

65/89

## SUPREME COURT OF VICTORIA

***BUSH v KEMERTZIS and ANOR***

Hampel J

11 July, 22 September 1989

**INDUSTRIAL RELATIONS – UNDERPAYMENT OF AWARD RATES BY EMPLOYER – INFORMATION NOT LAID WITHIN TWELVE MONTHS – WHETHER CONTINUING OFFENCE: *INDUSTRIAL RELATIONS ACT 1979*, SS82, 96, 108, 110; *MAGISTRATES (SUMMARY PROCEEDINGS) ACT 1975*, S165.**

Section 82 of the *Industrial Relations Act 1979* ('Act') makes provision for the manner of payments to employees, whereas s108 of the Act deals with offences and the penalties applicable for breaches of the Act. As the Act contains no time limit in which an information can be laid, the limitation of 12 months as provided for in s165 of the *Magistrates (Summary Proceedings) Act 1975* applies. Accordingly, where an employee was not paid in accordance with the provisions of s82 of the Act and s108 created an offence which was not continuous, and an information was laid after more than 12 months had elapsed since the date of the alleged breach, a magistrate was not in error in dismissing the information.

**HAMPEL J: [1]** The defendants Con Kemertzis and Guilio Sereno, who are the respondents in these proceedings were charged on two informations laid by the applicant Garry Bush an inspector of factories and shops. One information alleged that as employers they failed to pay award rates in contravention of s82(2) of the *Industrial Relations Act 1979*. The other information alleged a failure to pay pro-rata holiday pay as provided by the relevant award. On 22nd February 1988 Mr Purcell, sitting as a Special Magistrate of the Metropolitan Industrial Court, upheld a submission made on behalf of the respondents that the information laid on 29th October 1987 under s82(2) should be dismissed. He held that the alleged offence was not a continuing offence and was statute barred. The other information was adjourned and is not the subject of these proceedings.

An order nisi to review that decision was granted on 9th March 1988 calling on the respondents to show cause why that order dismissing the information should not be reviewed on the ground that the Special Magistrate erred in ruling that the offence charged under s82(2) did not constitute a continuing offence and on its face the information was statute barred. The information which was dismissed was in the following terms -

"The information of Garry Bush of Melbourne in the State of Victoria who says that the said defendants having been the employers of one Amanda Keipert during the week ending the thirty-first day of October 1985 on work for which the lowest rates had been fixed in an Award of the Clothing and Footwear Shops Conciliation and Arbitration Board did on the [2] fourth day of March 1987 at Fitzroy fail to pay to the said Amanda Keipert in full in money the appropriate rates for such work in contravention of the provisions of section 82 of the *Industrial Relations Act 1979*".

The alleged underpayment was in relation to the week ending 31st October 1985. Section 82 which is in Part VIII of the 1979 Act under the general heading "Other Conditions" and the specific heading "Manner of paying employees" provides:

- "(1) Every employer shall pay or cause to be paid at least once in every fortnight all earnings due to every person employed by him in a trade to which an award or agreement applies.
- (2) Where an employer employs a person on work for which the lowest prices or rates have been fixed in an award or agreement the employer shall be liable to pay and shall pay in full in money without any deduction, other than a deduction permitted to be made under sub-section (4), to that person the price or rate so fixed.
- (3) For the purposes of this section a payment is a payment in money if it is made—
  - (a) in cash; or
  - (b) with the authority in writing of the person employed—
    - (i) by cheque, postal order or money order payable to that person; or
    - (ii) into a bank account specified in the authority by that person

(4) From any moneys payable under sub-section (1) by an employer to a person employed by him the employer may deduct and pay on behalf of the employee any payments authorised in writing by the employee to be so deducted and paid.

(5) Where the employee in writing withdraws—

(a) the authority given pursuant to sub-section (3) paragraph (b) and no authority is given in writing for payment in any of the other ways mentioned in that paragraph the employer shall pay the employee in cash;

**[3]** (b) the authority given pursuant to sub-section (4) with respect to a deduction and payment which was authorised by the employee, the employer shall cease to make that deduction and payment".

The *Industrial Relations Act* 1979 substantially repealed the *Labour and Industry Act* 1958. In that Act s133 provided:

"Every employer shall pay or cause to be paid at least once in every fortnight all earnings due to every person employed by him in any trade to which any determination applies".

It was contained in Division 2 of Part VII which dealt with conditions of employment its marginal note was "Fortnightly payment of earnings". Section 198 was in Division 2 of Part X which was concerned with legal proceedings. It provided:

"(1) Where an employer employs any person on work for which the lowest prices or rates have been fixed in a determination, such employer shall be liable to pay and shall pay in full in money without any deduction, other than a deduction permitted to be made by virtue of sub-section (1B), to such person the price or rate so determined.

(1A) For the purpose of this section a payment is a payment in money if it is made

(a) in cash; or

(b) with the authority in writing of the person employed—

(i) by cheque, postal order or money order payable to the person; or

(ii) into a bank account specified in the authority by a person.

(1B) From any moneys payable under sub-section (1) by an employer to a person employed by him the employer may deduct and pay on behalf of the employee any payment authorised in writing by the employee to be so deducted and paid.

**[4]** (1C) Where the employee withdraws in writing—

(a) the authority given pursuant to paragraph (b) of sub-section (1A) and no authority is given in writing for payment in any of the other ways mentioned in that paragraph, the employer shall pay the employee in cash;

(b) the authority given pursuant to sub-section (1B) with respect to a deduction and payment which was authorised by the employee, the employer shall cease to make that deduction and payment.

(2) Such person if he has made demand in writing on such employer (which demand, if such person has left the employment of such employer, shall be made within six months after he has left such employment) may within twelve months after such money became due take proceedings in any court of competent jurisdiction to recover from the employer the full amount or any balance of such sum so demanded due in accordance with the determination, any smaller payment or any express or implied agreement or contract to the contrary notwithstanding".

It is immediately apparent that what Parliament has done is to take the old s133 and combine it with the old s198 (without sub-s(2)) to produce the new s82 which is now to be found amongst provisions which deal with the keeping of records, meal intervals and the manner of paying employees. Sub-section (2) of s198 was removed and has now become s96 in the "legal proceedings" division of the Act for it deals with recovery of award rates. Part XII of the *Industrial Relations Act* 1979 now contains the offences and penalties. Section 108(1) provides for penalties and breaches of awards in these terms:

Where a price or rate of payment for any reason or class of person is fixed in an award which is in force every person—

**[5]** (a) who either directly or indirectly or under any pretence or device attempts to employ or employs or authorizes or permits to be employed any person at a lower price or rate of wages or piecework (as the case may be) than the price or rate fixed;

(b) attempts to employ or employs or authorises or permits to be employed any apprentice or minor in excess of the number or proportionate number fixed by the award; or

(c) contravenes or fails to comply with any of the provisions of the award or of the provisions of this Act relating to awards or agreements or to aged infirm or slow workers - shall be guilty of an offence.

Penalty: 1st offence – not more than \$500;

2nd offence - not more than \$2000;  
3rd or subsequent offence - not more than \$3000.

Section 110 provides for a general penalty as follows:

"(1) Every person who contravenes or fails to comply with any of the provisions of this Act or of any regulation order notice direction or rule thereunder shall be guilty of an offence against this Act.

(2) Every person guilty of an offence against this Act for which no penalty is expressly provided shall be liable to a penalty of not more than \$300."

Section 192(1)(a) of the *Labour and Industry Act* which contained the twelve months limitation period in which an information could be laid "after the commission of the offence" was repealed and no equivalent provision exists in the 1979 Act. The limitation which applies is that in s165 of the *Magistrates (Summary Proceedings) Act* 1975, namely twelve months "from the time when the matter of the information arose and not afterwards". This is because Sections 90 and 91 of the *Industrial Relations Act* [6] give the Magistrates' Court and the Metropolitan Industrial Court constituted by a special magistrate jurisdiction to hear prosecutions under the Act.

On behalf of the applicant it was submitted that the alleged breach was one of s82(2) and thus amounted to an offence under s108(c) of the *Industrial Relations Act* 1979. This, it was argued, was a continuing offence and the limitation period of twelve months did not operate to affect this prosecution. It was conceded on behalf of the applicant that s108(a) creates offences which are not continuous and if the breach alleged was that of s108(a) the information was stale. The applicant relied on a number of authorities under earlier legislative provisions, such as *R v Industrial Appeals Court; ex parte Barelli's Bakeries Pty Ltd* [1965] VicRp 79; (1965) VR 615 in support of the argument that the offence as charged created a liability which must continue until discharged.

The respondents contended that s82 as such did not in its present form and context create the offence alleged, that the breach charged here, although couched in terms of s82(2), was in fact an allegation of an offence under s108(a) or s110 and therefore was found correctly to be statute barred. Ultimately the question is one of the interpretation of the *Industrial Relations Act* 1979. In my opinion s82, found as it now is in that part of the Act which deals with the manner of paying employees, creates obligations but does not in its terms create an offence. Part XII of the Act deals with offences and penalties and the offence appropriate to a breach of the obligation [7] created under s82(2) as is here alleged, is under s108(a). That sub-section covers the field so far as underpayment of employees is concerned. It is concerned with precisely the conduct here alleged and an information alleging such a breach must be brought within time. It follows that I can see no error in the approach adopted by the magistrate and the order nisi must be discharged with costs.

**APPEARANCES:** For the plaintiff Bush: Mr BM Dennis, counsel. AFA Lindeman, solicitor. For the defendant Kemertzis: Mr T Hurley, counsel. Rossi Ryan & Raniga, solicitors.