02/76

INDUSTRIAL APPEALS COURT

GARLICK v INGE BROS PTY LTD (No 1)

Leckie J, President, G Lane Esq and N Gibbs Esq, Employers Representatives

27 August 1975

LABOUR AND INDUSTRY – DISCRETIONARY POWER TO ORDER AMOUNTS DUE TO EMPLOYEE CONSIDERED – COMPANY CONVICTED OF FAILURE TO PAY AMOUNTS OF HOLIDAY PAY – AMOUNTS NOT ORDERED TO BE PAID BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *LABOUR & INDUSTRY ACT* 1958, S199(1).

HELD: Appeal allowed. Amounts ordered to be paid.
1. The Magistrate was in error in declining to make the order on the claim on the grounds of delay and the fact that the claimant owed money to the employer.

2. The claimant's right to payment did not arise under the contract of service but a statutory one and the only remedy was by way of proceedings under the *Labour and Industry Act* 1958. The fact that the employee owed money to the employer was not a matter to be taken into consideration by the Magistrate.

THE PRESIDENT: This is an appeal against the Industrial Court to order the payment by the respondent Company of three amounts of holiday pay, consequent upon the conviction of the Company upon three charges of failure to pay such amounts.

There was some discussion during the case as to whether, the appeal being in the nature of a rehearing, the convictions themselves were subject to review. As, however, the Court is of the opinion that, on the evidence led before it, the Appellant was properly convicted on each charge, the question is of academic interest only.

The power to make an order for payment of the amounts said to be due is contained in s199(1) of the *Labour and Industry Act* 1958, which reads (omitting unnecessary words):

> '(1) Where a person is in respect of any employe or former employe of his convicted of an offence the Court may order the offender to pay to the employe ... such sums for arrears (for any period not exceeding twelve months) of any moneys payable under this Act as the Court considers to be or to have been due to the employe.'

It is clear that this power is a discretionary one (see *Howard v Springvale Sawmilling and Building Co Pty Ltd* [1923] VicLawRp 63; (1923) VLR 518). The Court will not interfere with the exercise of a discretion unless it can be shown that it was improperly exercised or exercised upon wrong grounds.

We have been told that the Magistrate gave three reasons for declining to make an order for payment. There was some slight dispute as to the exact terms of those reasons, but we are prepared to accept them as stated by Mr Byrne on behalf of the Respondent.

They were in summary:

1. Delay in the matter coming before the Court
2. Mr Michalitsis owed money to the Respondent
3. Mr Michalitsis had worked over a long period knowing the basis on which he was employed and took no step for many years.

Before examining these reasons, it is important to note that the Court being satisfied that Mr Michalitsis did not, in fact, take any annual leave, the required payments became due upon the termination of his employment by virtue of Clause (6) of the *Labour and Industry (Annual Holidays) Order* 1967. Consequently, the starting point in examining the matter of delay is 3 December 1970.

The evidence is that Mr Michalitsis first complained to the Department in January 1971. It could not therefore be said that there was any undue delay on his part. Any delay since then apparently was caused by the Department and he should not be penalised for that.

It is argued that Mr Michalitsis could have proceeded under section 149 of the Act. But the matter having been referred to the Department, he was perfectly entitled to leave the matter to be pursued by it with the expectation of an order under section 199.

As to basing the refusal to make an order upon the evidence that money was owing to the Respondent by Mr Michalitsis, it is to be noted that Mr Michalitsis had no claim to annual holidays or payment in lieu arising *ex contractu.* His right was a statutory one and his only remedy was by proceedings under the Act. He could not plead his entitlement by way of set-off or counterclaim in the Supreme Court action commenced against him. Consequently, in our view, this was not a proper consideration to be taken into account in the exercise of the discretion given to the Magistrate.

It may be that, in certain cases, the fact of a worker standing by whilst aware of his statutory rights could affect the exercise of a discretion. But in view of our conclusion that in the present case the exercise of the discretion miscarried because of the two other reasons, it is not necessary to comment further on this aspect.

The exercise of the discretion having miscarried, the Court may substitute its own view, which is that it is proper to make the orders for payment requested.

The calculation of the amounts due presents some difficulty. It is quite clear that Mr Michalitsis was to be remunerated by way of commissions; this appears not only from the Letter of appointment but also from subsequent dealings. The fact that he received an advance of $150 per week or any other amount is quite irrelevant. So also is the question of car allowance. He was paid a car allowance as a condition of his employment but this in the Court's view is quite divorced from the question of commissions.

The calculations presented by the Appellant were not based on the appropriate periods, so that the question of whether they were otherwise correct is immaterial. The document submitted on behalf of the Respondent as an analysis of the record cards which it kept is the only information which is correctly based. It sets out the net commission earned in each month of Mr Michalitsis' employment, and consequently it is possible to calculate his remuneration for each of the two completed years and for the balance of his period of employment. As previously pointed out, the car allowance does not enter into this. The Court is prepared to make calculations on the basis of these figures.

For the first year the total is $11,888.23 and three fifty-seconds of this is $685.86; for the second year the total is $11,912.50 and three forty-ninths of this is $729.34; the figure for the last two months is $480.00 and three forty-ninths of this is $29.35. There will be orders against the Respondents for these amounts in default distress.
