Groote Eylandt Mining Co Ltd v Thompson [2002] NTSC 17

PARTIES:	GROOTE EYLANDT MINING CO LTD
	v
	ZANE ROBERT THOMPSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM WORK HEALTH COURT
FILE NO:	LA 21/2001 (9926066)
DELIVERED:	21 March 2002
HEARING DATE:	7 March 2002
JUDGMENT OF:	BAILEY J

CATCHWORDS:

Appeal – against decision of Work Health Court – whether the respondent was a "worker" within the meaning of the *Work Health Act*, s 3(1) – deductions made under Prescribed Payments Scheme (PPS) – requirement for worker to be a PAYE taxpayer.

Work Health Act (NT), s 3, s 116(1)
Income Tax Assessment Act 1936 (Cth)
Work Health Amendment Act 2000

Michalak v Murlise Pty Ltd (1995) 125 FLR 305, followed.
KP Welding v Herbert (1995) 102 NTR 20, considered.
Herbert v KP Welding (1995) 125 FLR 299, distinguished.

REPRESENTATION:

Counsel:

Appellant:	C McDonald QC
Respondent:	S Southwood QC

Solicitors:

Appellant:	Cridlands
Respondent:	Morgan Buckley

Judgment category classification:	B
Judgment ID Number:	bai02006
Number of pages:	28

bai0102006

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

Groote Eylandt Mining Co Ltd v Thompson [2002] NTSC 17
No. LA 21/2001 (9926066)

BETWEEN:

GROOTE EYLANDT MINING CO LTD
Appellant

AND:

ZANE ROBERT THOMPSON
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 21 March 2002)

[1] This is an appeal pursuant to s 116(1) of the *Work Health Act* ("the Act") from a decision of the Work Health Court delivered on 19 September 2001.

[2] The grounds of appeal are:

> "1. His Worship erred in finding the Respondent was a 'worker' within the meaning of section 3 of the *Work Health Act*.
>
> 2. His Worship erred in failing to follow the authority of *Michalak v Murlise Pty Ltd* (1995) 125 FLR 305.
>
> 3. Having found at all material times the Employer did not deduct instalments of income tax from the Respondent's wages on a PAYE basis His Worship erred in finding the Respondent was a 'worker' within the meaning of the *Work Health Act*.

4. Having found at all material times the Employer did deduct income tax from the Respondent's wages on the PPS basis and at the PPS rate, His Worship erred in finding the Respondent was a 'worker' within the meaning of the *Work Health Act*.

5. His Worship erred in the application of the law and as articulated by the Supreme Court to the agreed facts."

[3] The appellant seeks to have the decision of the learned magistrate reversed and judgment entered for the appellant. The appellant also seeks an order that the respondent pay the appellant's costs in this Court and the Work Health Court.

[4] The only issue for determination by the Work Health Court was whether the respondent was a "worker" within the meaning of the Act.

[5] The proceedings before the Work Health Court were conducted largely by reference to an agreed statement of facts, supplemented by evidence from the respondent and Manuel Driss (who the learned magistrate found to be the alter ego of Drisco Pty Ltd, a subcontractor to the appellant: see paragraphs 3, 17 and 19 of the agreed statement of facts below).

[6] The agreed statement of facts was:

"1. The worker (respondent) was born on 24 October 1976.

2. Groote Eylandt Mining Company ('GEMCO') is duly incorporated and capable of being sued.

3. At all material times the worker was employed by Drisco Pty Ltd ('the employer').

4. The worker commenced employment on or about 9 April 1994.

5. When the worker commenced employment with the employer the worker was aged 17 years. This was the worker's first job after leaving school.

6. The worker was paid wages of $150.00 gross per day and was required to work a 6 day week.

7. The worker was employed by the employer to do labouring work. And at all material times:

   7.1 the worker was to and did do whatever he was directed by Mr Manuel Driss or Mr John Driss on behalf of the employer;

   7.2 the employer supplied boots, gloves and helmet and all machinery and tools that the worker used;

   7.3 the worker performed work in the way he was instructed by the employer, its servants and agents;

   7.4 the employer provided all materials used by the worker in the worked performed by the worker;

   7.5 the worker was obliged to obey the directions of the employer, its servants and agents on the manner in which the work was to be performed and where and when it was to be performed;

   7.6 the work the worker was instructed to do was performed by the worker personally;

   7.7 the work performed by the worker was performed as a part of the business of the employer;

   7.8 it was a term that the employer could terminate the services of the worker;

7.9 the worker was not permitted to work for anyone else during the hours of the day he was committed to work for the employer;

7.10 the worker was required to start and finish work at times stipulated by the employer.

8. At all material times the employer did not deduct instalments of income tax from the worker's wages on a PAYE basis.

9. At all material times the employer did deduct income tax from the worker's wages on the PPS basis and at the PPS rate.

10. On or about 7 May 1994 the worker suffered an injury at work.

10.1 Dislocated right elbow with comminuted fracture of the radial head and a comminuted fracture of the distal right radius.

10.2 Initial loss of, and subsequent reduction in, ulnar nerve function.

10.3 Dislocated radial head.

10.4 Minimal compression fractures of the T11 and T12 vertebrae.

11. The injury arose out of or in the course of the worker's employment with the employer.

11.1 The injury occurred at or about 10.20 am on 7 May 1994.

11.2 The site of the injury was the magnetic separation area, concrete building at the manganese mine on Groote Eylandt in the Northern Territory, the premises of GEMCO.

11.3 The injury occurred while the worker was performing work for the employer in accordance with the terms of his employment.

11.4 The injury occurred when a timber bracing on which the worker was working gave way resulting in his freefall to a steel catwalk approximately 10 metres below.

12. The worker gave notice of the injury to the employer as soon as practicable.

13. The worker duly completed a claim form.

14. The worker caused the claim form and medical certificate to be served on the employer on or about 28 May 1994.

15. As a result of the injury the worker:

15.1 was totally incapacitated for work until 30 June 1995;

15.2 was partially incapacitated from 30 June 1995 to the present and continuing;

15.3 from 30 June 1995 was (and remains) capable of earning $204.00 per week in the most profitable employment reasonably available to him; and

15.4 has therefore suffered a loss of earning capacity and has incurred medical expenses.

16. As at the date of his injury, the worker's normal weekly earnings, in accordance with the provision of the Act, were $900 per week.

17. At the time of the injury GEMCO had, in the course of, or for the purpose of, its trade or business contracted with the employer ('the contract') for the execution of certain works in respect of which the worker was working at the time of the injury.

18. At the time of the injury the worker was performing the duties of his employment in pursuance of the contract.

19. If the worker is found to be a worker within the meaning of the Act then, by virtue of s 127(1) of the Act, as it existed at the date of the injury, GEMCO is liable to pay compensation to the worker pursuant to the Act as if the worker had been employed by GEMCO."

[7] The learned magistrate found the facts (F1 to F19 inclusive) set out at para [6] above proved, subject to the qualification (not material for present purposes) that the appellant, not the employer, provided the respondent with the equipment and materials referred to at F7.2 and F7.4.

[8] In addition to the agreed statement of facts, the learned magistrate made further findings of fact and findings as to the credibility of the respondent and Manuel Driss on the basis of the evidence before him. With one exception, the appellant has not sought to challenge any of the findings of the learned magistrate. The additional findings may be summarised as follows:

(a) The respondent gave truthful evidence.

(b) The evidence of Manuel Driss was unreliable. He told the truth when it suited him and he told lies or made up his story as he went along when that suited him – "He is not only a liar but a fairly heartless one" (para [5] Reasons for Decision).

(c) There was no discussion as to the amount the respondent was to be paid before he commenced work.

(d) The respondent did not ask Manuel Driss about tax deductions.

(e) The respondent did not understand the difference between PAYE and PPS deductions.

(f) Manuel Driss informed the respondent that 20% of his pay would be deducted for tax, but did not tell the respondent that this would be under the prescribed payments scheme (PPS).

(g) Manuel Driss did not inform the respondent that he was required to arrange his own (injury) insurance.

(h) Manuel Driss made a conscious decision not to insure those working under him in accordance with the Act, regardless of his statutory duty.

(i) Manuel Driss never intended to make PAYE deductions on behalf of the respondent.

(j) It was not shown that the respondent either intended to become a PAYE taxpayer or intended not to become such a taxpayer.

(k) There was no agreement between Manuel Driss and the respondent to pretend that the employment relationship between them was something other than employer/employee for tax purposes.

(l) The respondent had received wages prior to the accident from which PPS deductions had been made.

(m) The respondent performed work under a contract of service. The relationship between the employer and the respondent was employer and employee.

(n) The respondent was at the material time (7 May 1994) a worker as defined by the Act, employed by the employer. In particular, the respondent was a PAYE taxpayer.

[9] The appellant seeks to challenge only the learned magistrate's finding that the respondent was a PAYE taxpayer within the meaning of s 3(1) of the Act. In the appellant's submission, the learned magistrate erred in finding that the respondent was a PAYE taxpayer and it necessarily follows that the learned magistrate erred in finding that the respondent was a worker within the meaning the of Act.

[10] At the material date for present purposes, "worker" was defined in s 3(1) of the Act in the following terms:

> "'worker' means a natural person –
>
> (a) 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;
>
> (b) who is a person, or a member of a class of persons, prescribed for the purposes of this definition;
>
> but does not include a person –
>
> (c) who is employed in the service of the Commonwealth;
>
> (d) subject to subsection (2), who is a member of the immediate family of the employer;

(e) subject to subsection (3), who is a director (by whatever name called) of a body corporate;

(f) subject to subsections (7) and (8), who is employed in voluntary work and who receives in relation to that work, if anything, nothing more than reasonable travelling, accommodation or other out-of-pocket expenses;

(g) who is a person, or a member of a class of persons prescribed for the purposes of this definition; and

(h) who is a person referred to in subsection (10)."

"PAYE taxpayer" was also defined in s 3(1) of the Act as follows:

> "'PAYE taxpayer', in relation to a worker, means that his 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 employer but only because –
>
> (a) of the shortness of time during which the worker has been in the employment of his employer; or
>
> (b) having regard to the amount of money paid to the worker, his employer is not required to make such deductions under that Division."

[11] The learned magistrate found that the respondent was a PAYE taxpayer on the proper application of proviso (a) of the definition of "PAYE taxpayer". In short, the learned magistrate found the respondent was a person with respect to whom the employer was required to make PAYE deductions but had not done so:

> "… only because –
>
> (a) of the shortness of time during which the worker has been in the employment of the employer."

[12] Before referring to the learned magistrate's reasons for concluding that the respondent was a PAYE taxpayer, it is appropriate to say something of the difference between a PAYE taxpayer and a person who is subject to deductions of tax under the prescribed payments scheme (PPS). In *KP Welding v Herbert* (1995) 102 NTR 20, Kearney J conveniently summarised the difference between PAYE and PPS tax deductions at p 28:

> "… PAYE tax is deductible under Div 2 of Pt VI of the ITAA only from the salary or wages of an employee; that is, it is deductible only when a relationship of employer/employee exists, in accordance with those terms as defined in s 221A(1) of the ITAA. 'Employee' is there defined in terms of 'a person who receives, or is entitled to receive, salary or wages'; and 'employer' as 'a person who pays or is liable to pay any salary or wages'. It can be seen that PAYE tax is therefore deductible only when a master-servant relationship exists; that is, in traditional common law terms, when one person contracts to perform work for another, and is substantially subject to the control and direction of that other when doing it. It follows that PAYE tax is not deductible from money paid to an independent contractor, that is, a person who undertakes to perform work but is not, in its execution, subject to the control and direction of the person for whom he performs the work. Payments to independent contractors in certain industries, including the building and construction industry, are (separately and distinct from the PAYE system) subject to deductions of tax at source under the prescribed payments scheme (PPS), provided for by ss 221YHA-221YHZ which constitute Div 3A of Pt VI of the ITAA; the standard rate is 20%.
>
> It can be seen for the purpose of policing the PAYE system the Australian Taxation Office must determine whether the necessary employer-and-employee relationship exists. The office primarily uses the 'control' test for this purpose."

[13] His Honour's judgment continues with an outline of the 'control' test applied by the Australian Taxation Office to distinguish employees from independent contractors.

[14] In the present case, the appellant does not seek to challenge the learned magistrate's finding that the respondent was an employee, not an independent contractor (see para [8(m)] above). Accordingly, the respondent was a person with respect to whom the employer was *required* to make PAYE tax deductions. However, such deductions were *not* made (F8 at para [6] above) – rather tax was deducted from the respondent's wages on the PPS basis and at the PPS rate (F9 at para [6] above).

[15] Where, as in the present case, PAYE deductions are not made by an employer, the definition of PAYE taxpayer in s 3(1) of the Act provides only two circumstances in which a person will qualify as a PAYE taxpayer, namely, where such deductions are not made, but only because:

> "(a) of the shortness of time during which the worker has been in the employment of his employer; or
>
> (b) having regard to the amount of money paid to the worker, his employer is not required to make such deductions under (Division 2 of Part VI of the *Income Tax Assessment Act 1936* of the Commonwealth)."

[16] In reaching his conclusion that the respondent qualified as a PAYE taxpayer pursuant to proviso (a) above, the learned magistrate had regard to the second reading speech which accompanied amendments to the Act's definition of "worker" and the introduction of "PAYE taxpayer" as a component of that definition. His Worship also extensively considered *KP Welding v Herbert* (1995) 102 NTR 20 (Kearney J), *Herbert v*

KP Welding (1995) 125 FLR 299 (Court of Appeal allowing the appeal) and *Michalak v Murlise Pty Ltd* (1995) 125 FLR 305.

[17] The relevant part of the Minister's speech when introducing the amendments to the definition of worker in s 3(1) which the learned magistrate considered was as follows (Parliamentary Record, NT Legislative Assembly, 15 August 1991, p 1587):

> "The next major initiative included in the bill is the removal of the exemption certificate provisions. In the present Act, provision exists for a person to be exempted from compulsory insurance requirements if he can demonstrate that he is an independent contractor. Such an exemption effectively removes the individual from the scope of the act in terms of both compulsory insurance and compensation benefits. Its purpose was to avoid delays caused by litigation, where it was not clear whether or not a person was a worker and thus entitled to compensation. The system has been reasonably successful in achieving its fundamental aims, but has been something of a bureaucratic nightmare to administer. It is also open to abuse. The new bill removes the exemption provisions altogether and, instead, redefines 'worker'. The new definition will relate to the taxation regime under which a person is paid.
>
> *The basis for future determination of a person's 'worker' status will be whether that person is employed and paid under the 'Pay As You Earn', or PAYE as it is commonly known, taxation provisions. This will be the sole basis for the purposes of worker compensation.* It will alleviate the existing, cumbersome administrative procedures and, in effect, will be monitored by the Australian Tax Office. Special provision is included in the bill for those who have only just commenced work with an employer and have not yet had PAYE tax deducted only because they have not yet been paid. There is also provision for low-income earners who do not reach the tax threshold and therefore do not pay PAYE tax. This amendment will be easy for workers and employers to understand and it has the advantage of keeping bureaucratic red tape to a minimum." (emphasis added)

[18] In *KP Welding*, supra, at first instance, Kearney J held, in substance, that the objective described by the Minister (highlighted above) had been achieved by the definitions of worker and PAYE taxpayer inserted into the Act. At (1995) 102 NTR 20 at 38, his Honour observed:

> "I consider that in the definition of 'PAYE taxpayer' the legislature has plainly adopted an 'objective' test: whether the employer in fact makes tax deductions which purport to be made under the PAYE system instituted by the ITAA. If he does – and that is a matter which usually will be very readily ascertainable and not in dispute – the person from whose payments he makes those deductions 'is a PAYE taxpayer' for the purposes of the definition of 'worker' in s 3(1). I arrive at that opinion from the ordinary meaning and grammatical sense of the language used in the definition of 'PAYE taxpayer'; understood in that sense the definition yields an operation which cannot be said to be unintended by the legislature, and in my view clearly was intended. I do not consider that the legislature intended that the test of whether a person was a 'worker' under the Act required the court to investigate the liability of his employer to make PAYE deductions under the ITAA. Rather, the Act is concerned only with the *fact* that tax deductions are made, in apparent conformity with the PAYE system. The court is not required to 'police' the ITAA, in this regard."

[19] In upholding an appeal against the judgment of Kearney J on other grounds, Martin CJ and Thomas J jointly observed at (1995) 125 FLR 299 at 301:

> "It appears that the legislature has endeavoured to avoid or minimise disputes which may arise under the 'contract of service test', by substituting the definition. In the ordinary course of events it might be expected that proof that an employer made the (PAYE) deductions referred to would be a simple and cheap method of establishing that an injured person falls within the provisions of the Act."

[20] Herbert was injured during his second day at work and before he had received any wages. Herbert had insured himself against work-related accidents and there were indications that he would have preferred to have

had PPS rather than PAYE tax deductions. However, the Work Health Court had found that at the date of his accident, no agreement had been reached between Herbert and KP Welding as to whether tax was to be deducted under PPS or on a PAYE basis.

[21] Kearney J in ruling against Herbert held that for "shortness of time" to be the sole reason why PAYE deductions had not been made by the employer (proviso (a) to the definition of PAYE taxpayer in s 3(1) of the Act): "there must have been prior agreement tacit or express, that PAYE deductions were to be made". The Court of Appeal disagreed. Martin CJ and Thomas J at 302 held:

> "No such agreement is required to attract the operation of the relevant provisions of the *Income Tax Assessment Act*, it depends upon the relationship between the parties.
>
> If the relationship between the parties as at the date of the injury is in dispute in circumstances such as arose in this case, it is necessary for that relationship to be determined by the Work Health Court. It must make a decision as to whether or not the injured worker fell within the definition, based upon an assumption that the parties would not evade the provisions of the *Income Tax Assessment Act* by 'shift or contrivance': *Fox v Bishop of Chester* (1824) 2 B & C 635 at 655; 107 ER 520 at 527. 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 of 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.
>
> The appellant was a 'worker' at the time he was injured. The appeal is allowed."

[22] In a separate judgment, agreeing that the appeal should be allowed, Angel J, observed at p 304:

> "Although it is not necessary to decide the question for the purposes of the appeal, I would add that I agree with the learned judge that there is no warrant for re-modelling the words of the legislature by construing 'makes' in the definition of PAYE taxpayer as 'is required to make'".

[23] In the later case of *Michalak v Murlise Pty Ltd* (1995) 125 FLR 305, the appellant was employed under an oral contract as a concretor. He was paid $160 per day and was not entitled to sick pay, holiday pay or long service leave. In contrast to the circumstances which had arisen in *KP Welding*, supra, deductions for tax had in fact been made from all monies paid to the appellant at the rate of 20% in accordance with the PPS.

[24] In rejecting a submission that the Court of Appeal's decision in *KP Welding*, supra, required the Work Health Court to determine the relationship between the parties, Thomas J held:

> "In this case, as distinct from *Herbert v KP Welding Pty Ltd*, the employer was actually making deductions from money paid to the appellant at the rate of 20 per cent in accordance with the Prescribed Payment Scheme. This fact established the relationship that existed between the appellant and respondent for the purpose of the definition.
>
> I agree with the submission made by counsel for the respondent, that the word 'means' in the definition is intended to be exhaustive: D C Pearce, *Statutory Interpretation in Australia*, 2nd ed (1981) par 151, *Sherritt Gordon Mines Ltd v Commissioner of Taxation (Cth)* [1977] VR 342 at 353.
>
> I also agree with the respondent's submission that the plain meaning of the words in the definition is that only a 'person who is a PAYE taxpayer' is a worker for the purposes of the Act. The legislative intent of the amendment as stated by the minister in the Second Reading Speech is expressed in the law. I do not agree with the submission of counsel for the appellant that it is appropriate in this case to read the additional words into the definition of PAYE taxpayer that he suggests.
>
> In the present case, the learned stipendiary magistrate found as a fact that the appellant had tax deducted at the rate of 20 per cent under the Prescribed Payment Scheme. This is not consistent with the payment of PAYE tax. The appellant was not, on the findings of the learned stipendiary magistrate, a PAYE taxpayer. Neither did he fall within the exception provided for in the definition of PAYE taxpayer.
>
> I agree with the conclusion of the learned stipendiary magistrate that the appellant was not, at the material time a worker as defined in the *Work Health Act*, employed by the respondent."

[25] In the present case, the learned magistrate purported to apply the Court of Appeal's reasoning in *KP Welding*, supra and to distinguish *Michalak v Murlise Pty Ltd*, supra.

[26] After referring to *KP Welding*, supra, the learned magistrate continued at p 18 of his reasons for decision:

> "[24] …
>
> Of course, the court was contemplating a situation where no wages or fee on a contract had been paid. It was obvious that 'PAYE taxpayer' had to be read to allow for a case that fitted proviso (a). It is obvious, too, that in the instant case this approach would produce the result that the worker was paid as if he were a PPS contractor. Put another way, he was not paid as if he were a PAYE taxpayer. But if Parliament was mindful of the possibility of an accident before the first pay-packet, it was also mindful of the fact that the Australian Tax Office (ATO) was to be the policeman or watchdog for the new provision. This was clear from the second reading speech, set out in paragraph 18. Granted 'monitored, in effect, by the ATO' is not strong stuff, but it still evinces an intent to let the ATO bring employers into line.
>
> [25] The Act does not exclude the PPS taxpayer explicitly. If it did, this worker would almost assuredly be out of court. The Act does not say, either, that the ATO has any role in enforcing any sanction against the employer. Only the Minister suggested that. But it is surely the case that the intention of Parliament, when it forged the link with ITAA, was to use the immense power of ATO to enforce compliance. As I see it, from my limited knowledge of how our tax system operates, a worker in the position of this lad (but not so unlucky) would at the appointed time (October 31 unless he had another arrangement) lodge his return. The ATO would see that his principal occupation was labourer, that he had produced not a group certificate but a PPS certificate for his instalments, and he had not claimed the sorts of work related expenses which contractors are expected to claim and which I suppose are the reason for the preferential (or different) instalment deduction treatment that they get. ATO would

smell a rat and would come down on employer and possibly employee so that the right deductions would be made in the future. And either the employer would recognise his liability to invest in a worker's compensation policy or the Work Health authorities, informed somehow of this, would use their coercive powers. I do not think it is far fetched. But it requires time to bring the scenario about. It requires months. Absent some other reason for a tax audit or investigation, nothing is likely to be uncovered until an assessor notices something odd about a return. Does proviso (a) cover this? I think it is reasonably clear that it does.

[26] The real reason why deductions under Division 2 of Part VI are not made by an employer may be the desire of the employer to save the cost of the policy or to pay his men an attractive pay in a hardship posting, but the Court cannot contemplate, where the worker is not party to evasion by shift or contrivance, that reason. It is not a reason in any way connected to the worker. The Act does not specifically allow it, and I suggest public policy, as expressed by the entire remedial structure and purpose of the Act, is against it. Ignoring the employer's reason, the Court is left with the reason that the ATO has not had time to digest material and tell the employer to meet his obligations under Division 2 of Part VI. In the instant case the evidence all points to that conclusion. Of course, it points equally to the employer not taking competent advice. But these are only aspects of the same reason, which simply stated is that the deductions were not made because the time had been too short to point out the error of the employer's ways. This is clearly an instance, although not one that would necessarily have came to the mind of the Court of Appeal dealing with a quite different situation, which would fit the words 'deductions … not made … but only because of the shortness of time during which the worker has been in the employment of his employer'. There could be occasions when a period of a number of months, even in excess of sixteen months, would fit the bill, and probably it would not be consonant with common-sense to allow the period to go beyond the first tax assessment. One can imagine this Court deciding that by lodging a palpably false tax return the worker had placed himself in a position where the only inference open to be drawn was that he had by then positively agreed with the employer to contract in blatant defiance of the ITAA, and could no longer rely on *Fox v Bishop of Chester* (1824) 2 B & C 635 at 655: 107 Er 520 at 527. That is not a question for today.

[27] The majority in *Herbert v PK Welding* adjusted the definition of 'PAYE taxpayer' in the grammatical sense only, so as to read 'in relation to a worker, means that his employer should have made deductions … 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.' Angel J indicated at p 304 – albeit clearly obiter dicta – that he agreed with Kearney J in *KP Welding v Herbert* that there was no warrant for re-modelling the words of the Act by construing 'makes' in the definition of 'PAYE taxpayer' as 'is required to make'. With respect, there is little difference between what one should have done and what one was required to do: one may wonder did the majority of the Court of Appeal mean to say 'his employer would have made deductions.' This point has not been argued before me.

[28] Applying *Herbert* in the way I do to this case is consonant with the purpose of the Act, as it is set out in the preamble, and as discussed by Thomas J in *Michalak v Murlise* at 308-310. However, it is urged by Mr Reeves that I am bound by *Michalak* to find against the worker. In *Michalak* the fact that the employer was actually making deductions at the rate of 20% in accordance with PPS was held to be definitive. At 311, 'This fact established the relationship that existed between the appellant and respondent for the purpose of the definition.' The basis for this is that the word 'means' in the definition is intended to be exhaustive: p 310. On that reasoning, 'worker' means only a very limited class indeed, and the operation of the statute can readily be seen to be 'capricious', to use one of the words of *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297, 320-321 applied by her Honour at p 308."

[27] The learned magistrate sought to distinguish *Michalak v Murlise Pty Ltd*, supra in the following manner:

"[30] …

I would distinguish *Michalak* on these bases: although in *Michalak*, as in the instant case, the employer was making the PPS deductions, there was a finding that, albeit after the compensable event, Michalak signed the PPS authority, which

> is some evidence that he was paying PPS by choice; unlike Michalak there was no agreement at all like the 'moral contract' [sic] described at 306 that the applicant was not to be entitled to sick pay, holiday pay or long service leave (such an exclusionary contract being a pointer towards the status of subcontractor, or a contrivance to evade enactments like the *Long Service Leave Act*). … But the main thing distinguishing the two cases is that the learned magistrate did not make any explicit finding that, apart from the PAYE question, the applicant was a worker. I make that finding. Indeed I say that in the evidence and the agreed facts I can find nothing to suggest a contrary view. Really, all the Supreme Court had before it in *Michalak* was an injured man who was not, on the natural meaning the of words, a PAYE taxpayer. The Supreme Court certainly has held that 'it is not appropriate in this case to read the additional words ['or is required to make'] into the definition of PAYE taxpayer': at 310. It might well hold it to be appropriate in the case of an infant who has not even considered trying by some shift or contrivance to evade his obligations.
>
> [31] To avoid capricious injustice in the case at bar the Act has to be read more widely than a narrow interpretation of *Herbert* would allow. *Herbert* must be applied in accordance with 'the principle that sections of the workers compensation legislation should be construed and applied 'liberally and practically' in a way which will promote the underlying legislative purpose and object': *Walker v Wilson* (1991) 172 CLR 195 at 204, cited by Thomas J in *Michalak* at 308."

[28] The thrust of the appellant's submissions was that the learned magistrate has misapplied the Court of Appeal's judgment in *KP Welding*, supra and wrongly distinguished *Michalak v Murlise Pty Ltd*, supra. In the submission of Mr McDonald QC the present case is not distinguishable from *Michalak v Murlise Pty Ltd*, supra and the Work Health Court was bound to follow it. In short, Mr McDonald submitted that the fact that deductions from the respondent's wages were made on a PPS basis, in the words of Thomas J in *Michalak v Murlise Pty Ltd*, supra at 310 "… established the relationship

that existed between the appellant and respondent for the purpose of the definition (of 'worker')". It was submitted that on the findings of the learned magistrate, the respondent was not a PAYE taxpayer. Neither did he fall within the exception provided for in the definition of PAYE taxpayer. In particular, the learned magistrate had relied on a passing reference to the Australian Taxation Office in a minister's second reading speech to extend impermissibly the liberal approach to interpretation of remedial legislation referred to in *Walker v Wilson* (1991) 172 CLR 195 at 204. In Mr McDonald's submission, it was mere conjecture that to say that it was only a matter of time before the ATO discovered that the respondent was having tax deducted on the wrong (PPS) basis and moved to require his employer to make deductions on the correct (PAYE) basis. On the findings of the Work Health Court the employer was making PPS deductions on a PPS basis at all times and was not making at any time PAYE deductions. This fact, it was submitted, made the case distinguishable from *KP Welding*, supra where no deductions had been made because of the shortness of time of the employment relationship.

[29] Mr McDonald developed his submissions on behalf of the appellant in some depth. A good deal of the submissions were directed at the proper approach to interpreting the definition of PAYE taxpayer in s 3(1) of the Act and, in particular, whether there was any warrant for re-modelling the words of the legislature by construing "makes" (PAYE deductions) in the definition as "is required to make". Mr McDonald emphasised that submissions to this effect

had been made, considered and rejected in *KP Welding*, supra both at first instance and on appeal and by Thomas J in *Michalak v Murlise Pty Ltd*, supra.

[30] For the respondent, Mr Southwood QC emphasised that there was no challenge to the finding of the learned magistrate that the relationship between the respondent and his employer was one of master and servant (employer/employee). Accordingly, the respondent's employer was obliged under the *Income Tax Assessment Act 1936* (Cth) ("ITAA") to make PAYE tax deductions. In Mr Southwood's submission a literal approach to the construction of "PAYE taxpayer" in the Act would mean that whether a person is a "worker" would depend entirely on the whim (or error) of his employer in making or not making appropriate PAYE deductions from his wages. In the respondent's submission, the legislature could not have intended that a person's status as a "worker" would be denied by the failure of his employer to make PAYE deductions required by the ITAA and irrespective of whether the person understood or even knew the basis of tax deductions from his wages.

[31] In Mr Southwood's submission, a liberal and pragmatic approach to construction of the Act was necessary to avoid the capricious, arbitrary and irrational results which would flow from applying the fact of PAYE deductions as the sole criterion for determining whether a person is a worker within the meaning of the Act. In the respondent's submission, it is appropriate and necessary to read in the words "or is required to make" after

the word "makes" in the definition of PAYE taxpayer. It was put that such an approach would be consistent with the objectives of the Act, in particular by providing financial compensation to workers incapacitated from workplace injuries and would apply only to the very small number of cases where any employer had failed to make PAYE deductions which he was required to make under the ITAA.

[32] Mr Southwood did not seek to argue with any vigour that the learned magistrate's purported application of the Court of Appeal's decision in *KP Welding*, supra was correct.

[33] For present purposes, I do not consider that it is necessary to canvass the submissions of the appellant and respondent as to the proper construction of PAYE taxpayer in any detail. The submissions made in this regard were substantially the same as those advanced before Kearney J in *KP Welding*, supra and Thomas J in *Michalak v Murlise Pty Ltd*, supra. In both cases, their Honours unequivocally rejected the proposition that the words "or is required to make" should be read into the definition of PAYE taxpayer. Similarly, the Court of Appeal's judgment in *KP Welding*, supra provides no support for such an approach. Nothing is to be gained by a further detailed analysis of the principles of statutory construction applied to beneficial legislation. It is sufficient to indicate that I agree generally, with respect, with the reasons given by Kearney and Thomas JJ for holding that the definition of PAYE taxpayer provides an "objective" test, namely, whether the employer *in fact* makes tax deductions which purport to be made under

the PAYE system. If such deductions are made, the person from whose payments the employer makes such deductions "is a PAYE taxpayer" within the meaning of worker in s 3(1) of the Act.

[34] The present case is not distinguishable in any material respect from *Michalak v Murlise Pty Ltd*, supra. The learned magistrate sought to distinguish that case principally upon the basis that, in contrast to the case before him, there had been no finding that the parties were in a master/servant relationship. The attempt to distinguish the case upon that basis ignores the fact that the absence of such a finding lies at the heart of the judgment of Thomas J. After referring to the fact that PPS deductions were made by the respondent from the appellant's payments, her Honour at p 310 held:

> "This fact established the relationship that existed between the appellant and respondent for the purpose of the definition. … This is not consistent with the payment of PAYE tax. The appellant was not, on the findings of the learned stipendiary magistrate, a PAYE taxpayer. Neither did he fall within the exception provided for in the definition of PAYE taxpayer."

[35] In short, there was no need for the Work Health Court to make findings as to the parties' relationship – the fact that PPS deductions were made, rather than PAYE deductions, determined the issue.

[36] The learned magistrate in the present case was bound to follow *Michalak v Murlise Pty Ltd*, supra. Having found that PPS deductions were made from the appellant's payments, the learned magistrate was required to find that

the appellant was not a PAYE taxpayer and, accordingly, not a worker within the meaning of the Act.

[37] The learned magistrate's purported application of the approach adopted by the Court of Appeal in *KP Welding*, supra, similarly cannot be sustained. Where PAYE deductions are not in fact made by an employer, the first proviso to the definition of PAYE taxpayer applies when the reason for the absence of such deductions is:

> "… *only because*:-
>
> (a) of the shortness of time during which the worker has been in the employment of his employer …" (emphasis added)

[38] In the present case, it was not only an agreed fact that at all material times the employer did not deduct instalments of income tax on a PAYE basis, but the learned magistrate also found the employer never intended to make PAYE deductions on behalf of the respondent. The reason the PAYE deductions were not made had no connection with the "shortness of time" of the respondent's employment. PAYE deductions were not made because the employer had made a conscious decision not to make such deductions. He had made a conscious decision to make deductions of tax on the PPS basis. In such circumstances, it is not to the point that at some future indeterminate time, the ATO may have discovered that tax deductions were being made from the respondent's wages on an incorrect basis and moved to correct the situation. The respondent did not fall within the exception provided for in the definition of PAYE taxpayer.

[39] The respondent was not a PAYE taxpayer and accordingly was not a worker as defined by s 3(1) of the Act.

[40] For the above reasons, I would allow the appeal, quash the decision of 19 September 2001 that at the time of his accident on 7 May 1994 the respondent was a worker within the meaning of the Act and in lieu thereof order that his application for compensation be dismissed on the basis that he has failed to establish that at the time of his accident he was a "worker" within s 3(1) of the Act.

[41] Before leaving this matter, I would add that, in my view, this case is a graphic example of the deficiencies of the Act's definition of "worker" as it stood at the time of the respondent's accident. The definition of worker has been amended by the *Work Health Amendment Act* 2000 (which commenced on 1 July 2000) to take account of the recently enacted "PAYG provisions" of the *Taxation Administration Act 1953* (Cth). The definitions of worker and PAYE taxpayer canvassed in the present case were in force from 1 January 1992 until 30 June 2000. It will be apparent from the reasons I have sought to express that I am satisfied that the meaning of those definitions is clear and unambiguous. However, it is difficult to imagine that the legislature would have set out to defeat a claim for compensation from a person in the situation of the present respondent.

[42] I consider that there is a great deal of merit in Mr Southwood's submissions that the definition of PAYE taxpayer as it stood from 1 January 1992 until

30 June 2000 was capable of working great injustice and unfairness to employees. The power to make appropriate tax deductions from an employee's wages lies with the employer. It would seem a gross injustice that an employee's compensation claim under the *Work Health Act* can be defeated because of his employer's failure to comply with statutory obligations placed upon him by the ITAA. Notwithstanding the 2000 amendments to the Act, the legislature may wish to consider appropriate action, whether by legislation or otherwise, to remedy the situation in relation to the present respondent and any other employees in a similar position.

Orders

(1) Appeal allowed.

(2) The decision of the Work Health Court of 19 September 2001 that at the time of his accident on 7 May 1994 the respondent was a worker within the meaning of the *Work Health Act* is quashed.

(3) In lieu thereof order that the respondent's application for compensation filed on 16 November 1999 is dismissed on the basis that he has failed to establish that at the time of his accident he was a "worker" within the meaning of s 3(1) of the Act.

(4) The respondent is to pay the appellant's costs both of the appeal and the proceedings before the Work Health Court. Such costs are to be taxed in default of agreement.

(5) The appellant's costs in the Work Health Court are to be calculated at 100% of the Supreme Court scale.

———————————————