33/07; [2007] VSCA 138

SUPREME COURT OF VICTORIA — COURT OF APPEAL

ABC DEVELOPMENTAL LEARNING CENTRES PTY LTD v WALLACE

Maxwell P, Chernov & Neave JJ A

6, 28 June 2007 – (2007) 16 VR 409; (2007) 172 A Crim R 269

CRIMINAL LAW – REGULATORY OFFENCE – COMPANY THE PROPRIETOR OF A CHILD CARE CENTRE – A CHILD AT THE CENTRE GOT OUT OF THE CENTRE INTO THE SURROUNDING STREETS WHERE HE WAS EXPOSED TO POTENTIAL HARM – CHILD WAS NOT PROPERLY PROTECTED NOR ADEQUATELY SUPERVISED – COMPANY CHARGED WITH TWO OFFENCES – CRIMINAL LIABILITY – WHETHER COMPANY LIABLE – FINDING BY MAGISTRATE THAT COMPANY LIABLE – PENALTIES IMPOSED – WHETHER MAGISTRATE IN ERROR: *CHILDREN'S SERVICES ACT* 1996, SS26, 27.

ABC Developmental Learning Centres Pty Ltd ('ABC') was the proprietor of a child care centre. A child aged nearly three got out of the centre while the staff were not looking. Subsequently, two charges under the *Children's Services Act* 1996 ('Act') were laid against ABC alleging that ABC failed to take reasonable precautions to protect the child from hazards and failing adequately to supervise him. At the hearing, ABC submitted that the escape of the child was due to the failures of two of its staff and not to a lack of proper management or a breakdown in the general system of child care at the centre. In those circumstances, ABC submitted that the criminal blame lay entirely with the two staff and not the company. The magistrate rejected this submission and found the charges proved. An appeal to the Supreme Court was dismissed (see MC14/06). Upon appeal—

HELD: Appeal dismissed.

1. The duties imposed by s27(1) of the Act on the proprietor and on a staff member are both directed at ensuring adequate supervision, but their scope is different. The proprietor's duty is to ensure adequate supervision of all children at all relevant times. The staff member's duty extends only to a child in the care of that staff member.

2. The duty under s27(1) of the Act has all the same characteristics as the duty under s21 of the *Occupational Health and Safety Act* 2004 ('OHS Act'). A breach of s27 does not require proof of *mens rea*. The offences are committed by the objective failure of the person to meet the specified standard whether the failure was deliberate or inadvertent.

3. Under s27(1), the proprietor has a duty to ensure – that is, make certain – that a certain state of affairs exists viz adequate supervision of all children. Like s21(1) of the OHS Act, s27(1) is framed to achieve a result. Unless there is adequate supervision, the company is in breach. Liability under the section does not depend upon any failure by the company itself, meaning by those persons who "embody the company". If it is proved that there was not adequate supervision, it is immaterial where in the organisation the failure occurred.

4. It will be a question of fact in each case whether there has been a failure to ensure adequate supervision. In practice, the supervision of children at a children's service will be wholly or very largely the responsibility of the staff of the service, rather than of management. Whether a lapse in supervision by a staff member will or will not constitute a failure by the proprietor to ensure adequate supervision will depend on the court's view of what the proprietor's duty required in the circumstances. No issue of that kind arose in the present case, since ABC conceded that there had not been adequate supervision.

5. Accordingly, it was open to the judge to conclude that the failure of the staff members to ensure adequate supervision was attributable to ABC as proprietor.

MAXWELL P, CHERNOV and NEAVE JJ A:

1. The appellant ("ABC") is the proprietor of a childcare centre. The operation of the centre is governed by Part 4 of the *Children's Services Act* 1996 ("the CS Act"). Section 27 provides as follows:

> (1) The proprietor of a children's service must ensure that all children being cared for or educated by the service are adequately supervised at all times that children are on the premises where the service operates or in the care of that service.

> Penalty: 50 penalty units.
>
> (2) A staff member of the children's service must ensure that any child in the care of that staff member is adequately supervised.
> Penalty: 50 penalty units.

2. The duties thus imposed, respectively, on the proprietor and on a staff member are both directed at ensuring adequate supervision, but their scope is different. The proprietor's duty is to ensure adequate supervision of all children at all relevant times. The staff member's duty, not surprisingly, extends only to a child in the care of that staff member.

3. One afternoon in 2003, 12 children were in the playground at the centre, being cared for by three staff. One of the staff went to the toilet, leaving the children in the care of the other two. These two staff had a clear and uninterrupted view of the playground area. One of the children contrived, however, to climb over the playground fence and leave the centre, unaccompanied and unsupervised.

4. The respondent, an authorised officer of the Department of Human Services, filed charges against ABC in the Magistrates' Court, alleging breaches of s26 and 27 of the CS Act. (Section 26 is concerned with the protection of children from hazards). After a trial lasting two days, the Magistrate found the charge of inadequate supervision proved. In the light of that finding, it was agreed that the charge under s26 should be dismissed. The Magistrate fined ABC $200 without conviction. ABC appealed under s92 of the *Magistrates' Court Act* 1989, but that appeal was dismissed. ABC appeals, by leave, from that dismissal.

Attributing to the company the conduct of the staff

5. The Magistrate found as a fact that the two staff members had failed to ensure that all children in their care were adequately supervised. He found that they had failed to observe the child in question moving a blue foam block to a position adjacent to the fence, from a point some 12 metres from it. The child had then climbed on top of the cube and from there over the fence. The Magistrate noted that an internal review conducted by ABC had reached the same conclusion about inadequate supervision by the staff members.

6. The Magistrate then posed this question:

> "Having established their failure to adequately supervise the children can this failure be attributed to the proprietor ABC? ... Should their failure be the company's failure?"

The Magistrate concluded that the acts of the staff members could be attributed to ABC, and that their failure to ensure adequate supervision was the failure of the company. His Honour adopted the following statement by the Privy Council (per Lord Hoffmann) in *Meridian Global Funds Management Asia Ltd v Securities Commission* ("*Meridian*")[1]:

> "In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

7. The Magistrate continued:

> "ABC can only discharge its statutory duties through its human agents. The [*Children's Services Act*] seeks to ensure the supervision of, and appropriate care of, and the wellbeing of, an extremely vulnerable group being young children. Parliament has clearly expressed this intention. The statutory obligation upon ABC was to ensure the adequate supervision of these children protecting them from hazards."

8. The Judge on appeal concluded that the Magistrate was correct in attributing "the identified failures of the two childcare workers... to ABC for the purposes of the prosecution under ss26(1) and 27(1)."[2] Like the Magistrate, his Honour treated the Privy Council decision in *Meridian* as the appropriate "framework for analysis".[3]

9. Describing crimes "arising out of the conduct of low-level employees" as "the heart of the matter", his Honour said:

> "According to Lord Hoffmann, there is no one answer to the question whether the criminal actions of employees (or directors or contractors) of a company can be counted as the actions of the company. In some cases it is necessary to fashion a special rule of attribution. Depending on the scope of the rule, the actions of the employees may or may not be attributed to the company. The scope of the rule will depend upon the court's interpretation of the terms of the offence and the policy of the enabling statute.
>
> Whether the actions of high-level or low-level employees will be attributed to the company will depend upon the circumstances. The matter was put succinctly by Callaway JA:[4]
>
> 'Sometimes only the board of directors acting as such or a person near the top of the corporation's organisation will be identified with the corporation itself. On other occasions someone lower, and perhaps much lower, in the hierarchy will suffice.'
>
> Where the employees are high-level, it may be possible to identify the company with their actions because they represent its directing mind and will. Where the employees are low-level, as in this appeal, the company can still be identified with their actions if this is required by the terms of the offence and the achievement of the policy objectives of the enabling statute."[5]

10. His Honour's conclusion was in these terms:

> "We can see that the offences specified in ss26(1) and 27(1) are designed to protect children and are an important component of the scheme by which the policy of the *Children's Services Act* is implemented. A children's service proprietor that is a company can only protect children from hazards and supervise them through employees, contract staff and similar persons. *In my view the terms of the offences and the policy of the legislation are such that the actions of such persons done within the scope of their work can be attributed to the company.* If their actions do not comply with the standards expressed in ss26(1) and 27(1), this can count as non-compliance by the company for the purposes of a prosecution."[6]

No question of attribution arises

11. ABC submitted that the Judge fell into error in thus defining the "rule of attribution" for the purposes of the CS Act. It was argued that the only acts (or omissions) which should be attributed to ABC were the acts (or omissions) of persons who took part in the management of the company.

12. In our view, on the proper construction of s27 of the CS Act no rules of attribution are called for. In *R v Commercial Industrial Construction Group Pty Ltd* ("CICG")[7], this Court explained why no rules of attribution (of acts of an employee to the employer company) were called for where the employer was alleged to have breached its statutory duty to ensure a safe working environment for employees.[8] In our opinion, the duty of a proprietor of a children's service to ensure adequate supervision of children is a duty of the same kind. We begin by repeating the essential reasoning from CICG.

The Occupational Health and Safety Act

13. CICG concerned a breach of the general safety duty imposed by s21(1) of the *Occupational Health and Safety Act* 1985, which obliged an employer to:

> "... provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health."

14. The same duty is now imposed by s21(1) of the *Occupational Health and Safety Act* 2004. Breach of that general safety duty does not depend on proof of *mens rea*.[9] There is no defence of honest and reasonable mistake, so the liability is properly to be regarded as absolute.[10] Because of the practicability qualification, the obligation is not absolute[11] but the liability for breach is absolute nevertheless. Unlike the position in *Tesco Supermarkets Ltd v Nattrass*,[12] there is no "due diligence" defence, nor is it a defence to show that the breach was "due to the act or default of another person."

15. It is immaterial at what level in an organisation the safety breach occurs. Adapting what was said by the Court of Appeal in *R v British Steel Plc* ("British Steel") (in relation to the UK

equivalent of s22 of the *Occupational Health and Safety Act* 1985), an employee –

> "... will only be exposed to the risk if the system (if any) designed to ensure his safety has broken down and it does not matter for the purposes of [s21] at what level in the hierarchy of employees that breakdown has taken place."[13]

In a commentary on *British Steel*, published in the *Criminal Law Review*,[14] Professor Sir John Smith[15] said:

> "Where a statutory duty to do something is imposed on a particular person (here, an 'employer') and he does not do it, he commits the *actus reus* of an offence. It may be that he has failed to fulfil his duty because his employee or agent has failed to carry out his duties properly but this is not a case of vicarious liability. If the employer is held liable, it is because he, personally, has failed to do what the law requires him to do and he is personally, not vicariously, liable. *There is no need to find someone – in the case of a company, the 'brains' and not merely the 'hands' – for whose acts the person with the duty can be held liable. The duty on the company in this case was 'to ensure' – ie to make certain – that persons are not exposed to risk. They did not make certain. It does not matter how*; they were in breach of their statutory duty and, in the absence of any requirement of *mens rea*, that is the end of the matter."[16]

16. The English Court of Appeal adopted the same approach in *R v Gateway Foodmarkets Ltd.*[17] The Court held that the employer company had breached the equivalent of s21(1) when its employee was exposed to the risk of injury –

> "not by any act or omission of the [company], meaning their head office personnel or senior management who could be identified with the company itself, but by those of their employees who were not in that category, specifically the store manager or the section managers who had allowed the irregular [unsafe] system to grow up [which led to the employee's death] and who had implemented it in contradiction of their instructions from head office."[18]

17. In the view of the Court of Appeal, the general duty provision should be interpreted so as to impose liability on the employer whenever the relevant event occurred, namely, a failure to ensure the health and safety of an employee.

> "The duty under each section is broken if the specified consequences occur, but only if 'so far as is reasonably practicable' they have not been guarded against. So the company is in breach of duty unless all reasonable precautions have been taken, and we would interpret this as meaning 'taken by the company or on its behalf'. *In other words, the breach of duty and liability under the section do not depend upon any failure by the company itself, meaning those persons who embody the company, to take all reasonable precautions*. Rather, the company is liable in the event that there is a failure to ensure the safety etc of any employee, unless all reasonable precautions have been taken – as we would add, by the company or on its behalf ...
>
> [I]f the test is whether all reasonable precautions have been taken by the company or on its behalf, then *it would not seem to be material to consider whether the individual concerned, who acted or was authorised to act on behalf of the company, was a senior or a junior employee.*"[19]

This analysis was adopted by a differently-constituted Court of Appeal in *R v Nelson Group Services (Maintenance) Ltd*,[20] a case relied on by ABC in this appeal.[21]

The CS Act duty to supervise

18. The duty under s27(1) of the CS Act has all of the same characteristics as the duty under s21 of the *Occupational Health and Safety Act*. It was not contended by ABC that breach of s27(1) required proof of *mens rea*.[22] On the contrary, ABC accepted – correctly, in our view – the following conclusions of the learned trial Judge about the duty imposed by s27(1):

> "These offences are expressed in terms of a mandatory standard for the protection and supervision of children enforced by a penalty for breach. Intention to breach the expressed standard is not an element of the offences created. *The offences are committed by the objective failure of the person to meet the specified standard whether the failure was deliberate or inadvertent.* This is apparent from the terms of ss26 and 27 and also from the fact that the legislature has not included the defence of taking reasonable steps and exercising due diligence, as it did in relation to the different offence of publishing an advertisement for an unlicensed children's service (s8(1) and (2))."[23]

19. Under s27(1), the proprietor has a duty to ensure – that is, make certain – that a certain state of affairs exists viz adequate supervision of all children. Like s21(1) of the OHS Act, s27(1) is framed to achieve a result.[24] Unless there is adequate supervision, the company is in breach. Liability under the section does not depend upon any failure by the company itself, meaning by those persons who "embody the company". If it is proved that there was not adequate supervision, it is immaterial where in the organisation the failure occurred.

20. Senior counsel for ABC argued that the duty under s27(1) of the CS Act was distinguishable on two grounds from the duty under s21(1) of the *Occupational Health and Safety Act*. The first was that the word "adequate" in s27(1) introduced an element of fault, such that proof of negligence on the part of the proprietor was an element of the offence under s27(1). Reference was made to s12.3 of the *Criminal Code Act* 1995 (Cth). The second ground of distinction was said to be that s27(2) imposed a separate and complementary duty on staff members to ensure adequate supervision.

21. In our view, there is no distinction on either ground. As to the first ground, the word "adequate" in s27(1) does not introduce the notion of fault (negligence) into that provision, any more than the words "so far as is reasonably practicable" introduce the notion of fault into s21(1) of the *Occupational Health and Safety Act*. In each case, the words of qualification define the scope of the duty, that is, define the state of affairs which it is the duty of the employer/proprietor to bring about and maintain. They "prescribe the measure of the precautions to be taken."[25] What it is "reasonably practicable" for an employer to do depends, in part, on what the employer knows – or ought to know – about the risk in question and about how it might be eliminated or reduced.[26] But this does not mean that a breach of the duty (under s21(1)) to do what is reasonably practicable requires proof of negligence.

22. The position is even clearer in the case of s27(1), since the word "adequate" imports no consideration of the proprietor's knowledge. Moreover, ABC's acceptance of the proposition that an inadvertent breach is still a breach of s27(1) leaves no room for an argument that negligence is an element of the offence.

23. Of course, it will be a question of fact in each case whether there has been a failure to ensure adequate supervision.[27] In practice, the supervision of children at a children's service will be wholly or very largely the responsibility of the staff of the service, rather than of management. Whether a lapse in supervision by a staff member will or will not constitute a failure by the proprietor to ensure adequate supervision will depend on the court's view of what the proprietor's duty required in the circumstances. No issue of that kind arises in the present case, since ABC conceded that there had not been adequate supervision.

24. As to the second ground of distinction, the *Occupational Health and Safety Act* also imposes a complementary safety duty on employees: s25(1). The existence of that parallel duty does not limit the scope or nature of the duty imposed on the employer.[28] Rather, the imposition of parallel duties on employer and employee is intended to promote the object of ensuring workplace safety. In the same way, the imposition by s27 of the CS Act of parallel duties on proprietor and staff of a children's centre was obviously intended to promote the object of ensuring that children are adequately supervised.

25. ABC submitted that the conclusion arrived at by the Magistrate, and by the Judge, amounted to the imposition of vicarious liability on the company as proprietor.[29] For the reasons we have given, no question of vicarious liability arises. The duty to ensure adequate supervision is imposed on the proprietor itself. If that duty is breached, the proprietor itself is directly liable.[30]

26. ABC argued that, if the legislature had intended to make a corporate proprietor liable for all of the acts of every employee, agent and officer, no matter where in the employment hierarchy that person might be and no matter what his/her responsibility might be, that could have been done expressly. Attention was drawn to s143 of the *Occupational Health and Safety Act* 2004, which provides:

> **"143. Imputing conduct to bodies corporate**
> For the purposes of this Act and the regulations, any conduct engaged in on behalf of a body corporate by an employee, agent or officer (within the meaning given by section 9 of the *Corporations Act*) of

the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate."

27. Counsel also referred to the following provisions of the *Ozone Protection and Synthetic Greenhouse Gas Management Act* 1989 (Cth):

> **"65. Conduct by directors, servants and agents**
> (1) Where, in proceedings for an offence against this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:
> (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
> (b) that the director, servant or agent had the state of mind.
>
> (2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct."

28. Statutory attribution provisions of this kind are engaged only where it is necessary to decide whether the conduct, or state of mind, of a servant or agent of a company is to "count as" the conduct, or state of mind, of the company. For the reasons we have given, no such question arises under s27(1) of the CS Act. Thus the absence from the CS Act of a statutory attribution provision is irrelevant, just as the presence of such a provision (dealing with intention) in the *Occupational Health and Safety Act* 1985 was irrelevant in CICG.[31]

29. If, contrary to our view, it were necessary to consider the question of attribution, we would not hesitate to uphold the conclusion of the learned Judge, for the reasons he gave, that the failure of the staff members to ensure adequate supervision was attributable to ABC as proprietor.

30. For these reasons, although they are different from those given by the Judge, we would dismiss the appeal.

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[1] [1995] UKPC 5; 1995] 2 AC 500, 507; [1995] 3 All ER 918; [1995] BCC 942; [1995] 3 WLR 413; [1995] 2 BCLC 116 (original emphasis).
[2] *ABC Developmental Learning Centres Ltd v Wallace* [2006] VSC 171, [42]; 161 A Crim R 250.
[3] Ibid [6], referring to the *Director of Public Prosecutions Ref No 1 of 1996* [1998] 3 VR 352, 355; (1997) 96 A Crim R 513 (Callaway JA).
[4] *Director of Public Prosecutions Ref No 1 of 1996* [1998] 3 VR 352; (1997) 96 A Crim R 513.
[5] Ibid [8], [10] (footnotes omitted).
[6] Ibid [28] (emphasis added).
[7] (2006) 4 VR 321.
[8] *Occupational Health and Safety Act* 1985 s21(1); see now *Occupational Health and Safety Act* 2004 s21(1).
[9] As the English Court of Appeal pointed out in *R v British Steel Plc* [1995] 1 WLR 1356, 1361; [1995] Crim LR 654; [1995] ICR 586, in relation to the equivalent legislation, the *Health and Safety at Work etc Act* 1974 (UK).
[10] See *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523, 590 (Dawson J); (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553; *Italo Australia Construction Pty Ltd v Parkes* [1988] 24 IR 428, 431; *Drake Personnel v WorkCover Authority (NSW)* (1999) 90 IR 432, 452; *Broken Hill Associated Smelters Pty Ltd v Stevenson* (1991) 42 IR 130, 145; *R v Gateway Foodmarkets Ltd* [1996] EWCA Crim 1768; [1997] 3 All ER 78, 82; [1997] 2 Cr App R 40; [1997] Crim LR 512; [1997] ICR 382 (applying the House of Lords decision in *R v Associated Octel Co Ltd* [1996] UKHL 1; [1996] 4 All ER 846; [1997] IRLR 123; [1997] Crim LR 355; [1996] 1 WLR 1543; [1996] ICR 972.)
[11] *Chugg v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249, 251 (Brennan J).
[12] [1971] UKHL 1; [1972] AC 153; [1971] 2 All ER 127; [1971] 2 WLR 1166.
[13] *R v British Steel Plc* [1995] 1 WLR 1356, 1363D; [1995] Crim LR 654; [1995] ICR 586.
[14] [1995] 1 WLR 1356; [1995] Crim LR 654; [1995] ICR 586.
[15] The author of *The Law of Theft*, joint author of *Smith and Hogan's Criminal Law*, and a member of the editorial board of the *Criminal Law Review*.
[16] Professor Sir John Smith, 'Health and Safety at Work' [1995] Crim LR 654, 655 (emphasis added). This commentary was quoted by the English Court of Appeal in *Attorney-General's Reference (No.2 of 1999)* [2000] QB 796, 812.
[17] [1996] EWCA Crim 1768; [1997] 3 All ER 78; [1997] 2 Cr App R 40; [1997] Crim LR 512; [1997] ICR 382 (Evans LJ delivering the judgment of the Court).
[18] Ibid 80-81.
[19] Ibid 83 – 4 (emphasis added).

[20] [1998] EWCA Crim 2511; [1998] 4 All ER 331, 350-351; [1999] 1 WLR 1526; [1999] IRLR 646; [1999] ICR 1004 (Roch LJ delivering the judgment of the Court).
[21] Similar views were expressed by Tipping J, as a member of the New Zealand Court of Appeal in *Linework Limited v Department of Labour* [2001] NZCA 125; [2001] 2 NZLR 639; [2001] ERNZ 80.
[22] cf *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.
[23] *ABC Developmental Learning Centres Ltd v Wallace* [2006] VSC 171, [19]; 161 A Crim R 250 (emphasis added).
[24] *British Steel* [1995] 1 WLR 1356, 1363; [1995] Crim LR 654; [1995] ICR 586; *R v Nelson Group Services (Maintenance) Ltd* [1998] EWCA Crim 2511; [1998] 4 All ER 331, 348b; [1999] 1 WLR 1526; [1999] IRLR 646; [1999] ICR 1004. In the Second Reading Speech for the Children's Services Bill, the Minister said: "It is paramount that there is in place a legislative framework that *ensures* the safety and wellbeing of ... children" (emphasis added).
[25] *Chugg v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249, 251 (Brennan J).
[26] *Occupational Health and Safety Act* 2004 s20(2).
[27] cf in the OHS context, *R v Nelson Group Services (Maintenance) Ltd* [1998] EWCA Crim 2511; [1998] 4 All ER 331, 349f, 351d; [1999] 1 WLR 1526; [1999] IRLR 646; [1999] ICR 1004.
[28] *Linework Ltd v Department of Labour* [2001] NZCA 125; [2001] 2 NZLR 639, 648 [38]; [2001] ERNZ 80.
[29] cf *Tiger Nominees Pty Ltd v State Pollution Control Commission* (1992) 25 NSWLR 715; (1992) 58 A Crim R 428; (1992) 75 LGRA 71.
[30] *R v Gateway Foodmarkets Ltd* [1996] EWCA Crim 1768; [1997] 3 All ER 78, 82e; [1997] 2 Cr App R 40; [1997] Crim LR 512; [1997] ICR 382, citing *R v Associated Octel Co Ltd* [1996] UKHL 1; [1996] 4 All ER 846; [1997] IRLR 123; [1997] Crim LR 355; [1996] 1 WLR 1543, 1547; [1996] ICR 972; *Linework Ltd v Department of Labour* [2001] NZCA 125; [2001] 2 NZLR 639, 650 [45]; [2001] ERNZ 80.
[31] *Supra* at 328 [32].

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