

32/85

INDUSTRIAL RELATIONS COMMISSION OF VICTORIA IN COURT SESSION

GAINSMITH v TUCKER**Mr KD Marshall, President****14 January, 12 April, 7 June 1985**

INDUSTRIAL LAW – LABOUR AND INDUSTRY – ADVERTISEMENT THAT RETAIL SHOP OPEN DURING PROHIBITED HOURS – WORDING OF ADVERTISEMENT – MEANINGS OF "INDICATION" "SHOPPER" – WHETHER ADVERTISEMENT CONTRAVENES ACT: LABOUR AND INDUSTRY ACT 1958, S98(1B)

Section 98(1B) of the *Labour and Industry Act* 1958 ('Act') provides (insofar as relevant):

"Any shopkeeper or person employed in a shop or a business who publishes any statement or indication that at any time when a shop is required by this Act to be closed—

- (a) the shop will be open for the sale of goods by retail; or
- (b) any person will be in attendance at the shop who will sell goods therein; or
- (c) any person will be in attendance at the shop who will receive orders for goods by any means; or
- (d) the shop will be open for inspection of goods therein; or
- (e) shall be guilty of an offence against this Act"

G. a shopkeeper, authorised the following statement or indication to be published in a newspaper: "Inspect at Warehouse, Mon., Wed., Fri. 10 a.m. to 8 pm.; Tues., Thurs. to 5 pm. 284-288 High Street, Northcote. LATE SHOPPERS NOTE PHONE ENQUIRIES 489-2400, 489-2155, 489-2855 SATURDAY & SUNDAY 10 A.M. to 5 PM." G. was subsequently charged and convicted of publishing statements in contravention of s98(1B) of the Act. On appeal—

HELD: Appeal allowed. Conviction and fine quashed.

(1) The word "shopper" includes a person who is involved as a purchaser in the sale of goods by retail, as well as a person who may be considering purchasing goods of a kind specified in an advertisement inviting telephone enquiries.

(2) Although the advertisement may have involved artful draftsmanship, it did not contain a statement or indication that the shop would be open for the sale of goods by retail during prohibited hours.

KD MARSHALL P: *[After setting out the details of the charge and the relevant provisions of s98(1B) of the Labour and Industry Act 1958, the President continued]: ... [2] The main issue is whether the terms of the relevant advertisements constituted statements or indications that the shop would be open for the sale of goods by retail contrary to the provisions of section 98(1B). [3] Both advertisements were headed "Bankrupt Furniture and Bedding" and described a variety of items of furniture which were available for sale. One advertisement then set out the words "All reasonable offers accepted" and the other "No reasonable offer refused". The terms of the advertisements are not identical but the differences are not significant for the purposes of this case. The following words appear at the end of the advertisement which appeared in "The Sun" on 17 March 1984: 'Inspect at Warehouse, Mon., Wed., Fri. 10 an, to 8 pm.; Tues., Thurs. to 5 pm. 284-288 HIGH ST., NORTHCOTE LATE SHOPPERS NOTE PHONE ENQUIRIES 489-2400, 489-2155, 489-2855 SATURDAY & SUNDAY 10 A.M. TO 5 PM.'* With the exception of one telephone number, the same terms appear in the advertisement of 7 July 1984.

Mr Connor, counsel for the appellants, admitted that they were the shopkeepers "of these premises" at the relevant dates 17 March 1984 and 7 July 1984. He accepted that as a result of section 80(1) of the Act "this furniture shop had to be closed after the hour of one o'clock (pm.) on the Saturday (and/or Sunday)" and that "if there was, in fact, a statement or indication that the shop would be open for the sale of goods by retail after one o'clock on the Saturday, then an offence has been committed". He said that the relevant words of the advertisements are the last three lines of the above quotation.

Mr Connor referred to the words "Late shoppers note, phone enquiries" and contended that no offence against section paragraphs (a), (b), (c) or (d) of section 98(1B) had been committed because to reach a stage where one says there is a statement or an indication that the shop will either be open, [4] that a person will be in attendance at the shop who will sell goods or that a person will be in attendance at the shop who will receive orders for goods or that the shop will be open for the inspection of goods, is to go beyond the reasonable meaning to be attributed to such a phrase in the advertisement. He submitted that it is not against the law for people to make enquiries by telephone about goods at a time when the shop is not entitled to be open and that it is quite proper to construe the advertisements as being limited to an inquiry by telephone.

Mr Dennis, who represented Mr Tucker, submitted that in ordinary parlance the words "Late Shoppers" would mean people who wanted to buy goods, not merely those who wanted to make enquiries; that if the advertisement relates only to telephone enquiries it has the peculiar result that, although the appellants were not obliged to close their shop from 10 a.m. to 1 pm. on Saturday, it invites enquiries only at that time; that as people can normally go shopping between those hours on a Saturday they would not then be late shoppers and there is therefore some inconsistency in the appellants' argument about the meaning of those words. He argued that Mr Connor's argument that the words of section 98(1B) are to be construed literally – i.e. before an offence is committed, the advertisement must actually or substantially follow the words of the Act by indicating that a shop will be open for the sale of goods by retail – leads to a result which could not have been intended by the Parliament.

Mr Dennis then said that the case of *Kennett v Holt* [1974] VicRp 79; [1974] VR 644 is authority for the proposition that the Commission has power to convict the appellants of a cognate offence – i.e. that any of [5] the alternatives in paragraphs (a) to (e) of section 98(1B) are available to the prosecution if the evidence establishes any of them. He said that paragraph (c) is the only one which might have any relevance to this point. He argued that in section 98(1B) the word "statement" should not be construed narrowly and that the word "indication" is defined in the *Shorter Oxford Dictionary* as "to point out; make known; show; suggest; call for". He submitted that the words of the advertisement do suggest that someone will be in attendance for the purpose of receiving orders or that the shop will be open for the sale of goods. On appeal, the question for the Commission is whether or not the advertisements constitute a breach of section 98(1B)(a), or possibly paragraph (c). Both Mr Connor and Mr Dennis seemed to indicate that the words of the advertisements are not without ambiguity. It might be equally correct to say that they involve artful draftsmanship. It is to be noted that the wording of the charges which came before the Magistrates' Court were based upon section 98(1B)(a).

Whilst the word "shopper" correctly describes a person who is involved as a purchaser in the sale of goods by retail, it seems to me that it can also be used to describe a person who may be interested in goods in a rather more general way. For example, a person may be considering purchasing goods of a kind specified in an advertisement which informs that person that he or she may make a telephone inquiry between 10 a.m. to 5 pm. on [6] a Saturday and Sunday. That person responds to the advertisement by making a telephone call to a specified number.

I have considered the last three lines of the advertisements which are before the Commission together with the words "No reasonable offer refused", or like words. But I am unable to conclude that the advertisements in whole or in part contain a statement or indication that the shop at Northcote would be open for the sale of goods by retail after 1 pm. on Saturday and on Sunday. In my opinion the advertisements on their own should not be regarded as a contravention of section 98(1B)(a) on the part of the shopkeeper. Mr Dennis invited me to regard the appellants as having committed a cognate offence. On the material before me, I am not attracted to the proposition. It seems to me that when a person faces quasi criminal proceedings under the *Labour and Industry Act*, as these were and are, he or she is entitled to know with reasonable precision the charges that they must answer.

Having said that, it should not be assumed that a prosecution based on section 98(1B) (c) would have failed. It may be that the two advertisements might more easily offend against paragraph (c) than paragraph (a), but of course such a matter could be decided only after the parties had had an opportunity to present full argument, if they so desired. It seems to me that the advertisements are an exercise in drafting brinksmanship. They go very close to contravening

paragraph (a) of section 98(1B); it is possible that they may go just far enough for the purposes of paragraph (c). I suggest that the appellants carefully consider these comments. [7] It ought to be said that the Magistrates' Court considered the particular charges which became the subject of these appeals at the same time that it considered a number of related charges brought under the Act. The appeals are allowed and the orders made by the Magistrate on 26 November 1984 are quashed. Order accordingly.
