John Holland Pty Ltd v Lewis [2004] NTCA 9

PARTIES:	JOHN HOLLAND PTY LTD
	v
	RAY LEWIS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 1 of 2004 (20018624)
DELIVERED:	9 June 2004
HEARING DATES:	18 May 2004
JUDGMENT OF:	ANGEL, MILDREN AND RILEY JJ

CATCHWORDS:

WORKERS COMPENSATION – Appeal – Onus of proof – Application of *Herbert v KP Welding Constructions Pty Ltd (1995) 125 FLR 299* – Whether deductions for taxation not made because of shortness of time - Definition of a "worker" for the purposes of the Work Health Act.

Cases:

Herbert v KP Welding Constructions Pty Ltd (1995) 125 FLR 299

Thompson v Groote Eylandt Mining Company Limited (2003) NTCA 05

Stewart v Dillingham Constructions Pty Ltd (1974) VR 24

Legislation:

s 127 Work Health Act

REPRESENTATION:

Counsel:

Appellant:	A.R. Harris QC
Respondent:	S.R. Southwood QC

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Priestley Walsh

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

John Holland Pty Ltd v Lewis [2004] NTCA 9
No AP 1 of 2004 (20018624)

BETWEEN:

JOHN HOLLAND PTY LTD
Appellant

AND:

RAY LEWIS
Respondent

CORAM: ANGEL, MILDREN AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 9 June 2004)

ANGEL J:

[1] I agree that the appeal should be allowed and that the judgment of the learned magistrate at first instance should be restored.

[2] In particular I agree that the learned judge on appeal erred in holding that the legal burden of proof reverted to the appellant to prove on the balance of probabilities that the respondent was being paid on a cash basis at the time of his injury and that the appellant had not discharged this onus of proof.

[3] Illegality was never pleaded by the appellant; in its answer, the appellant merely traversed the respondent's allegation that he was a worker. The learned judge said, inter alia, "The objective facts were not sufficient to establish, on the balance of probabilities, that there was an intention to defraud the tax office". Even assuming this to be so, it is, with respect, not to the point. The onus was on the respondent from first to last to establish he was a worker at the time of the accident. The learned magistrate after giving detailed and careful consideration to the evidence found that the respondent had not established on the balance of probabilities that he was a worker as defined. That was a finding open on the evidence which ought not to have been disturbed on appeal.

[4] In reaching his conclusion the learned magistrate clearly had regard to the circumstance that the respondent was not employed by the appellant, but by the contractor to the appellant, one Zagorianos. Being a stranger to the contract between Zagorianos and the respondent, the appellant was thus at a forensic disadvantage and the learned magistrate understandably and correctly took a cautious approach to the respondent's evidence.

[5] One issue on the pleadings was whether there were one or two contracts of employment. That was an issue which was not dealt with specifically in either the reasons of the learned magistrate or of the learned judge on appeal. The respondent contended in his pleadings that he was injured on the first day of a second separate contract of employment. However the evidence was that he was on trial for the first week and that if his work

proved satisfactory he would continue the following week. He was informed his work during the trial period was satisfactory prior to the weekend preceding his starting work on the job for the appellant. I agree with counsel for the appellant that the condition of satisfaction was a condition subsequent of one contract of employment to which the transitional statutory provision as to who was a "worker" applied.

[6] The burden of proof was, as the learned magistrate said, on the respondent to prove, on the balance of probabilities, that on 3 July 2000, the date of the accident, he was a worker. The learned magistrate found the respondent failed to discharge that burden of proof and he has not been demonstrated to be wrong.

[7] The appeal should be allowed and the orders of the learned magistrate restored.

MILDREN J:

[8] I agree with the judgment of Riley J and with the orders he proposes and I have nothing further to add.

RILEY J:

[9] On 3 July 2000 the respondent suffered injury in the course of his employment. He made a claim for compensation pursuant to the provisions of the Work Health Act and an issue arose as to whether he was a "worker" for the purposes of that Act. The matter came before the Work Health Court

where it was held that he was not a worker. A subsequent appeal to the Supreme Court resulted in the setting aside of the decision of the Work Health Court and the making of a declaration that the appellant was a worker for the purposes of the Act.

[10] The circumstances surrounding the employment of the respondent were a little unusual. He was a painter by trade and had been without work for some time. He met Mr Zagorianos and asked him for a job. Mr Zagorianos needed the services of a painter as he was about to undertake a contract with the appellant, John Holland Pty Ltd. Mr Zagorianos was concerned to ensure that the respondent was able to adequately perform the work and he therefore offered the respondent a "trial" on a smaller job. There was some discussion regarding the rate of pay for the trial but no figure was agreed. The usual range was, according to the respondent, between $25 per hour for "the very best tradesmen" down to $20 per hour. There was no discussion at all between Mr Zagorianos and the respondent as to the basis upon which he was to be engaged and, in particular, whether he was to be engaged as a PAYE taxpayer or as a subcontractor under the Prescribed Payment Scheme or under some other arrangement.

[11] The respondent started work, on a trial basis, during the week commencing Monday 26 June 2000. Mr Zagorianos was pleased with his performance and, on Friday 30 June 2000, gave the respondent $525 in cash in an envelope. There was no accompanying pay slip and nothing in writing or by way of discussion to indicate how the amount of $525 was calculated or the

taxation status of the payment. The respondent was happy with the payment and was "delighted to be working again".

[12] The contract with John Holland commenced on Monday 3 July 2000. The respondent attended at the worksite, commenced work and then, late in the afternoon of that day, fell from a ladder and was badly hurt. He has not worked since. His immediate employer, Mr Zagorianos, did not have workers' compensation insurance and the respondent therefore proceeded against John Holland Pty Ltd pursuant to the provisions of s 127 of the Work Health Act. That section deals with the responsibilities of a principal contractor in relation to a worker employed by a subcontractor.

[13] The Work Health Court was invited to determine, as a preliminary issue, whether the respondent was a worker for the purposes of the Act. At the relevant time a "worker" was defined to mean a natural person:

> "who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person and who is a PAYE taxpayer in respect of any remuneration or other benefit received in relation to the performance of such work or service."

[14] In relation to a worker a "PAYE taxpayer" was defined to mean:

> "that his or her employer makes deductions from money paid to the worker for work performed or service provided to the employer in accordance with Division 2 of Part VI of the Income Tax Assessment Act 1936 of the Commonwealth, and includes a worker in respect of whom such deductions are not made by his or her employer but only because –

(a) of the shortness of time during which the worker has been in the employment of his or her employer; or

(b) having regard to the amount of money paid to the worker, his or her employer is not required to make such deductions under that Division."

[15] The definition of a "worker" changed shortly after the occurrence of the injury suffered by the respondent but neither party contends that the amended definition has application to the relationship of employment as found by his Worship. It was faintly contended that there may have been two contracts of employment. That contention cannot be sustained for the reasons expressed by Angel J.

The decision of the Work Health Court

[16] The learned magistrate concluded that he was not persuaded that the respondent was "a worker" for the purposes of the Work Health Act. In so concluding he proceeded solely on the basis of the evidence given before him by the respondent. No other witness was called. Mr Zagorianos was not called to give evidence and the court was informed that he was unavailable to either party. There was no documentary evidence of the nature of the employment relations. The only documents that may have been of relevance were created after the injuries were suffered and in relation to the proposed claim for compensation. The learned magistrate observed that the documents did not assist him in assessing the testimony of the respondent.

[17] The learned magistrate paid close attention to the evidence of the respondent. His Worship noted that the respondent made admissions that he had never lodged a tax return with the Australian Taxation Office and that he had, at times, unlawfully worked for cash in hand. His Worship regarded these as frank and honest admissions which "did his credit no harm". He went on to say:

> "In general, he seemed to me to be an honest witness. The difficulty with his evidence does not relate to his honesty, but rather to the lack of so many of the documents (which can also serve as aids to memory and a check on imagination) which would exist for any worker who had a regular relationship with the taxation authorities."

[18] His Worship was "strongly of the view that the payment of $525 made on 30 June 2000 was a cash payment from which no PAYE deductions had been made by Mr Zagorianos". In other words, the payment to the respondent was an unlawful cash in hand arrangement which would mean that the respondent was not a worker within the definition in the Act for the period covered by the payment. The bases upon which his Worship reached his conclusion included the following matters:

(a) the respondent's history of having worked on an unlawful cash in hand basis in the past and his preparedness to undertake paid work for cash with no deductions at all for taxation purposes;

(b) his having never lodged a tax return with the ATO;

(c) during the time that the respondent worked for Mr Zagorianos he was (as found by his Worship) in receipt of benefits from Centrelink and had done nothing to terminate those payments;

(d) the respondent had not given his tax file number to Mr Zagorianos nor, I note, was there any evidence of a request having been made by Mr Zagorianos for the number;

(e) there was no agreement reached between the respondent and Mr Zagorianos as to an hourly or weekly rate of remuneration;

(f) the method of payment, being $525 in cash in an envelope with no accompanying documentation;

(g) the fact that there was no discussion between the respondent and Mr Zagorianos when the respondent received the $525 in cash regarding how the amount was calculated or clarifying the taxation status of the payment; and

(h) the cash payment made on 30 June 2000 was a payment in relation to which there was no evidence of PAYE deductions having been made by Mr Zagorianos or of any intention on the part of anyone that any payment would be made to the ATO.

[19] In those circumstances, having considered the whole of the evidence of the respondent and assessed him as a witness, the learned magistrate was satisfied that the payment made was an unlawful cash in hand payment.

His Worship then considered whether the nature of the relationship between the worker and Mr Zagorianos changed between the time of the work performed as a trial and 3 July 2000. He expressed the view that he could not find "sufficient material" to persuade him that there was any difference. The only material was a "feeling, idea, impression" expressed by the respondent that there was a difference. In the circumstances his Worship concluded:

> "On all the evidence my conclusion is that it is at least as likely that a continued regime of cash payments was contemplated. I am therefore not persuaded that Mr Lewis (the respondent) was a "worker"."

[20] By reference to the definition of "a worker" in the Work Health Act his Worship concluded that the respondent was not a PAYE taxpayer in respect of any remuneration and, also, that it had not been shown that deductions for PAYE obligations had not been made only because of the shortness of time during which the worker was in the employment of Mr Zagorianos. His Worship held that the onus rested upon the respondent to establish on the balance of probabilities that on the day he suffered injury he was a worker for the purposes of the Act. His Worship observed that the legal burden of proof remained on the respondent throughout and he had not discharged the onus.

The decision of the Supreme Court

[21] An appeal from a magistrate in the Work Health Court is to the Supreme Court and is limited to questions of law. On appeal the learned judge set aside the findings of his Worship and declared the respondent to have been a worker for the purposes of the Act.

[22] On appeal it was held that the hearing before the Work Health Court had miscarried because the learned magistrate had misdirected himself as to the manner in which he should arrive at a finding as to whether the respondent was a worker and, also, as to who bore the burden of proof in such circumstances.

[23] In the course of his reasons for decision the learned magistrate considered and distinguished the Court of Appeal decision in *Herbert v KP Welding Constructions Pty Ltd* (1995) 125 FLR 299. Her Honour held that his Worship was in error in so doing. She noted the similarities between that case and the present and went on to observe:

> "This case has considerable similarities with the facts in *Herbert v KP Welding Constructions Pty Ltd*. The court must proceed on the basis that there is an assumption that the parties would not evade the provisions of the Income Tax Assessment Act by shift or contrivance."

[24] The submission was made to her Honour, and again in this Court, that in circumstances such as arise in the present case the Court must make a decision as to whether the injured worker falls within the definition based on the assumption that the parties would not evade the provisions of the

Income Tax Assessment Act by "shift or contrivance". It was submitted that the effect of the decision in *Herbert* was that in cases such as this a rebuttable presumption of law was created that once it is established that a worker is employed pursuant to a contract of service it is to be presumed that he is a PAYE taxpayer. The submission continued that a rebuttable presumption of law has the effect of placing the legal burden of proof on the other party, in this case the appellant.

[25] In the case of *Herbert* the worker and the employer had agreed that the worker would be employed by the employer and that he would work an identified number of hours and be paid at the rate of $14 per hour. There had been no discussion as to whether income tax was to be deducted at the PAYE rate or in accordance with the Prescribed Payments Scheme. An injury occurred to the worker on the second day of his employment and before he had been paid any sum at all. In those circumstances Martin CJ and Thomas J held:

> "A court of law ought not to contemplate that parties to an employment contract would come to an agreement that, notwithstanding the relationship established by that contract, they would or might pretend that the contract was other than what it was for taxation purposes. Whenever a situation such as this arises the correct approach is to consider what the position would have been had the worker been paid for his labour immediately prior to the injury giving rise to his claim for compensation. In these circumstances the definition of "PAYE taxpayer" should be adjusted, in the grammatical sense only, so as to read, in relation to a worker, means that his employer should have made deductions from money paid to the worker for work performed or services provided to the employer in accordance with Division 2 of Part VI of the *Income Tax Assessment Act* of the Commonwealth, but such deductions were not made by his employer only because of the shortness of time during

> which the worker was in the employment of his employer. To do that presents no injury to the statute, but enables it to be employed in a way that does justice and in accordance with the evident policy of the Parliament.
>
> It should not be thought that the reasons in this matter are to be given any application other than the facts that this case warrant. As the arguments in the appeal show there are many issues to be explored arising from the new definition of "worker". It does not do away with the need to determine the relationship between the parties in all cases."

[26] In the same case (at 304) Angel J said, in agreeing that the appeal should be allowed:

> "The parties having entered a legal relationship which attracted PAYE obligations and that relationship subsisting at the time of the accident, it follows that the shortness of employment was the only reason PAYE deductions were not made, assuming, as we must, that the respondent would meet its legal obligations."

[27] In my view, contrary to the observations of the learned judge on appeal, *Herbert* is not authority for the proposition that a court "must" proceed on the basis that the parties would not evade the provisions of the Income Tax Act by shift or contrivance. In my view, the court in *Herbert* was doing no more than observing that where there is no evidence to the contrary it will be assumed that the arrangements put in place between the parties will take place in conformity with the general law. This, as the appellant points out, is no more than the expression of a logical inference from the stated facts. The court in *Herbert* made it clear that the observations were relevant to the facts in that particular case. Nothing was said to suggest that the court was

creating a rebuttable presumption applicable to other circumstances in other cases.

[28] The circumstances in *Herbert* differed from those in the present case in that here the learned magistrate was prepared to find, on the basis of the evidence before him, that the parties were arguably contemplating a regime of unlawful payments with no deductions at all for taxation purposes. Such was not the case in *Herbert* where the alternative interpretations available to the court consisted of one where the parties would comply with the requirements of the law and another where they would not. In those circumstances and in the absence of evidence supporting either view the court concluded that it should be assumed the parties would meet their legal obligations.

[29] In my view the observations of her Honour regarding the application of *Herbert* demonstrated error. Based on that error her Honour concluded that the legal burden fell upon the appellant in these proceedings to prove that the respondent was working on a cash basis. That also demonstrated error. The obligation on the Work Health Court was to decide the matter on the basis of the evidence before it and, if need be, by reference to the onus resting on the respondent to prove his case.

[30] In the present matter there was an evidentiary basis upon which the learned magistrate could have reached the conclusions identified in his reasons for decision and, in those circumstances, no question of law arises. Contrary to

the finding of her Honour that there was no evidence of agreement between the respondent and Mr Zagorianos as to what tax rate was to be deducted, the learned magistrate had concluded that the payment for the preceding week had been a cash payment from which no PAYE deductions had been made or were to be made. Rather than concluding that there was no evidence as to what rate of tax was to be deducted in the future, his Worship in fact concluded that there was no evidence that any different system would apply from 3 July 2000. In other words he found that a payment regime was in place from the previous week and that it was at least as likely that it would continue as any other alternative. This is not a case of saying that no agreement had been reached and therefore one should assume compliance with the law. Rather it was found that an unlawful regime was in place and there was no reason to conclude it would not continue.

[31] This Court was referred to the decision of the Northern Territory Court of Appeal in *Thompson v Groote Eylandt Mining Company Limited* (2003) NTCA 05. That case differs from the present case in that there the employer sought to take advantage of a young and ignorant worker by deducting PPS payments rather than PAYE payments, contrary to the law. Having considered the purpose of the relevant provisions of the Work Health Act the court referred to the legal maxim that no man shall take advantage of his own wrongdoing and concluded that the words "employer makes deductions" in the definition of "PAYE taxpayer" include those employers who are required by law to make such deductions but who do not do so

without the knowledge or authority of the worker. That is not the situation here. In the present case there was an implied agreement between the employer and the employee to pay the employee in cash without deduction for taxation. The respondent had been in such arrangements in the past. He was not innocent of any wrongdoing.

[32] It was submitted on behalf of the respondent that the onus of establishing an unlawful scheme rested upon the appellant. The onus rested upon the respondent to prove each essential element in his cause of action. The onus of proof in the sense of the legal onus would only shift when by the defence there is raised not merely a denial of some essential element of the plaintiff's cause of action but some allegation which may constitute a good defence and which amounts to an avoidance of the plaintiff's prima facie claim to relief: *Stewart v Dillingham Constructions Pty Ltd* (1974) VR 24 at 28. In the present case the burden of establishing that the respondent fell within the ambit of the definition of "worker" for the purposes of the Work Health Act rested with the respondent. In the relief sought the respondent claimed a declaration that he was "a worker within the meaning of that definition in the Work Health Act" and the employer responded by denying that allegation and asserting that the worker was not a PAYE taxpayer. That is another way of denying that he fell within the ambit of the definition. The onus remained upon the respondent.

[33] In my view, the judgment of the Supreme Court revealed error. No error was or has been demonstrated in relation to the application of the law by the

learned magistrate in the Work Health Court. The appeal should be allowed and the finding of the Work Health Court that the respondent was not a worker for the purposes of the Work Health Act should be reinstated. The respondent should pay the costs of the appellant in this Court and in the court below.

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