

32/09; [2009] VSC 613

SUPREME COURT OF VICTORIA

DPP v ANDERSON

Pagone J

28 October 2009

CRIMINAL LAW – PERSON ACTING AS A CROWD CONTROLLER – PROHIBITION PLACED UPON A PERSON WHO EMPLOYS OR ENGAGES A CROWD CONTROLLER – PERSON CHARGED WITH BREACH OF ACT – LICENSED CROWD CONTROLLER UNABLE TO GIVE EVIDENCE – MEANING OF "EMPLOY OR ENGAGE" – CONTRACT FOR SERVICE – WHETHER ACCUSED EMPLOYED OR ENGAGED CROWD CONTROLLER – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: PRIVATE SECURITY ACT 2004 (VIC), SS91H(3), 131(2).

A. was charged with a breach of s131(2) of the *Private Security Act 2004* ('Act') in that he had employed or engaged a person to act as a crowd controller. At the hearing, the Magistrate was not satisfied that there was a contract of service or services between the A. and the crowd controller. The Magistrate held that there was no evidence of an employment agreement, that the word "engage" meant to "engage in services" and upheld a 'no case' submission. Upon appeal—

HELD: Appeal dismissed.

1. **The primary task of statutory construction is to determine and apply the intention of the legislature when enacting the relevant provisions. That task is not to be undertaken by taking each word in the statute, finding dictionary meanings of the words and applying the dictionary meanings to arrive at a conclusion. The task is, rather, to discern from the possible meanings a word may carry that meaning which Parliament intended when using the chosen words in the particular context in which they are found.**

2. **The prohibition contained in s131(2) of the Act is not directed against the person carrying out the activities of crowd controller but rather upon another person, namely, the person who might be employing or engaging the crowd controller. The section is not sufficiently wide enough to capture all situations where a manager or owner of the premises permits a person to act as a crowd controller.**

3. **The word "engage" is plainly directed to a contract for services so as to ensure that the prohibition extends to prevent a person from engaging another either as an employee or as an independent contractor. As used in this provision, the word "engage" is intended to prevent a person being retained as an independent contractor.**

PAGONE J:

1. The Director of Public Prosecutions appeals the decision of a magistrate on the meaning of the word "engage" in s131(2) of the *Private Security Act 2004* (Vic) ("the Act"). On 9 June 2009 the magistrate dealt with a series of charges against Philip Anderson including a charge under s131(2) of the Act that he had employed or engaged a Nicholas Va'alepu as a crowd controller at the Bond Lounge Bar on 19 November 2007.

2. The learned magistrate decided on the facts that he was not satisfied that Mr Anderson had breached s131(2). In this regard the learned magistrate said:

From the admitted facts, and from the evidence of Ms Martin, I can be satisfied that Mr Va'alepu was not paid by herself or, to her knowledge, by the defendant, and that there was no contract of service or for services between the defendant and Mr Va'alepu. The licensed crowd controller, Daniel Rodgers, is deceased and, of course, unable to give evidence. Had he done so, it may have been different. He may have purported to act as agent for Mr Anderson, but, at this point in time, that's sheer speculation. What I can be satisfied about is that the defendant suffered or permitted Mr Va'alepu to carry out some of the activities that a crowd controller would carry out. However, on the evidence before me it's not open to draw the inference that there was some form of implied agreement.

I have dealt with the terms "employ" and "retain," and I should add that "employ," where appearing, both in section 131(2) and in the definition of crowd controller, ought to have the same meaning. Finally, I turn to the word "engage" as it appears in section 132(2). Again, to my knowledge and from

my research, I don't believe that section has been judicially considered in any way, but taking into account what I have said about the law of employment and the context of the legislation, I am satisfied that "engage" means nothing more than "engage in services," and as I said, there is no evidence that there was such an employment agreement between the defendant and Mr Va'alepu, and, in those circumstances, there is no case to answer with respect to charge number 1.

It is this conclusion, with the construction given by the learned magistrate to the word "engage", which the appellant appeals from in this proceeding.

3. Section 131(2) of the Act provides:

A person must not employ or engage another person to carry on a class A security activity unless the person reasonably believes that the other person holds a private security individual operator licence that authorises the carrying on of that activity.

A "class A security activity" is defined in s3 of the Act to include, relevantly, acting as a crowd controller. "Crowd controller" is itself defined in the Act to mean:

crowd controller means a person who is employed or retained principally to maintain order at any public place by doing all or any of the following—
(a) screening entry into; or
(b) monitoring or controlling behaviour in; or
(c) removing any person from; or
(d) otherwise maintaining order in—
any such place, unless that person is doing nothing more than securing or checking that persons allowed admission—
(e) have paid for admission; or
(f) have invitations or passes allowing for admission;

It is plain from the definition of "crowd controller" that for a person to come within its meaning the person, relevantly in this case Mr Va'alepu, must be a person who was either "employed or retained" by the person upon whom the prohibition is placed (in this case Mr Anderson). Nonetheless, the appellant maintained that the primary prohibition in s131(2) by using the word "engage" extends the prohibition to a person who is "permitted" to act as a crowd controller.

4. The primary task of statutory construction is to determine and apply the intention of the legislature when enacting the relevant provisions.^[1] That task is not to be undertaken by taking each word in the statute, finding dictionary meanings of the words and applying the dictionary meanings to arrive at a conclusion.^[2] The task is, rather, to discern from the possible meanings a word may carry that meaning which Parliament intended when using the chosen words in the particular context in which they are found.

5. The purpose of the Act is stated in s1 to include the regulation of the private security industry for the purpose of ensuring public safety and peace. In the second reading speech enacting the legislation, the Minister referred to the then tragic death of David Hookes as highlighting a need for what the Minister referred to as "a robust regulatory regime". He went on to state that the legislation would ensure that persons entering the security industry would be of an appropriate character with applicants being required to have a licence to meet competency criteria. The provision of services without a licence or registration was said by the Minister to be made illegal^[3] by the then proposed legislation. From these observations the appellant contended that a principal intention of the Act was to ensure that people who were not trained or registered as crowd controllers should not carry out the duties of a crowd controller. The appellant also contended that these requirements were for the protection of the safety of the community and should therefore be characterised as remedial or beneficial. I put to one side for present purposes the characterisation of the provisions imposing a penalty as remedial or beneficial, but readily accept that the prohibition in s131(2) may be seen as being for the protection of the safety of the community. A relevant question, however, is how that safety of the community was effected through the provisions in the Act.

6. It is plain that s131(2) does not say that a person must not engage in the activities of a crowd controller; that is, the prohibition is not directed against the person carrying out the activities of crowd controller. The prohibition is placed, rather, upon another person, namely, upon

the person who might be employing or engaging the crowd controller rather than upon the crowd controller. Placing the prohibition upon the person employing or engaging the crowd controller is consistent with the Minister's stated objective of ensuring "that persons entering the security industry" be of an appropriate character; that is, that the target of the provision operates upon the commercial activities of those people securing the services of others in the "security industry". The placing of the prohibition upon the person acquiring the service sets as its target the people paying for, and therefore economically supporting, an industry.

7. The primary target of the prohibition in s131(2) is not as broad as the appellant contended. The appellant's submission was that:

... to give effect to the purpose of the legislation the word ["engage"] must be given a meaning wider than to employ someone on a contract. It must be sufficiently wide to capture all situations where a manager or owner of [the] premises permits a person to act as crowd controller.

I am unable to accept this submission. The purpose of the legislation is not expressed as broadly as the submission would have it. The section could simply have imposed an obligation upon a person acting as a crowd controller but it does not do so. Rather (as I have said) it focuses its target upon the regulation of an industry by requiring that those who would "employ or engage" a crowd controller be limited in doing so from those persons who are licensed. The industry is thereby being regulated by preventing economic reward to persons other than those who are licensed. The specific prohibition is against employing or engaging a non-licensed person. The activity that is prohibited is that of employing or engaging and, in that context, "engage" is plainly directed to a contract for services so as to ensure that the prohibition extends to prevent a person from engaging another either as an employee or as an independent contractor. The meaning of "engage" may also be seen by its place in the term "employ or engage" as intending to capture both employees (a contract of service) and independent contractors (a contract for service). The word "engage" may well have other meanings in different circumstances^[4] but as used in this provision it is intended to prevent a person being retained as an independent contractor.

8. Accordingly, I will dismiss the appeal with costs to be taxed unless otherwise agreed between the parties.

[1] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 278-284; *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214, 234; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257 (Dawson J); William Blackstone, *Commentaries on the Laws of England* (3rd ed, 1765, Clarendon Press) 60-61.

[2] *MLC Limited v Commissioner of Taxation* [2002] FCA 1491; (2002) 126 FCR 37, [31]; 196 ALR 502; 51 ATR 283 (Hill J).

[3] Legislative Assembly, 22 April 2004, 787 (Andre Haermeyer).

[4] See, for example, *Benninga (Mitcham) Limited v Bijstra* [1946] KB 58, 62 (MacKinnon LJ); *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266, 268-9 (Jenkins LJ).

APPEARANCES: For the appellant DPP: Mr CJ Ryan SC, counsel. Office of Public Prosecutions. For the respondent Anderson: Mr BJ Thompson, counsel. PR Rule, solicitors.