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FEDERAL COURT OF AUSTRALIA at MELBOURNE

AUSTRALIAN TIMBER WORKERS UNION v MONARO SAWMILLS PTY LTD

JB Sweeney, Evatt and Keely JJ

19, 20 February, 20 March 1979; 11, 29 April 1980

[1980] FCA 43; 29 ALR 322; (1980) 42 FLR 369; 45 ALT 29; noted 56 ALJ 325

INDUSTRIAL LAW – BREACH OF AWARD – CONTRACT OF SERVICE OR FOR SERVICES – ISSUE OF LAW OR FACT – FAILURE OF MAGISTRATE TO STATE REASONS OR PRIMARY FACTS FOUND – TIMBER INDUSTRY CONSOLIDATED AWARD – STANDARD OF PROOF.

The circumstances pointed clearly to the existence of the relationship of employer and employee. The employee was not conducting some sort of business of his own and, in his activities, was part and parcel of the organization. The purpose of the employer was to have logs cut, conveyed to their mill and there manufactured. The employee was not in any sense carrying on a business of his own. The work he performed was not peripheral, but was integral to the organization. Accordingly, a breach of the award had been committed by the employer.

JB SWEENEY and EVATT JJ: This is an appeal against the dismissal by a Stipendiary Magistrate of a summons seeking the imposition of a penalty pursuant to s119 of the *Commonwealth Conciliation and Arbitration Act* 1904 on the defendant for a breach of the *Timber Industry Consolidated Award* (134 CAR 763) in respect of the failure to pay an amount due for annual leave to an employee, Mr Alfred Harry Wales. The respondent was Monaro Sawmills Pty Ltd (Monaro) and the complainant the Australian Timber Workers Union (the union). The learned Magistrate gave his judgment in the following terms:

> "It was agreed that if Mr Wales is to be regarded an employee of the company then the company is bound by the award and Mr Wales is entitled and to payment in respect of annual leave accrued under the award. The question to be determined in the matter is whether Mr Wales is an employee subject to the award either as an incentive employee or an employee performing under "piece work" conditions, or whether he was an independent contractor. The onus of proof in these matters rests with the complainant to satisfy me on the balance of probability that he was an employee within the terms of the award. Neither the evidence adduced nor the arguments put have convinced me that the complainant has discharged this onus with which he is charged. I am satisfied that there did not exist between the defendant and Mr Wales a relationship of master and servant but rather that Mr Wales was engaged by the defendant on a contractual basis as an independent contractor."

Determining terms of contract. Contract of Service or a Contract for Services.

It will be noted that the Magistrate treated all the questions arising at the hearing as appropriate to be dealt with according to the balance of probabilities. In fact there were three groups of issues. The first was to determine the terms of the contract entered into between Mr Wales and Monaro and included the conduct of the parties to the contract entered into, with a view to ascertaining whether, and if so what, inferences could be drawn from that conduct to assist in the determination of the question of what the contract was. The issue which then arose was whether the contract, the terms of which had been ascertained, was a contract between employer and employee: a contract of service or a contract for services. It appears, however, that the learned Magistrate treated all these issues as governed alike by the question of the proper onus to be applied. He poses the question to be determined as whether Mr Wales was an employee subject to the award either as an incentive employee or an employee performing under piece work conditions, or whether he was an independent contractor, and he states that he decided these questions by applying the civil onus of proof.

It is clear that not all of these are questions of fact. If a contract is in writing its proper construction is clearly a matter of law and, in our view, this is also the position when the contract is not in writing or when its terms must be inferred from circumstances including the conduct of

the parties in carrying out the contract (*Price v Grant Industries* (1978) 45 FLR 129; (1978) 21 ALR 388 at 393). To this extent the determination of an issue such as this may well be said to involve mixed questions of law and fact; the fact being the ascertainment of the relevant conduct of the parties under their contract and the inferences proper to be drawn therefrom as to the terms of that contract. Once the terms have been sufficiently ascertained, however, the classification of the contract, whether as one for services or of service, is a question of law. We are of opinion then that the judgment of the Magistrate shows an *ex facie* error of law in that he appears to have determined the question of the classification of the contract as a question of fact, or alternatively to proceed to determine a question of law on the balance of probabilities.

Civil or Criminal Proceedings?

During the hearing a question was raised whether proceedings under s119 were civil or criminal. The court hold in *Gapes v Commercial Bank of Australia* [1979] FCA 62; (1979) 27 ALR 87; (1979) 38 FLR 431, that proceedings under s119 wore not criminal and we propose to follow that decision.

Need to state facts found and reasons.

It will be noted that the learned Magistrate stated only briefly his conclusions. He did not specify in any way the facts he found and the facts on which he based his conclusion. This factor, the failure to state the facts found and the reasons therefore, has created problems. Courts have over the years repeatedly stressed the need for reasons to be given by a tribunal. For example, in *Donovan v Edwards* [1922] VicLawRp 10; (1922) VLR 87 at 88; 28 ALR 51; 43 ALT 139, Irvine CJ said:

> "In the exercise of their judicial functions justices are not exempt from the duty which attaches to every judicial officer to state to the best of his ability the facts he finds and the reasons for his decision".

(see also *Brittingham v Williams* [1932] VicLawRp 35; (1932) VLR 237; 38 ALR 176 and *Lock v Gordon* [1966] VicRp 23; (1966) VR 185). Similar statements have long been made in ether courts.

In *Carlson v King* (1947) 64 WN (NSW) 65, Jordan CJ in delivering the judgment of the Full Court of the Supreme Court of New South Wales said (at p66):

> "It has long been established that it is the duty of a court of first instance, from which an appeal lies to a higher court, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision. The duty is incumbent not only upon Magistrates and District Courts but also upon this court, from which an appeal lies to the High Court and the Privy Council."

(see also *Pettitt v Dunkley* 38 FLR 199; [1971] 1 NSWLR 376; 5 Fam LR 137). It is unnecessary, we think, to refer to further authorities on this point, but we take the view that, in any case such as the present, the primary tribunal should state the facts found and the reasons for the decision and if this is not done a request for those reasons should be made by the parties or their legal representatives. The question was raised whether this failure by the Magistrate amounts to an error of law as stated in *Pettitt v Dunkley*, *supra*. The appeal in that case, however, was limited to a question of law which became impossible of resolution without reasons stated by the learned trial judge and, while the position is more difficult here than it should be, we do not think we should regard the failure as being an error in law itself.

Examination of the Evidence of the making of the Contract

It appears that Monaro conducted a sawmill in the Bairnsdale region. It secured its logs for the operation of the sawmill by engaging (to use a neutral term) fellers to fell trees on an area specified in a licence issued to it by the Forests Commission. It appears that the felling of trees was required to be done in such a manner as to secure "good timber", that the feller had to present the article, the felled tree, to the satisfaction of the sawmiller. In addition to the felling of trees the feller was required to obey any instructions given by the Forests Commission. He was also required to fell culls which, we presume, were trees of no commercial value. The evidence showed that Wales had felled trees for Monaro on previous occasions and that he was experienced in the work. Wales attended at Monaro mill and agreed to cut timber standing on blocks of which Monaro was a licensee from the Forests Commission. The remuneration for such work was agreed

to be the rate of $1.35 per cubic metre of timber cut. The respondents evidence was that the only recollection the manager who made the engagement had of the conversation was that he said he was interested only in getting good timber. He agreed that the rate was worked out having regard to what a feller could earn in the light of the nature of the timber. Some picture of the working of the industry can also be gleaned from the award. Fellers may be weekly employees. Classification 26 of cl 4 provides a wage rate for "a feller who works alone, selects his trees and sharpens his own saws" and provides a lower rate for other fellers. Provision is also made by the award in cl 8 for "piece work fellers". They are persons who, with the concurrence of the employer, supply, operate and maintain their own power saws and receive a rate which would enable them to earn not less than 12½ per cent in excess of the ordinary time rate. In addition they receive an allowance for power saws as may be agreed upon, but not less than $8 per week in 1974.

It will be noted that in the making of the contract there was no discussion as to hours or days to be worked or as to quantities. There was no discussion about the supply of tools and none about the method of payment of public holidays, annual leave or like matters. We think it follows from this that both parties accepted that, by reason of the award which admittedly bound the respondent and also bound Mr Wales who was member of the organization, the provisions of the award were incorporated in the contract of employment. It then becomes necessary, we think, to examine the conduct of the parties thereafter in order to deduce the nature of the agreement between Mr Wales and the respondent. There were a number of matters which were not in dispute which are relevant to decide if there was a reservation of a right to control in material aspects.

(1) Wales admittedly performed work as a feller on the relevant dates under an arrangement with Monaro. He had previously been engaged as feller with Monaro and was experienced in work of this nature.

(2) Upon engagement Monaro notified the Forests Commission of Wales' engagement.

(3) Wales performed work in an area allotted to him by Mr Smith described as the "bush boss" of Monaro. It appears that the Forests Commission marked out in the licensed area blocks of approximately 10 chains x 10 chains and that one of those was then assigned to each feller. He would then continue working solely within that block until another was allotted to him. His duty was to cut the trees and clear the area to the satisfaction of the Commission as well as cutting culls.

(4) Wales and the other fellers were paid sums of money according to the quantity of millable timber cut by them. The rate of payment was $1.35 per cubic metre. In addition payment was made for culls. This appears to have been calculated as a fixed amount payable to Monaro by the Commission for each cull felled and there was deducted from this amount some of the cost to Monaro of procuring workers' compensation insurance. The precise method of calculation did not appear.

(5) Wales generally worked Monday to Friday but he could work such hours as he pleased and take such meal breaks or smokos or the like as he pleased.

(6) Wales supplied his own saw, files and axe, and spare parts and fuel were purchased by him from Monaro.

(7) There were some huts which had been used for employees in other capacities and these were made available to Wales and to other fellers to use if they desired to do so and they resided in these during the week.

(8) Wales used his own motor vehicle for transport from the huts to the actual place of employment.

(9) At some periods instalments of income tax were deducted but generally this was not done.

(10) Monaro took out a workers' compensation policy covering the fellers and kept it in operation.

(11) During the period of Wales' work as a feller with Monaro the records of the company appear to show that two persons were engaged as partners in felling timber and clearing one block. In addition the persons who snigged and hauled the logs after they had been felled were in the records of the company described as contractors. Wales himself was described in records kept by the company as a contract feller.

(12) In his income tax returns Wales claimed depreciation on the saws and other tools used in the work.

The first aspect to be considered is whether there was a reservation of a right to control and this we think is shown by the facts. The area in which he was to cut was allocated to him. Mr Smith was employed as a bush boss by Monaro and one of his main duties was quality control of the timber cut. He visited each block daily. When the mill required logs to be cut to special lengths he so informed the fellers. This happened occasionally. If long butting was required he also so directed the feller and if a defect appeared he would direct the cutting off of a section of the log. He conveyed to men such as Wales instructions from the Forestry Commission relating to the felling of trees and if necessary he gave directions designed to keep up a supply of logs to the mill. Officers of the Forestry Commission from tine to time instructed fellers to cut certain trees.

All those aspects show that, without any express terms when the agreement was made, a degree of control was exercised and this is consistent with a reservation of the right so to do. We think that in determining the nature of the contract which did exist, what matters is lawful authority to command so far as there is scope for it (cf *Zuijs v Wirth Bros Pty Ltd* [1955] HCA 73; (1955) 93 CLR 561; [1956] ALR 123, as a modern position of the control test. We do not regard the question of the right to control as conclusive in itself as there may be other countervailing features (*Queensland Stations Pty Ltd v FC of T* [1945] HCA 13; (1945) 70 CLR 539; [1945] ALR 273; (1945) 8 ATD 30. The countervailing features here were said to consist of various matters. In the first place that Wales was free to work whichever days and whatever hours he chose, although he generally worked Monday to Friday. Next he provided his own saw and purchased fuel and parts for it from the respondent. Thirdly, he was paid a piece work rate. As against those features there is the fact that Wales did not, during the period this engagement lasted, work for any other person. The company records showed Wales described as a contractor but, as against this, Wales' evidence was that he was known as a feller and never as a felling contractor. The evidence was that the provisions of cl39 of the award dealing with contractors were not complied with in Wales' case.

It is, in our view, impossible to regard a term incorporated in a contract of employment, by reason of an award, as constituting a countervailing factor which should be used to find that the contract was one with an independent contractor. Matters such as terms used in the company's own records or the term used by Wales seem to us of little value. In addition it is the fact that on some occasions Monaro made deductions from the payments due for income tax purposes. But this does not constitute any admission on their part for the payments made after receipt of a letter from the Commissioner of Taxation advising that persons of this class were employees and that the deductions should be made. We regard this fact as quite neutral (*RES Logging Co Pty Ltd v Bridge* (1969) SR (NSW) 604). In addition payments were made on premiums for workers' compensation insurance, but since workers' compensation may be payable in appropriate circumstances to Wales, whether he was an employee or an independent contractor, this does not help.

Wales cut from the block trees which were designated as culls by the Forestry Commission and a payment per tree for these was made by the Forestry Commission to Monaro and then an amount for each tree so cut less some deduction for workers' compensation premiums was paid to Wales and each of the fellers. We do not think there is any room for regarding Wales as working for the Forestry Commission in any sense. One fact should be added and that is that logs were measured and payment made at fortnightly intervals to Wales. None of these matters relied upon as countervailing measures seems to us to cut down in any way the effect of the reservation of control or to show that the relationship was not one of master and servant.

Conclusion – Decision of the Court

In our view, the circumstances point clearly to the existence of the relationship of employer and employee. We do not think there is any sense in which it could he said that Wales was conducting some sort of business of his own. So far as the tests proposed by Denning LJ, as he then was, in *Stevenson, Jordan and Harrison Ltd, Macdonald and Evans* (1952) 1 TLR 101 at 111; [1952] WN 7 and *Bank Voor Handel en Schespvaart NV v Slatford* (1952) 2 All ER 956 at 971, in these terms:

> "In this connection I would observe the test of being a servant does not rest these days on submission to others, it depends on whether the person is part and parcel of the organization."

Without feeling the need to define the term "part and parcel" of an organization, we think that here Wales, in his activities, was part and parcel of the organization. The purpose of Monaro was to have logs cut, conveyed to their mill and there manufactured. Wales was not in any sense carrying on a business of his own. The work he performed was not peripheral, but was integral to the organization.

For these reasons we are satisfied that the appeal should be upheld. In reaching these conclusions we have had regard to the decision of the learned Magistrate treating it as more likely to be right. At the same time we regard the matter as a civil proceeding in which the civil onus of proof is the correct one, but taking into account that it involves a fine in that a breach of an award had been committed and that a penalty is to be imposed. While this is a lower onus than the criminal one, it still requires a proper degree of satisfaction (*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; [1938] ALR 334; 12 ALJR 100). The appeal is allowed and the order dismissing the summons and complaint set aside. In lieu thereof, the court finds that the respondent committed a breach of the award as alleged and imposes a penalty of $100 and directs that the penalty be paid to the organization, the Australian Timber Workers Union.
