**03/88**

## SUPREME COURT OF VICTORIA

# *FIELDMAN v CUTLER*

**Nathan J**

**2 October 1987**

**INDUSTRIAL RELATIONS – CHAUFFEUR – EMPLOYED TO DRIVE SOLICITOR FROM HOME TO PRACTICE – WHETHER DRIVING CONNECTED WITH SOLICITOR'S PRACTICE – WHETHER SOLICITOR'S PRACTICE A "BUSINESS" – WHETHER PRACTICE A "TRADE OR BUSINESS" UNDER *MOTOR DRIVERS AWARD* 1984 – "IN CONNEXION WITH".**

The Jurisdiction clause of the *Motor Drivers Award (Vic)* 1984 ('Award') provides:

"This Award applies ...to persons employed - (a) driving ... passenger vehicles which are—
(i) hired or plying for hire;
(ii) used in connexion with the business of an omnibus or other passenger carrying service;
(iii) used in connexion with any other trade or business."

Clause 16(e) of the Award provides:

"A 'chauffeur' is one who drives a ... vehicle principally for the purpose of carrying passengers in connexion with any trade or business, other than a passenger vehicle which is hired ...

F., a solicitor, employed C. to drive F. between his home and office in F.'s car at a rate of $7.50 per trip. Subsequently C. discovered that if he had been remunerated in accordance with the Award, he would have received $3,431.24 more than he did on the fee-per-trip basis. C. successfully sued for the amount owing in the Magistrates' Court. Upon order nisi to review—

**HELD: Order absolute. Order quashed.**
**1. The carrying of passengers must be for the trade or business of the passenger, not for the trade or business of the chauffeur.**

**2. The phrase "in connexion with" means "having some nexus or relationship to the industry for which the award was pronounced." Whilst C.'s driving provided the means whereby F. could practise as a solicitor, it did not establish a nexus or connexion with F.'s work as a solicitor.**

**3. Whilst in the industrial relations sense a solicitor's practice could be a "business", the phrase "trade or business" as used in the Award must be interpreted as within the genus of those businesses or trades engaged in the carrying of passengers for reward. As F.'s practice was not such a business, the Award did not cover it and C. was not entitled to he remunerated in accordance with it.**

**NATHAN J:** **[1]** Mr Fieldman, a solicitor employed Mr Cutler to drive him between his home and office in his (Mr Fieldman's) car. They settled upon a fee of $7.50 per trip, a shamelessly inadequate sum given the number of hours involved (at least 25 per week). After some time Mr Cutler discovered that if he had been remunerated in accord with the *Motor Drivers Award* (Vic.) No.3 of 1984 (the Award) he would have received $3,431.24 more than he did on the fee per trip basis. He issued a Default Summons for this sum and the Magistrate found in his (Cutler's) favour ordering the amount claimed plus interest plus costs. Mr Fieldman obtained an order nisi to review this decision. The single ground is paraphrased thus: Mr Cutler, in driving back and forth between Mr Fieldman's home and office in Mr Fieldman's car was not driving a passenger **[2]** vehicle used in connexion with any trade or business within the meaning of the Award.

This brings me directly to the Award which says:

"JURISDICTION: This Award applies to the whole of Victoria to persons employed —
(a) driving mechanically-propelled passenger vehicles which are —
(i) hired or plying for hire;
(ii) used in connexion with the business of an omnibus or other passenger-carrying service;
(iii) used in connexion with any other trade or business;"

Part IV sets the hourly rate and minimum period of work for chauffeurs and Clause 16(e) defines:

> "A 'Chauffeur' is one who drives a mechanically propelled vehicle principally for the purpose of carrying passengers in connexion with any trade or business, other than a passenger vehicle which is hired or plying for hire or which is used for the purpose of giving practical instruction in the driving thereof."

The critical question is the construction of the Jurisdiction Clause (a)(iii), that is, use of a passenger car in connexion with any other trade or business. The competing submissions considered by the Magistrate as stated by him were:

> "A 'Chauffeur', which Mr Olle (for Cutler) submits the complainant was, is defined as one who drives a mechanically propelled vehicle principally for the purpose of carrying passengers in connection with any trade or business. Mr Olle submits that that was what his client was doing:- driving the defendant to and from his office, which must mean he was driving the defendant in connection with his business. Mr Saccardo (for Fieldman) submits that this Award applied only to those persons employed as chauffeurs and employed by **[3]** businesses engaged in the hiring out of chauffeurs. I find that I agree with Mr Olle's submission that the defendant did come within the award – he was driving a passenger in the course of that passenger's business."

I am of the view the Magistrate was in error but for reasons which were not put to him. That error was made for the following reasons. An Award pronounced by a Conciliation and Arbitration Board under the terms of the *Industrial Relations Act* 1979 No. 9365 is restricted to cover only those contracts of employment or agreements for the giving of services as are defined in it. Awards are the creatures of statute, they can have no operation outside their confines, where the common law prevails. Although the *Interpretation of Legislation Act* 1984 No. 10096 s35 enjoins a Court to approach statutory interpretation so as to fulfil the purposes of an Act, where there is no ambiguity, as is the case here, that Act is of no assistance.

An Award can only regulate the labour market in the areas assigned to it. It cannot reach out and cover all employments involving the use of a car, merely by being entitled *Motor Drivers Award*. This conclusion is further illustrated by the other categories referred to in the jurisdiction provision. They relate to (b) delivering cars for sale; (c) cleaning cars, buses and taxis; (d) conductors; (e) ticket sellers; (f) driving instructors; (g) car-park attendants. These are all specific nominated uses of cars, buses and taxis. However, there are multitudinous uses to which vehicles of these types could be put but which are not covered by the Award.

**[4]** It is in this context that the phrase "any other trade or business" and the word "chauffeur" must be interpreted. I deal with the word first. *The Macquarie Dictionary* defines it as "a person engaged to drive a motor vehicle." Although it is commonly understood to mean a person who drives for the purposes of business, for example to visit factories or sites, keep appointments or collect passengers from an airport. If the dictionary meaning were to prevail it would probably encompass Mr Cutler. However, the word chauffeur is not to be interpreted in that way. It must be interpreted in the terms used in Clause 19 of the Award which refers to "carrying passengers in connexion with any trade or business". I am satisfied "the carriage" must be for the trade or business of the passenger and not the trade or business of the driver. To hold otherwise, as I was invited to do, would be absurd as it would divest the word "other" in the definition section of any meaning. Other, where there used, clearly relates to different trades or businesses than those referred to in parts (i) and (ii) i.e. taxis and buses.

Accordingly I must now turn to the fulcral examination of the meaning of "in connexion with any other trade or business." My consideration falls into two parts. Firstly, whether the driving back and forth was an activity in connexion with the trade or business of a solicitor and secondly, whether the practice as a solicitor is a trade or business. Dealing with the first point; it is certain, **[5]** even if unfortunately so, that expenses incurred in travelling to and from a place of practice are not deductible as income-earning or business expenses, so far as the Taxation Commissioner is concerned. In the Court of Appeal decision *Newsom v Robertson (Inspector of Taxes)* [1953] 1 Ch 7; [1952] 2 All ER 728; (1952) 33 Tax Cas 542, when considering the travelling expenses of a barrister from his home to chambers, Denning LJ said (p731):

> "What is the position of people so placed? Are their travelling expenses incurred wholly and exclusively for the purposes of the trade profession or occupation? I think not. A distinction must be drawn

> between living expenses and business expenses. In order to decide into which category to put the cost of travelling you must look to see what is the base from which the trade profession or occupation is carried on ... in the case of a barrister it is his chambers. Once he gets to his chambers the cost of travelling to the various courts is incurred wholly and exclusively for the purpose of his profession but it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession. At any rate not wholly or exclusively ..."

Also *Lunney v FCT* [1958] HCA 5; (1957-58) 100 CLR 478 per Williams, Kitto and Taylor JJ, p501:

> "Expenditure of this character (that is travelling expenses by a dentist from home to his surgery) is not by any process of reasoning a business expense. Indeed it possesses no attribute whatever capable of giving it the colour of a business expense. Nor can it be said to be incurred in gaining or producing a taxpayer's assessable income or incurred in carrying on a business for the purposes of gaining or producing his income. At the most it may be said to be a necessary consequence of living in one place and working in another."

**[6]** Analogous reasoning with the tax position does not dispose of this case for there may be many situations in which an expense is incurred but it may be disallowed as a business expense by the Commissioner. But the analogy does fortify the proposition that the driving back and forth was not an activity pursued in connexion with Mr Fieldman's business (if it was such) as a solicitor. It was a consequence, as the authorities put it, of his living in one place and working in another. The position may have been different if Mr Cutler had been employed to drive Mr Fieldman around and about after he had arrived at his office, e.g., to land settlements or the Titles Office, whereby Cutler's driving back and forth became an incident rather than the sole purpose of his employment, but he was not a chauffeur in that sense.

Turning to the phrase "in connexion with" I must interpret the phrase in the industrial relations context in which it finds itself. As I have said, an award is the result of a Conciliation and Arbitration Board settling disputed claims in industrial matters, such as wages, or conditions. An award is limited by definitive boundaries. From the analysis I have already pursued, it is obvious that not every driving of a motor vehicle by a person for a fee or reward is covered by the terms of the Award. When considering awards pronounced under the Commonwealth Conciliation and Arbitration Act the High Court has considered the phrase "in connexion with" and interpreted it to mean "having some nexus or relationship to the industry for which the award was pronounced." In *R v Moore; ex parte Australian Workers Union* (1976) 11 ALR **[7]** 449 the AWU sought to have its award interpreted so as to cover caterers and cooks employed by a sub-contractor to a mining company. The terms of its award read:

> "Every ... worker engaged in ...labour in or in connexion with the following industries namely metalliferous mining."

Barwick CJ speaking for the Court and approving the decision of the Full Court of the Conciliation and Arbitration Commission said (p454):

> "The business of the respondent companies was quite distinct and separate from that of the mining companies engaged in metalliferous mining. True it is that the respondent companies served the mining companies and provided them with commodities and services, the provision of which was desirable if not indeed necessary for the maintenance of the work force to carry on the mining operations, but that does not mean that in contracting to provide and in providing these commodities and services the respondent companies entered into the business of the mining companies so as themselves to be carrying on metalliferous mining. Nor were their employees employed in connexion with that industry."

I also refer to *R v Moore and Others; ex parte The Miscellaneous Workers Union of Australia* [1978] HCA 51; (1978) 140 CLR 470; 22 ALR 347; (1978) 53 ALJR 116. This was also a "headhunting case", that is, where a union seeks to have the coverage of its award interpreted in such a way as to maximise the numbers of eligible members. In that case the Rules of the Union provided that workers engaged in or in connexion with metalliferous mining were eligible for membership. It served a letter of demand on some uranium mining companies and a number of project engineers which the companies had engaged to design and construct the actual mines. In that

case the eligibility rules and particularly the phrase "in connexion with" were interpreted so as to encompass the project engineers, **[8]** holding that they were engaged in activities in connexion with metalliferous mining. In distinguishing the *AWU case* Jacobs J said (p477):

> "The facts of the last mentioned case were quite different. Catering and cleaning services were far removed from any concept of metalliferous mining which was the relevant industry in that case. The decision does not assist the present applicant ... Construction work cannot be looked at apart from what is being constructed. The connexion is so close as to be inseparable. The mine owner is engaged in or in connexion with the industry of metalliferous mining when it has its metalliferous mining installations and associated works constructed. The constructor is engaged in work in connexion with metalliferous mining when it constructs the mining installations and associated works."

See also *R v Hibble and Others; ex parte Broken Hill Proprietary Co Ltd* [1921] HCA 15; (1921) 29 CLR 290; 27 ALR 199. In *Re Leighton Contractors Pty Ltd* (1985) 2 Qd R 377, De Jersey J considered that a sub-contractor did not work upon land in connexion with the construction of a dam, but was working in connexion with the provision and maintenance of the work force engaged in the construction of the dam. The case turned upon Queensland legislation (*The Sub-Contractors' Charges Act* 1974-75) but followed the line of reasoning I have chosen to adopt here and as adumbrated in the High Court decisions.

Mr Cutler in driving Mr Fieldman to his office was not engaged "in connexion with" Mr Fieldman's practice as a solicitor. The quality of the work performed by Mr Fieldman, and certainly the nature and scope of the practice, would not have varied with the means of his attendance. Whether he arrived at his office by public transport or driven by a friend or by Cutler his practice **[9]** as a solicitor would not have varied or been influenced by the train driver, friend or Mr Cutler. Mr Cutler simply had no connexion with Mr Fieldman's activities as a solicitor. Mr Cutler's driving provided the means whereby Mr Fieldman was able to continue as a solicitor, but that does not establish a nexus or connexion to his work of being a solicitor.

It follows then that the order nisi should be made absolute on the basis of this reasoning. However, I proceed to dispose of other contentions which entrench my conclusions already pronounced. The phrase "trade or business" in part (iii) of the definition section should be interpreted *ejusdem generis* with the categories listed in parts (i) and (ii). Those parts deal with taxis, hire cars and buses. Therefore the phrase "other trade or business" must be interpreted as one within the genus of those businesses or trades engaged in the carrying of passengers for reward. Of course, Mr Fieldman's practice was not such a business and the Award cannot cover it. It was also contended that Mr Fieldman could not have been a passenger in his own vehicle. I merely observe this cannot be so, by asking the converse question – if he was not a passenger what was he? A passenger is simply a person being transported between different points in a vehicle driven by another.

I turn to the second substantial point, that is whether a solicitor engaged in his practice is also engaged in a trade or business. It has been held that the practice of a solicitor is the carrying on of a profession and not that of a trade or business. See *Levine v Malleson;* **[10]** *Levine v Weigall and Crowther* unreported per Crockett J 2/11/83 noted in LIJ Vol 57 No 12 p1277. See also *Stuchbery & Others v General Accident Fire & Life Assurance Corporation Ltd* (1949) 2 KB 256. However, that case concerned the English *Landlord and Tenant Act* 1927 and as I have said I must interpret this phrase in the industrial context in which it appears. The criteria of what is a business generally was considered in *American Leaf Tobacco v Inland Revenue Commissioners* (1978) 3 WLR 985. In the general community the words "trade" "business" and "profession" bear distinct and separate meanings. If the man in the street was asked he would be likely to say a solicitor is a professional man rather than a tradesman or businessman.

In *Re Australian Salaried Medical Officers Federation* (1986) 15 IR 410 Bolton J of the Australian Conciliation and Arbitration Commission appears to have considered that doctors were engaged in a business. That case is no more than glancingly relevant here as the Federation was a registered organisation. Although it is possible to imagine a solicitor's practice requiring the use of a chauffeur for e.g. attendances at settlements, visiting ill or disabled clients, attending at views in planning applications, that is not likely to be amongst the general run of things. A person employed for the purposes of driving in those circumstances may well be covered by the Award. Accordingly, if that were the fact situation it might have been possible to contend that such a

person was employed in connexion with a business, the incidental but necessary concomitant of which was the employment of a driver. But they are not the facts here and I do not postulate upon them.

**[11]** It is probable that a solicitor's practice could, in the industrial relations sense, be a business. Persons are employed by individuals, firms, companies or some such entity; collectively these may be known as businesses. It is obvious an employee must be retained by somebody or something. Therefore to give effect to an Award in the absence of any definition of business a broad scope would have to be given to the term. But for the reasons already given I find that Mr Cutler was not engaged in connexion with Mr Fieldman's business, (if it was such) as a solicitor. The order nisi will be made absolute. I will quash the order made by the Magistrate below and hear counsel as to costs.

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