

45/11; [2011] VSC 617

SUPREME COURT OF VICTORIA

FELSTEAD v GATTO

Bell J

29 November 2011

CIVIL PROCEEDINGS – CLAIM FOR UNPAID WAGES – APPLICANT CLAIMED TO BE EMPLOYED AS SECRETARY/TREASURER OF AN INDUSTRIAL ORGANISATION AND THE ELECTED HOLDER OF THAT OFFICE – MAGISTRATE STAYED PROCEEDING ON BASIS THAT A PERSON COULD NOT BE THE EMPLOYED AND ELECTED HOLDER OF THE OFFICE AT THE SAME TIME – APPLICATION FOR JUDICIAL REVIEW OF THAT DECISION – WHETHER MAGISTRATE IN ERROR: SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES 2005 (VIC), O56.

F. was employed as the secretary/treasurer of the Council. When he was elected as Secretary/Treasurer some months later, F.'s employment was not expressly terminated and he continued performing the duties of his employed position. He was paid the wages of that position except for periods which led to the unpaid wages claim in the Magistrates' Court. F. was not precluded from holding both the employed and the elected position. The magistrate decided otherwise and stayed the proceedings. Upon appeal—

HELD: Appeal allowed. Matter remitted to the Magistrates' Court for hearing and determination.

1. The general powers of employment in the rules of the Council (cl 6.3) authorised the employment of a person to perform the duties of a secretary/treasurer where that person was or became the elected secretary/treasurer under those rules. Those powers of employment were amply wide enough to permit an engagement of that kind. There was no basis for imposing some qualification on the interpretation of those powers which would prevent the adoption of that course.

2. Accordingly, the Magistrate erred in deciding otherwise. Under the rules, a person could be both an employed and an elected secretary/treasurer on a parallel basis.

BELL J:

1. In a proceeding issued in the Magistrates' Court of Victoria, Steven Felstead claimed outstanding wages from the Victorian North East and Border Trades and Labour Council. He alleged he had been employed as the secretary/treasurer of the council on and from 9 December 2003. The wages related to periods of that employment in and between 2005 and 2008.

2. Paul Gatto was a member of the executive committee of the council, which was not incorporated. Certain legal problems arise when a proceeding is brought against an unincorporated association, none of which are necessarily irresolvable or need trouble us here.

3. In the proceeding in the Magistrates' Court, Mr Gatto's defence was (among other things) that Mr Felstead was not the employee of the council in the periods concerned. That was because Mr Felstead became the elected secretary/treasurer of the council on 25 February 2004. Accordingly, after that date, Mr Felstead performed the duties of secretary/treasurer as the unpaid holder of that elected office, not as a paid employee.

4. On that material ground, Mr Gatto made an application in the Magistrates' Court for Mr Felstead's proceeding to be struck out or stayed under rr23.01, 23.02 or 23.03 of the *Magistrates' Court (General Civil Procedure) Rules* 2010 (Vic). There were other grounds, but they are not here at issue. The magistrate upheld that application. Pursuant to r23.01, her Honour ordered the proceeding to be stayed and Mr Felstead to pay Mr Gatto's costs.

5. Mr Felstead issued an appeal to this court under s109(1) of the *Magistrates' Court Act* 1989 (Vic) against the magistrate's orders. Mr Gatto claimed the appeal was incompetent because the orders were not final in nature. Under s109(1), only final orders are amenable to appeal. It is unnecessary to determine whether the orders made by the magistrate were final. Under O56 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), Mr Felstead issued a precautionary

application for judicial review. He claimed an order in the nature of *certiorari* setting aside the orders of the magistrate on the basis that her Honour made an error of law on the face of the record. That application can and will be the vehicle for the determination of the substantive issues which are in controversy. I will grant all necessary leave for that application to be issued, including leave under r56.02(3) for it to be issued out of time. I will also order that the materials filed in the appeal are to be treated as filed in the application for judicial review. I will determine the proceeding on that basis. I acknowledge with gratitude Mr Gatto's cooperation in adopting this convenient course and will take it into account on the question of costs.

6. Now to the substantive issues in this proceeding. Mr Felstead contended that the magistrate made an error of law on the face of the record, which record was constituted by her Honour's reasons for decision. The alleged error of law was that Mr Felstead could not be an employee secretary/treasurer and the elected secretary/treasurer of the council at the same time. That, he contended, was the basis of her Honour's decision.

7. In response, Mr Gatto contended that Mr Felstead had characterised the basis of the magistrate's decision too narrowly. In his submission, her Honour decided as a fact that, at the material times, Mr Gatto was performing his functions as the elected secretary/treasurer of the council, not its employee. That, submitted Mr Gatto, was a finding of fact for which there was some evidence and in respect of which there was no error of law.

8. In carefully considered reasons for decision in writing, the magistrate set out the background facts. The application being interlocutory, those facts were quite properly taken at their highest from Mr Felstead's point of view. Her Honour referred to the submissions of the parties and the relevant rules of the council, as specified in its constitution. The critical reasons for granting the stay are to be found in the following paragraphs:

21. The question is whether it is arguable that, after February, 2004 the plaintiff performed the duties of Secretary/Treasurer under a contract of employment in parallel with his election to the office of Secretary/Treasurer. In my view, in light of the authority of *Roughan v Coulson*, the suggestion that the plaintiff upon election had the capacity of both holder of the office of Secretary/Treasurer and that of employee of the Council in the role of Secretary/Treasurer, cannot be sustained and is doomed to failure. I have formed this view in light of the Rules and Constitution of the Council and in particular the scheme of representation of affiliated unions through credentialed representatives, such as the plaintiff and the proscription of the duties and privileges of office upon election to Council under those Rules.

22. It follows therefore, that upon election to office, the Plaintiff is unable to sustain his claim in contract against the Defendant. I find that the proceeding does not, consequent upon my ruling, disclose a cause of action and/or is vexatious in that it cannot be sustained. I do not consider this defect capable of being cured by the provision of particulars. Pursuant to Rule 23.01 I order that the proceeding be stayed.

9. I think it is clear from these passages of her Honour's reasons that she did decide the application for the strike out/stay on the sole ground that Mr Felstead could not be both an employed and an elected secretary/treasurer of the council at the same time. It is true that she made that decision after considering the rules of the council, but her conclusions in that regard were solely conclusions of law involving the interpretation of those rules and were not conclusions of fact involving the particular circumstances of the case. That was the submission which was put by Mr Gatto in support of the strike out/stay application and that was the submission which the magistrate upheld. I regret that I cannot accept her Honour's reasoning on that legal issue.

10. The submissions of the parties and the reasoning of the magistrate assumed the capacity of the council to enter into a legally enforceable contract of employment depended on there being authority in the rules to enter that contract. The parties made the same assumption in their submissions in this court. The assumption may not be entirely correct, but I am prepared to continue in the same vein.

11. In my view, it does not follow from *Roughan v Coulson*,^[1] on which the magistrate relied, that a person cannot be both the holder of an elected office and an employee of an industrial organisation in respect of that office. The decision in that case was based on the rules which were in issue and the particular factual circumstances. The court did not pronounce any principles of

general application which are relevant to the present case. Authorities such as *Percy v Board of National Mission of the Church of Scotland*^[1] demonstrate that a person can be both an employee and an office-holder of an organisation, depending on its rules and the established facts. To the rules of the council and the facts of this case I therefore turn.

12. As correctly described by the magistrate, the constitution of the council made provision for the representation of affiliated unions whose credentialed representatives exclusively have the right to vote at meetings and stand for office (cl 5.3). The executive is comprised of elected officers and must meet monthly (cll 4.2.1, 10.1 and 10.2). The council has the power to hire and employ staff (cl 6.3), among other things.

13. The rules contain provisions relating to the election of officers of the council (cl 11) and their duties (cl 12). Those officers include one secretary/treasurer, whose duties are specified in familiar terms (cl 12.2(a) – (i)). The rules are silent on the question whether a person can at the same time be both an officer of the council and an employee of the council in respect of that office. Nothing in the rules expressly permits it, but neither is it expressly prohibited.

14. In my view, the general powers of employment in the rules of the council (cl 6.3) authorise the employment of a person to perform the duties of a secretary/treasurer where that person is or becomes the elected secretary/treasurer under those rules. Those powers of employment are amply wide enough to permit an engagement of that kind. There is no basis for imposing some qualification on the interpretation of those powers which would prevent the adoption of that course. It may be very convenient for the council to employ an elected secretary/treasurer. The duties may be more than the holder of that office is prepared or can be expected voluntarily to perform. In the proper management of the organisation, it is up to the executive or the council to determine whether to adopt this course. Undoubtedly, the person could not, as an employee, be directed by the council to do anything which was inconsistent with their elected office, but that is not the position here. I respectfully disagree with the magistrate's conclusion in this regard. Under the rules, a person can be both an employed and an elected secretary/treasurer on a parallel basis.

15. On the facts which are to be assumed for present purposes, Mr Felstead was employed as the secretary/treasurer of the council on 9 December 2003 pursuant to contractual arrangements of which there was evidence. When, under the rules, he was elected as the secretary/treasurer on 25 February 2004, Mr Felstead's employment was not expressly terminated. Rather, the matter was not discussed and he simply continued performing the duties of his employed position. He was paid the wages of that position, except for the periods which led to the unpaid wages claim in the Magistrates' Court. On the proper interpretation of the rules, Mr Felstead was not precluded from holding both the employed and the elected position. Whether there was such a contract of employment and whether there were unpaid wages for which Mr Gatto is liable are issues which must be determined in the proceeding. Mr Felstead has established that the magistrate erred in law on the face of the record in deciding otherwise. As he submitted, at least the written reasons of the magistrate constitute the record for these purposes.^[3]

16. Accordingly, there will be orders granting Mr Felstead all necessary leave to issue his application for judicial review, including leave under r56.02(3) of the *Supreme Court (General Civil Procedure) Rules* for that application to be issued out of time. The materials filed in the appeal will be treated as filed in the application for judicial review. The orders of the magistrate dated 21 March 2011 staying the proceeding in the Magistrates' Court and ordering Mr Felstead to pay Mr Gatto's costs will be set aside. There will be orders dismissing Mr Gatto's application in the Magistrates' Court for Mr Felstead's proceeding to be struck out or stayed and for Mr Gatto to pay Mr Felstead's costs of that application in that court. Mr Felstead's appeal in this court will be dismissed. Mr Gatto will be ordered to pay Mr Felstead's costs (including any reserved costs) of that appeal and the application for judicial review. In respect of those costs of Mr Felstead of the appeal and the application for judicial review which Mr Gatto has been ordered to pay, he shall have an indemnity costs certificate under s4(1) of the *Appeal Costs Act 1998* (Vic). In granting that certificate, and in doing so in respect of all of those costs, I take into account Mr Gatto's cooperation as aforesaid. As the consequence of these orders will be that Mr Felstead's proceeding in the Magistrates' Court is not stayed and must be heard and determined by that court, there is no need for a formal order of remitter to that effect.

^[1] (1983) 6 IR 31 (Neave J).

^[2] [2005] UKHL 73; [2006] 2 AC 28; [2005] 4 All ER 655; [2005] All ER (D) 229; [2006] 2 WLR 353; [2005] IRLR 234; [2005] ICR 525; [2006] SLT 11.

^[3] *Administrative Law Act* 1978 (Vic), s10.

APPEARANCES: For the applicant Felstead: Mr D Laidlaw, counsel. Mr Derek Norquay, The Law Centre, Wodonga, solicitors. For the respondent Gatto: Mr M McKenney, counsel. Mallesons Stephen Jacques, solicitors.
