25/99; [1999] VSC 516

SUPREME COURT OF VICTORIA

PETTET v READISKILL PTY LTD & ORS

Beach J

30 November 1999

CIVIL PROCEEDINGS – CONTRACT OF EMPLOYMENT – TERMS AND CONDITIONS OF – EMPLOYEE FAILED TO COMPLY WITH DIRECTION GIVEN BY EMPLOYER – CONTRACT TERMINATED AND EMPLOYEE DISMISSED – COMPLAINT ISSUED FOR DAMAGES FOR WRONGFUL DISMISSAL – COMPLAINT DISMISSED BY MAGISTRATE – APPEAL TO SUPREME COURT – FINDING OF SUPREME COURT THAT MAGISTRATE FAILED TO MAKE FINDING OF FACT WHETHER REFUSAL TO COMPLY WITH DIRECTION AMOUNTED TO A REPUDIATION OF THE CONTRACT SUFFICIENT TO JUSTIFY TERMINATION OF THE CONTRACT – REMITTED TO MAGISTRATE TO MAKE FINDING OF FACT – FINDING MADE AGAINST EMPLOYEE – WHETHER OPEN TO MAGISTRATE TO MAKE SUCH A FINDING – ORDER BY MAGISTRATE THAT EACH PARTY BEAR OWN COSTS – ORDER SUBSEQUENTLY AMENDED TO INDICATE THAT SUCH ORDER APPLY ONLY TO THE SUBSEQUENT HEARING – WHETHER MAGISTRATE IN ERROR IN AMENDING THE ORDER.

P. was employed by RP/L as an electrician. One of the terms of P's employment was that P. was required to perform all duties and functions as directed. P's services were terminated by RP/L when he refused to comply with a direction that he use a time clock to clock on and off each day. Subsequently, P. issued a complaint claiming damages for wrongful dismissal. The magistrate dismissed the claim. This order was later set aside by a Judge of the Supreme Court and remitted to the magistrate to make a finding of fact whether P's refusal to use the time clock amounted to a repudiation of his contract of employment thereby entitling the employer to terminate the contract. On the rehearing, the magistrate made the finding of fact against P. On the question of costs, the magistrate said that the parties should bear their own costs. Subsequently, the magistrate amended the order whereby P. was ordered to pay the costs of the original hearing and each party to bear their own costs for the rehearing. Upon application for the grant of *certiorari* to quash—

HELD: Originating motion dismissed.
1. The magistrate was not in error in finding that P.'s refusal to use the time clock amounted to repudiation of his contract of employment entitling his employer to terminate the contract. It was a term of the contract that P. perform all functions as directed. There was no doubt that such a direction was given and the magistrate was not in error in determining that it was not an unreasonable direction.

2. It is always within the inherent jurisdiction of the Magistrates' Court to amend an order made by the Court which contains an obvious error. It was clear from the surrounding circumstances that the reference by the magistrate to the parties bearing their own costs was a reference to the costs of the rehearing and not the costs of the original hearing. Accordingly, there was no basis on which *certiorari* could be granted to bring up the Court's order and quash it.

BEACH J:

1. The background to the present proceeding before the Court may be summarised as follows:

2. The plaintiff brought a proceeding against the first-named defendant Readiskill LMT Mildura a subsidiary of Readiskill Pty Ltd in the Magistrates' Court at Robinvale claiming damages for wrongful dismissal in the sum of $15,058.90. The plaintiff was employed by Readiskill to work as an A Grade electrician for a company called Angas Park Fruit Company Pty Ltd for a period of six months commencing on 2 February 1998.

3. The plaintiff and Readiskill executed a document entitled "terms of an appointment", the relevant provisions of which read:

> "2. Your terms and conditions of employment will be in accordance with this contract and attached letter of confirmation.
>
> 4. This contract of employment may be terminated at the conclusion of the first six months by either

> you or Readiskill by the giving of one week's notice.
>
> 5. You will be required to perform all duties and functions as directed by our client, the Angas Park Fruit Company.
>
> 9. Your initial assignment with Angas Park Fruit Company is for a period of six months. This may be extended by mutual agreement. This contract may be terminated during this period for negligence dishonesty or unsatisfactory work performance on your behalf."

The attached letter of confirmation referred to in the terms of appointment contain the following paragraph:

> "At the conclusion of each week you should complete a time sheet in the book provided detailing the hours worked and have the time sheet authorized by the client or an authorized client employee. Once signed you issue the yellow copy to the client and forward the green faxed copy to this office by Monday a.m. of each week."

4. Readiskill terminated the plaintiff's services because of his refusal to comply with a direction that he use a time clock to clock on and off each day. The dismissal took place on 8 April 1998 which, of course, was still within the six month term of employment.

5. On 3 December 1998 the magistrate found in favour of Readiskill, dismissed the plaintiff's complaint and ordered that the plaintiff pay costs of $3,438 to Readiskill. In doing so the magistrate said:

> "One of the clauses in the term of appointment was that Pettet be required to perform all duties and functions as directed by Angas Park. Pettet was aware that the location of his endeavours was to be in Robinvale with Angas Park. I am satisfied that this requirement was reasonable and equitable and did not contradict any of the documents which form the contract between Readiskill and Pettet. I believe that it is an appropriate requirement placed on Pettet to enable Angas Park on perform its business effectively. By his failure to comply with the requirement to use the time cards Pettet failed to comply with a direction effecting the requirement placed upon him by the terms of appointment in that he did not perform all duties and functions as directed by Angas Park. I am satisfied that by this refusal it was open to Readiskill to terminate the contract and to end the written employment of Pettet."

6. The appellant appealed from the orders of the Magistrates' Court pursuant to the provisions of s109 of the *Magistrates' Court Act* 1989. By order of 28 January 1999 Master Wheeler ordered that the questions of law shown by the appellant to be raised on the appeal were:

> "(a): Whether by virtue of clause nine of the term of employment (Exhibit B) or otherwise, the respondent was entitled to terminate the appellants employment as being 'unsatisfactory work performance' where there was a refusal to clock on and off by means of a time clock;
>
> (b): If yes to question one, what notice was required to be given."

7. The appeal came before Balmford J on 10 and 11 May 1999.

8. On 26 May 1999 Her Honour delivered judgment in the matter. Her Honour held in doing so that the appeal should be decided on the basis that the questions originally formulated by Master Wheeler be read as though expressed in the following terms:

> "(a): Whether the respondent was entitled to terminate the appellant's employment because the appellant did not pursuant to clause five of the terms of employment perform the duties and functions he was directed to by the Angas Park Fruit Company in that he refused to clock on and off by means of a time clock.
>
> (b): If yes to A, what notice was required to be given."

In her reasons for judgment Balmford J stated:

> "17. The question then arises as to whether the action of the appellant in refusing to use the time clock constitutes misconduct sufficient to amount to a repudiation of the contract, and thus to entitle the respondent to terminate it. That is a question of fact, as was found by the English Court of Appeal in

Woods v WM Car Services (Peterborough) Ltd [1982] ICR 963. It is a question which was not adverted to by the magistrate. Mr Wotherspoon, for the respondent, submitted there was evidence before the magistrate upon which he could find that the conduct of the appellant did amount to a repudiation. However, there is no indication in his reasons that he turned his mind to that question and it is not for this Court to speculate as to what finding he would have made had he done so.

18. Mr Wotherspoon also submitted in reliance upon *Pepper v Webb* [1969] 2 All ER 216; [1969] 1 WLR 514, a decision of the English Court of Appeal, and *Rosich v Atlas Group Pty Ltd* (1997) 77 IR 327, a decision of Finn J in the Federal Court, that the magistrate was entitled to take previous misconduct of the appellant into account in coming to his conclusion. However, I note that *Pepper v Webb* was an *ex tempore* decision, that only two authorities were cited before the Court and none in the judgment and that the decision was disapproved by Lord Denning MR in *Woods v WM Car Services (Peterborough) Ltd.* Finn J in *Rosich* was concerned with whether to 'desegregate the component parts of the composite event', which is not the case here. In any case, there is no suggestion in the magistrate's conclusion that he did not take into account any matter other than the refusal to use the time clock.

19. For the reasons given the answer to question (a) set out in paragraph 5 will be: Yes, if the appellant's conduct in so refusing amounted to a repudiation of the contract between himself and the respondent. Neither party made any submissions as to question (b) and I must assume it has been abandoned.

20. There will be an order that the decision of the magistrate be set aside and the matter remitted to the Magistrates' Court for rehearing in accordance with the finding of the Court, if possible, by the same magistrate, with or without the hearing of further evidence. The parties may wish to make submissions as to costs."

9. In due course the matter was referred back to the same magistrate and came before him on 15 September 1999. The magistrate did not hear any further evidence in the case but allowed the parties to make further submissions to him. At the conclusion of the hearing that day the magistrate made the following determination:

"Alright in that case Mr Pettet in respect of the question that I raised earlier as to whether or not your conduct, your actions in refusing to use the time clock constituted misconduct sufficient to amount to a repudiation of the contract and thus entitle the respondent, that is the defendant, to terminate it, I find that on the evidence before me that your refusing to use the time clock did so amount to misconduct that then amounted to a repudiation of the contract and that the defendant was entitled to terminate the contract. On that basis the claim is dismissed."

There was then the following discussion as to costs.

Defendant's Counsel: "Your Worship, that raises one other matter, the questions of costs. I would have thought that it would be appropriate that a certificate be granted to the Appeals Costs Fund but I am perhaps looking to your direction there." Magistrate: "Well perhaps I think it is a matter that all the parties in the circumstances can bear their own costs." Defendant counsel: "Sorry, Your Worship, I didn't hear." Magistrate: "I said I think on the basis of what has transpired it is probably better that all the parties bore their own costs."

10. The entry made in the register of the Magistrates' Court between that date and 20 September 1999 reads:

"Orders: Ian Edward Pettet v. Readiskill LMT Mildura. Defence to claim. Claim order: Dismissed. Other order: No order as to costs - each party to bear own costs."

11. I selected the date of 20 September 1999 because it is the date upon which that copy of the order issued from the Robinvale Magistrates' Court. It is to be noted that the extract is not a certified extract of the register.

12. On 22 September 1999 the defendant's solicitors wrote to the Registrar. The letter reads:

"Registrar, Magistrates' Court of Victoria, Deakin Avenue, Mildura. Re: Ian Edward Pettet v. Readiskill LMT Mildura Court no.L00960333. I refer to the Notice of Order made and to my discussion with you yesterday. I confirm that in my view the Notice does not accurately reflect the order that was made by His Worship on the 15 September 1999. The appropriate orders should be: 1. The Defendant was entitled to determine the plaintiff's employment because he did not, pursuant to clause 5 of the

> Terms of Employment perform the duties and functions he was directed by the Angas Park Fruit Company in that he refused to clock on by means of a time clock. 2. The order made 3 December 1999, be confirmed, namely: (a) The plaintiff's claim be dismissed. (b) The plaintiff pay the defendant's costs of $3,438. 3. That each party bear their own costs of today's proceedings. Please arrange for an amended Notice to issue. Yours faithfully."

13. That letter was followed by a further letter of 5 October 1999 which reads:

> "Re Ian Edward Pettet v. Readiskill LMT Mildura, Court no.L00960333. I refer to my letter of 22 September 1999 and to my discussion with you on 4 October 1999. I spoke with Mr Leo Foster at the Court at Geelong yesterday and he advised me that His Worship had indicated that the content of my letter accurately reflected the orders that were made and that he proposed to arrange for the Court records to be amended accordingly. Please advise whether or not this has yet been done. I am concerned that as matters stand the Court record is not accurate."

14. It would appear that on that day the register of the Robinvale Magistrates' Court was amended to read:

> "Orders. Ian Edward Pettet v Readiskill LMT Mildura. Defence to claim. Claim order: Dismissed. Other order: No order as to costs - each party to bear own costs. Other order: Order as to costs of $3,530 fixed being costs fixed on original hearing and amended as per 'slip rule' order that each party to bear own costs is applicable only to hearing on 15.9.99. Cost order: Ian E. Pettet to pay Readiskill LMT Mildura costs $3,438."

15. It is to be noted that that copy of the order is, in fact, a certified extract from the register.

16. On 19 October 1999 the plaintiff filed an originating motion in the Court seeking an order in the way of *certiorari* quashing the orders of the Magistrates' Court. The plaintiff's principal ground for relief appear in paragraphs one and two of his originating motion which read:

> "1. The plaintiff seeks *certiorari* that there was error of law in the face of the record, in that the learned Magistrate referred to his reasons for decision of 3 December 1998 in contravention of an order of this Honourable Court duly setting said decision aside for the purpose of rehearing after successful appeal.
>
> 2. The plaintiff seeks *certiorari* as to the order of the second defendant" (who I should add is the Magistrates' Court of Victoria at Mildura) "decided on the 15 September 1999 to affirm, as the only proper order made as to costs, as that which appears on the record of the rehearing as recorded on the Court tape recording machinery. The order referred to being that which was perfected prior to 20 September 1999 and subsequently provided by way of a certificate for the Supreme Court dated 23 September 1999 and not any other order subsequently issued.".

17. Having considered all the material placed before me in relation to this matter I can discern no error of law insofar as the magistrate's finding that the plaintiff's refusal to use the time clock amounted to a repudiation of his contract of employment entitling the first defendant to terminate the contract. And in doing so I consider the magistrate was perfectly entitled to have regard to his earlier findings in the matter.

18. This is not a case where the magistrate was required to review a finding of fact already made by him. It was the view of Balmford J that in making his original findings of fact the magistrate had overlooked making a finding of fact in relation to one aspect of the case. It was for that reason that the matter was referred back to the magistrate to enable him to make the appropriate finding of fact. That is what the magistrate did and, in my view, he made no error in the matter.

19. The plaintiff made further complaints concerning other findings of fact made by the magistrate. I content myself by saying that I am not satisfied that the magistrate made any erroneous findings of fact, certainly no finding of fact of the magistrate could be said to constitute an error of law on the face of the record.

20. Perhaps the gravamen of the plaintiff's complaint in this case can be summed up in his own words when he said to me on more than one occasion during the course of discussion that it was not within the scope of his contract that he be required to use a time clock to clock on and clock off. True it is the written documentation does not impose such a requirement upon him,

but in my view it was open to the magistrate to find that his refusal to do so in the circumstances did amount to a repudiation of his contract sufficient to justify termination of the contract.

21. When all is said and done, it was a term of his agreement with the first-named defendant that he perform all functions as directed by the Angas Park Fruit Company and there is no doubt that such a direction was given and I do not consider the magistrate made any error in determining that it was not an unreasonable direction.

22. The second matter of which the plaintiff makes complaint, of course, is the order for costs that was made against him in relation to the initial hearing before the Magistrates' Court. He argues that having pronounced on 5 September 1999 that the parties should bear their own costs of the proceeding the magistrate was then *functus officio* and could not re-visit the matter. In support of that proposition the plaintiff relied upon the decision of O'Bryan J in *Mansell v Keating* (unreported) 5 May 1995. In his submissions in response to those of the plaintiff, counsel for the first-named defendant drew attention to the difference between an order entered in the register by the Registrar of the Magistrates' Court on the one hand and an authenticated order of the Court on the other.

23. Section 18 of the *Magistrates' Court Act* deals with the matter. The relevant sub-sections of which read:

> "18(1) The principal registrar must cause a register to be kept of all the orders of the Court and of such other matters as are directed by this Act or the Rules to be entered in the register.
>
> (2) An order made by the Court must be authenticated by the person who constituted the Court."

24. What is said is that the first entry in the register, a copy of which is dated 20 September 1999, is simply a copy of what had been fed into the register from the computer and was not a copy of an authenticated Order of the Court. As against that, the copy of the Order produced by the Court on 5 October 1999 was a certified copy of the relevant entry in the register and it should be inferred, therefore, that it was a certified copy of the Order which by then had been authenticated.

25. It is further argued on behalf of the first defendant that the Magistrates' Court always has an inherent power to correct its own orders. In that regard counsel placed reliance upon *R v De Zylva* (1988) 38 A Crim R 207; *Kelly v Von Einem* (1995) 84 A Crim R 37, and the decision of the High Court in *L Shaddock & Associates Pty Ltd and Anor v Council of City of Parramatta* [1982] HCA 59; (1982) 151 CLR 590; 43 ALR 473; (1982) 56 ALJR 875.

26. Counsel's contention in this case was there had merely been an error made in the preparation of the Court register following the hearing on 15 September and that that record was corrected by the magistrate himself prior to the issue of the certified extract from the register on 5 October 1999.

27. The view I take of the matter is that it is always within the inherent jurisdiction of a Magistrates' Court to amend an order made by the Court which contains an obvious error.

28. In the present case it is clear from the surrounding circumstances that when the magistrate was talking about the costs of the proceeding on 15 September he was talking about the costs of the hearing before him that day and not the costs of the hearing on 3 December 1998. I can find no basis, therefore, on which certiorari can be granted in this case, bringing up the order of the Magistrates' Court to this Court and quashing it, and in that situation the originating motion must be dismissed with costs to be taxed including any reserve costs and paid by the plaintiff. (Discussion ensued.)

29. I do not propose to do anything further in the matter.

APPEARANCES: The plaintiff Pettet appeared in person. For the defendants: Mr R Wotherspoon, counsel. D Messenger, solicitor.
