

44/79

INDUSTRIAL APPEALS COURT at MELBOURNE

TUCKER v ATHNIC REAL ESTATE & INVESTMENTS PTY LTD

Judge Leckie, GC Lane Esq and NA Gibbs Esq.

4 June 1979

LABOUR AND INDUSTRY – NATURE OF EMPLOYMENT OF REAL ESTATE SUB-AGENT – "UNLICENSED" SUB AGENT – WHETHER ARREARS PAYABLE – WITNESSES ALLOWANCES AND COSTS: LABOUR AND INDUSTRY ACT, S199.

The fact that some employment may be contrary to some other legislative provision, (referring to that period of the sub-agent's employment prior to his being licensed), does not seem of necessity to indicate that the provisions of the *Labour and Industry Act* and determinations made thereunder are not applicable according to their tenor.

JUDGE LECKIE: *[In the course of decision His Honour Judge Leckie said]: ... In relation to these three informations, I feel it should be reiterated yet once again that this Court does not administer the *Real Estate Agents Act* and it 'cuts no ice' except in a very indirect way, for anyone to say 'This man was not an employee', because it would have been an offence against the *Real Estate Agents Act* to say that he was. That is of no concern of this Court.*

The Court, in these circumstances, has to ask itself two questions – whether he was employed, and secondly, if he was, in what capacity".

[After referring to the terms of the determination the Court concluded, on the facts, that the employee was a "probationary salesman" and therefore to be entitled to be paid appropriate minimum rates, holiday pay and payment in lieu of notice, and stated]:

The other matter to be mentioned about the determination, perhaps, is that the \$96 a week, as with other minimum rates may be offset against commission. In other words, it is a minimum payment and it is not in addition to commission under most agreements under the determination. So it is appropriate at a later stage to offset against what should have been paid as a minimum rate, what has been paid as commission.

Mr Dennis (for the Department) referred the Court to *Tod v Reiher* (a NSW Industrial Court decision in 1960) which held, *inter alia*:

"On its proper construction the award does not prescribe rates of pay for work rendered unlawful by the *Motor Traffic Act* 1909, as amended, and a complainant cannot succeed in a claim under the *Industrial Arbitration Act* for payment of wages in respect of such work."

[That case dealt with drivers of heavy vehicles failing to take proper rest periods. After discussion His Honour Judge Leckie said]: With the greatest respect to these New South Wales authorities which have just been cited, I am afraid I cannot agree with them. I think we would get into an absolutely impossible situation if that were correct, but in any event I do not see the degree of conflict. The example I have just suggested indicates the sort of absurdity that we could easily get.

As I said, it is not the function of this Court to administer the *Real Estate Agents Act*, and the fact that some employment may be contrary to some other legislative provision, (referring to that period of the sub-agent's employment prior to his being licensed), does not seem of necessity to indicate that the provisions of the *Labour and Industry Act* and determinations made thereunder are not applicable according to their tenor.

[Discussion then ensued as to the assessment of the moneys owing, during which certain problems as to the interpretation of Section 199 were referred to (i.e. With respect to the immense range of

unanticipated orders a literal interpretation of the expression "arrears of moneys payable under this Act" would permit). No ruling was made in this regard, His Honour saying, in conclusion] "You say it is discretionary, so I suppose it is not entirely a matter of law.

[On the question of costs the transcript reads as follows, after certain figures were proposed]:

THE PRESIDENT: Is the Department entitled to that? Is there not a witness rate?

MR DENNIS: There is a witness rate in the *Crown Witnesses' Allowance Regulations*, Your Honour, but it is my submission, that those regulations only govern the amount of allowance which the Court can certify where an order is not made against a party. I do not think this has been fully argued before, Your Honour. In my submission that is the intention of those regulations, otherwise it would lead to a ludicrous state where people are almost completely unreimbursed for their attendance in Court, and the Court would have no overriding discretion in allowing claims for costs other than those in the *Crown Witnesses' Allowance Regulations*.

THE PRESIDENT: That may be so. They might be in the position of jurors.

MR DENNIS: They may be yes. They have not been amended for about 4 or 5 years now. It would be extremely hard on citizens who come along to do their duty if they were to be out of pocket substantially for doing so.

THE PRESIDENT: I think those claimed rates are a little high. I shall allow \$30 and \$40 for Mr Panayioutou. It also seems to me a little hard that the claimant gets his witness expenses. I make the out of pockets \$90.50, giving Mr Tzimas \$12 and the documents, \$100 professional costs. It is ordered that the defendant pay the sum of \$190.50 for costs.
