or my staff would have found the judgment in any event, but it might well be said that but for Mr Singleton keeping to the time-honoured ethical rules of the bar in alerting me to all decisions pro and con his submissions, that the decision in **R** came to the Court's attention. I am extremely displeased that the Commission, which after all, is a governmental authority which is encouraged to be fair, sought to withhold it from me. Accordingly the plaintiff Commission should pay the respondent's costs of the appeal.

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