Lewis v John Holland P/L [2003] NTSC 118

PARTIES:	RAY LEWIS
	v
	JOHN HOLLAND PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	LA13/02 (20018624)
DELIVERED:	4 December 2003
HEARING DATES:	17 November 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

WORKERS' COMPENSATION – sufficiency of evidence and onus of proof – whether worker was an PAYE taxpayer – whether the appellant was a "worker" within the meaning of the Work Health Act (NT) as at the date of his injury.

Work Health Act 1986 (NT) s 3, 127
Work Health Amendment Act No 27/2000 (NT), s 4 (1)

Herbert v KP Welding Constructions Pty Ltd (1995) 125 FLR 299, applied.
Purkess v Crittenden (1964) 114 CLR 164; *Neat Holdings v Karajan Holdings* (1992) 67 ALJR 170; *Thompson v Groote Eylandt Mining Company Limited* [2003] NTCA 05, considered.

REPRESENTATION:

Counsel:	
Appellant:	S Southwood QC
Respondent:	P Barr
Solicitors:	
Appellant:	Priestley Walsh
Respondent:	Hunt and Hunt

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lewis v John Holland P/L [2003] NTSC 118
No. LA13/02 (20018624)

BETWEEN:

RAY LEWIS
Appellant

AND:

JOHN HOLLAND PTY LTD
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 4 December 2003)

[1] This is an appeal from a decision of the Work Health Court in Darwin delivered on 25 October 2002. The issue for determination was whether the appellant was a "worker" within the meaning of the Work Health Act as at the date of his injury on 3 July 2000 and in particular, whether he was a PAYE taxpayer.

[2] The learned stipendiary magistrate found that on the evidence presented by Mr Lewis, the appellant in these proceedings, there was not sufficient material to persuade the learned stipendiary magistrate that Mr Lewis was a "worker".

[3] The appellant appeals from that decision on the grounds set out in the Amended Notice of Appeal filed 6 November 2003 which provides as follows:

> "1. The learned Magistrate misapplied *Herbert v KP Welding Constructions Pty Ltd* (1995) 125 FLR 299 to the facts of the case.
>
> 2. The learned Magistrate erred in law in holding that the Appellant was not a worker.
>
> 3. The learned Magistrate erred in law and misdirected himself as to the burden of proof the worker bore in the proceeding below.
>
> 4. The hearing below miscarried."

[4] On behalf of the appellant, Mr Southwood QC seeks the following orders:

> "31. In the circumstances the appellant is entitled to the following orders:
>
> (a) A declaration that the Appellant is a worker within the meaning of the Work Health Act.
>
> (b) An order that the decision of Mr Wallace SM be set aside.
>
> (c) An order that the Respondent pay the Appellant's cost of the appeal and of the proceeding below.
>
> (d) An order that the matter be referred back to the Work Health Court for hearing of the Appellant's application for worker's compensation."

[5] At the commencement of the hearing of the appeal, Mr Southwood QC, counsel for the appellant, advised that Ground 4 was further particularised as follows:

(i) The learned stipendiary magistrate misdirected himself as to the manner in which he should arrive as to a finding as to whether the appellant was a worker or not.

(ii) The learned stipendiary magistrate misdirected himself as to who bore the burden of proof in such circumstances.

[6] The appellant had brought proceedings in the Work Health Court against the respondent pursuant to s 127 of the Work Health Act. This provision enables a worker employed by a subcontractor to bring proceedings for the payment of workers compensation against a principal contractor if the subcontractor is uninsured.

Background

[7] The appellant, Mr Ray Lewis, was born on 23 March 1959. The following background facts are not in issue and have been summarised in the written submissions prepared by Mr Southwood QC for the appellant.

> "6. On 26 June 2000 the Appellant entered into a contract of employment with Mr John B Zagorianas. He was employed as a painter.
>
> 7. From 26 to 30 June 2000 inclusive the Appellant painted houses for Mr Zagorianas and on 30 June 2000 Mr Zagorianas paid the Appellant $525.00 for the five days he worked painting the houses.
>
> 8. The Respondent had a contract with the Commonwealth Government to do building works including painting works at Shoal Bay Receiving Station ("Shoal Bay"). The Respondent subcontracted some of the paintings works it was contracted to do at Shoal Bay to Mr Zagorianas.
>
> 9. As part of his contract of employment, the Appellant was required by Mr Zagorianas to do painting work at Shoal Bay and the Appellant started to work at Shoal Bay on 3 July 2000.
>
> 10. On 3 July the Appellant injured his knee and back during the course of his work at Shoal Bay when the ladder he was standing on slipped down the wall it was resting against and the Appellant fell to the ground.

11. The Appellant was injured 8 days after he started work with the Respondent.
12. Mr Zagorianas did not have workers compensation insurance."

The evidence

[8] The appellant was the only witness who gave evidence at the hearing in the Work Health Court. Mr Lewis gave evidence (tp 14) as to his understanding of the difference between being employed for wages and the prescribed payment system (PPS). It was his evidence that he had worked PPS but that most of his long term work had been for wages. He stated he received a group certificate and holiday pay.

[9] He stated that for a period between 1991 and May 1994 he operated a registered business, RIP Painting Service. He employed people on the PPS system.

[10] Mr Lewis gave evidence (tp 17) that he applied for a Tax File Number in 1988. He stated that although he had a Tax File Number he had never lodged a tax return in Australia. He had been paying tax to the Commissioner through PPS or on wages and receiving group certificates but never lodged a tax return. He believes there is money at the tax office if he lodged his returns minus fines for not lodging a return.

[11] His evidence is that in the 1999/2000 tax year, he was unemployed and in receipt of unemployment benefits. He approached Mr Zagorianos for work as a painter. Toward the end of June 2000, Mr Zagorianos returned to him

and they discussed Mr Lewis working for Mr Zagorianos. Amongst other matters discussed, Mr Zagorianos said he would like to have a trial period first. Mr Zagorianos had two houses to finish which would be a weeks work and the next Monday he was to start at John Holland P/L. Mr Lewis stated in the discussion with Mr Zagorianos that he wanted $25 an hour gross. It is Mr Lewis' evidence that no figure was set but he understood it would not be under $20 per hour. He stated he understood this amount was to be paid to him as an employee at an hourly rate.

[12] It was the appellant's evidence that Mr Zagorianos told him he didn't need to bring any tools whatsoever. At the end of the trial period, Mr Zagorianos expressed his happiness with Mr Lewis' work at the end of the five day trial period. Mr Zagorianos gave Mr Lewis $525 cash in an envelope. Mr Lewis stated he was happy with this, although he was not clear how much that represented as an hourly rate. He expected to receive more money once he started the John Holland P/L work (tp 22). The work was at the Shoal Bay Receiving Station. Mr Zagorianos supplied the transport for the first few days of the job and all the tools. Mr Lewis said it was his belief he would be paid $25 per hour. He did not want to push the matter, he was happy to be working. He believed he was to be a full time employee. His experience was that if you are paid on the PPS system this is made clear straight away and the employee is given an exemption number. Prior to the accident, there had been no discussion about insurance or superannuation. The accident

occurred on the first day of work for John Holland P/L, that date being 3 July 2000.

[13] Mr Lewis gave evidence as to a compensation claim form and an employer's report which he and Mr Zagorianos completed. In this claim form he described his status as being full time, that his taxation situation was PAYE and that he had no other employment. He gave a description of the accident and the injury he sustained. It is the evidence of Mr Lewis that Mr Zagorianos filled out the employer's report of the incident in the presence of Mr Lewis and signed it. It stated Mr Lewis had started work for Mr Zagorianos on 26 June 2000. This was done after Mr Lewis had said Mr Zagorianos should put down the true date Mr Lewis started working for him. Mr Zagorianos wrote down that Mr Lewis was working 38 hours a week. Mr Zagorianos read the part of the form completed by Mr Lewis. Mr Zagorianos had then signed the employer's report and dated it. The copy of the claim form with the employer's report became Exhibit 2. It is claim number 121246. Mr Lewis gave evidence that he did not know as a matter of fact whether there were deductions made from his wages for tax (tp 35.5). Mr Lewis gave detailed evidence as to another claim form number 86827 which was tendered and marked Exhibit P4. The crucial difference between the two claim forms is that the first form to be completed was changed in the second form to reflect the fact that Mr Lewis had started working for Mr Zagorianos on 26 June and not on 3 July as originally stated. The claim form which became Exhibit 4 was the first to be filled out. After Mr Lewis

said the true date he commenced work should be stated, a second claim form was completed (Exhibit 2). Both Exhibit 2 and Exhibit 4 were completed by Mr Lewis and Mr Zagorianos on 29 July 2000.

[14] Under cross-examination, Mr Lewis had given evidence that it was his understanding that PPS would be a 20% deduction and that PAYE would result in a greater percentage deduction from the monies to be paid to him. Mr Lewis stated under cross-examination that he had taken jobs previously for straight cash with no tax deducted. He agreed that from 1990 to the year 2000, he had not put in any tax returns. He agreed that monies which had been deducted for tax would be lost to him because he never put in a tax return. It was Mr Lewis' evidence (tp 47) that the more tax he paid, the more it would be in his favour when he finally sorted out his position with the tax office. He agreed that he informed Centrelink about the $525 he earned in the week ending 30 June 2000 after it became apparent that he needed to make a compensation claim. Mr Lewis agreed (tp 54) that prior to starting work with Mr Zagorianos at the end of June 2000, he had been unemployed for about six to 12 months. During that period of unemployment he had done a day's work here and there on a cash basis which he had regularly disclosed to Centrelink.

[15] It is Mr Lewis' evidence that Mr Zagorianos had put on the claim form that he was paid $21 per hour but he had not stated this when he gave him the envelope with $525. His evidence is that because he had been through the trial period he had expected he would receive the exemption form before the

next pay. Mr Lewis explained that he had with a previous employer received the form for exemption and superannuation three weeks after commencing employment. He denied that he knew there would be no group tax forms in relation to his employment with Mr Zagorianos (tp 60). His evidence is that he was not doing this work on a cash basis, this was intended to be a full time job. His evidence is he did not query the $525 he was given because he was employed on a trial basis and this amount was sufficient.

[16] In re-examination Mr Lewis gave reasons why he had not lodged any tax returns. He stated he had worked very hard during his life and paid a lot of tax which is why he was sure he would be owed money by the tax office.

[17] Mr Southwood QC, counsel for the appellant, points out that $21 per hour for 38 hours amounts to $798. This would indicate an amount had been deducted for tax prior to Mr Lewis being given an envelope which contained $525 in cash.

[18] Mr Zagorianos was not called to give evidence. There was no other evidence presented to the Work Health Court.

The findings of the learned stipendiary magistrate

[19] The learned stipendiary magistrate stated he assessed Mr Lewis' credit from his testimony. He did not find the answers in the claim form of any

assistance in assessing Mr Lewis' credit. He found Mr Lewis to be an honest witness. His Worship stated in his reasons for decision (par 16):

> "… 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 more regular relationship with the taxation authorities."

[20] His Worship held that the burden of proof is on Mr Lewis to prove, on the balance of probabilities, that on 3 July 2000 he was a worker. The learned stipendiary magistrate concluded in paragraphs 28 and 29 of his written reasons for decision, as follows:

> "28. I have already expressed my reasons why I am strongly of the view that the payment of $525.00 made on 30 June 2000 was a cash payment from which no PAYE deductions had been made by Mr Zagorianas. Unless there is some persuasive reason to characterise the relationship between Mr Lewis and Mr Zagorianas as different on 3 July from what it was on 30 June, it seems to me that the making of that payment, in context, effectively forecloses the argument that deductions were not made only because of shortness of time.
>
> 29. I cannot find, in the evidence of Mr Lewis, sufficient material to persuade me that there was any difference. Mr Lewis's feeling, idea, impression of a difference may be correct based upon his experience in the industry, customs of the trade and judgment of his situation. He obviously has reason to want it to be correct now, and seems genuinely to hold that view now. Whether he would have held the same view on Monday morning, 3 July 2000, if asked, is in my opinion unproven. Indeed, 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 the Mr Lewis was a "worker". That being so it seems to me that the Application should be dismissed, but I will hear the parties on that question, and as to any ancillary matters."

The provisions of the Work Health Act

[21] Two days prior to the appellant's accident, i.e. on 1 July 2000, Amendment No. 27 of 2000 to the Work Health Act came into operation. This amendment changed the definition of "worker".

[22] Previously, the definition of a "worker" was in s 3 of the Work Health Act. After the amendment, persons excluded from the definition of "worker" were those who supplied their employer with written notice of an ABN number. On the evidence presented to the Work Health Court, Mr Lewis had not notified Mr Zagorianos of any ABN number. Except for s 4(1), being the Transitional Provision of the Work Health Amendment Act 2000 No. 27/2000, the appellant would have been a "worker" on and from 1 July 2000 unless and until he notified Mr Zagorianos in writing of his ABN number for the purposes of the work performed. The relevant provisions of the Transitional Provision is as follows:

> "(1) If immediately before the commencement of this Act a person was not a worker of person for whom he or she was performing work or a service because he or she was not a P.A.Y.E. taxpayer, the person is not to be taken to be a worker of that person for the purposes of the Principal Act in respect of any work or service performed for that person after that commencement despite that the person does not notify the person in writing of a number that is, or purports to be, the ABN of the person for the purposes of the work or service.
>
> .....
>
> (3) Subsection (1) ceases to apply on 1 August 2000."

[23] To prove that he was a "worker" within the meaning of s 3 of the Work Health Act as at the date of his injury on Monday 3 July 2000, Mr Lewis had

to establish that immediately before the commencement of the Act No. 27/2000, he was a PAYE taxpayer in respect of any remuneration received in relation to the work he had done as a painter.

[24] The relevant definition of "PAYE taxpayer" in the period to 1 July 2000 was as follows:

> "P.A.Y.E. taxpayer, in relation to a worker, means 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 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 the provision."

Submissions by counsel for the appellant

[25] In his written submissions, counsel for the appellant Mr Southwood QC, submitted that in analysing the magistrate's reasons for decision the following evidentiary provisions should be considered.

> "(a) The determination by the tribunal of fact in an adversary system of law is not a decision as to where the truth lies, but whether the party with the burden of proof has discharged the burden to the requisite standard: *R v Calides* (1983) 34 SASR 355.
>
> (b) The legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue is proved or disproved by a preponderance of evidence: *Purkess v Crittenden* (1964) 114 CLR 164 at 167-68.

(c) The evidential burden is the obligation to show that there is sufficient evidence to establish the existence of the fact in issue having regard to the standard of proof: *Purkess v Crittenden* (1965) 114 CLR 164 at 168.

(d) Certain facts may be established without evidence. These include facts which are presumed to exist: *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 213.

(e) Evidence my be weighed according to the proof which it was within the power of one side to produce and in the power of the other side to have contradicted: *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371-2: *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561 at 564.

(f) The existence of contrary possibilities is not conclusive against proof on the civil standard but rather one fact which, with others, must be taken in account in deciding whether the onus of proof has been discharged: *Murray v Kickmaier* [1979] 1 NSWLR 414 at 415.

(g) The strength of the evidence necessary to establish a matter on the balance of probabilities may vary according to the nature of gravity of the fact to be proved: *Neat Holdings v Karajan Holdings* [1992] 67 ALJR 170.

(h) A court in general is bound to accept uncontradicted evidence unless the evidence is in itself inherently unreasonable or improbable so that no person could accept it: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 561."

[26] Mr Southwood QC, on behalf of the appellant, submits that in this case there is a rebuttable presumption of law which has the effect of placing the burden of proof upon the respondent.

[27] It is submitted that the effect of the Court of Appeal decision in *Herbert v KP Welding Construction Pty Ltd* (supra), in cases such as the one before this Court, is to create a rebuttable presumption of law 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.

[28] It is the submission for the appellant that there is no contest that the appellant was employed pursuant to a contract of service. This is established on his uncontradicted evidence. Mr Southwood QC submits that it is therefore to be presumed that the appellant was a PAYE taxpayer and that this is supported by his evidence. It is submitted the evidence of Mr Lewis was inherently reasonable and uncontradicted and the court was bound to accept it.

[29] On the argument for the appellant, the legal burden therefore fell on the respondent to prove that the appellant was working on a cash basis. Mr Southwood QC submits that for the magistrate to make a finding that the appellant was working on a cash basis it was necessary for there to be clear or cogent or strict proof: *Neat Holdings v Karajan Holdings* (1992) 67 ALJR 170 at 171. The submission for the appellant is there was no evidence capable of establishing such a contention. For the respondent to succeed, it was necessary for the learned stipendiary magistrate to strictly find on the balance of probabilities that the worker was being paid on a cash basis at the time of his injury. There was no such finding. The existence of contrary possibilities is not conclusive proof on the civil standard.

Submission by counsel for the respondent

[30] Mr Barr, counsel for the respondent, stressed that John Holland P/L was not the employer of the worker. The employer was Mr Zagorianos. Mr Zagorianos was a contractor to John Holland P/L and employed Mr Lewis.

John Holland P/L, the respondent, is a stranger to the proceedings and not a party to the contract between Mr Zagorianos and Mr Lewis. The respondent was not privy to the claim forms which Mr Lewis and Mr Zagorianos completed (Exhibit 2 and Exhibit 4).

[31] On behalf of the respondent, Mr Barr submitted that in these circumstances the learned stipendiary magistrate was correct in taking a cautious approach to the evidence of Mr Lewis, because all of the matters about which Mr Lewis gave evidence were outside the knowledge of the respondent.

[32] In his written submissions Mr Barr states:

> "The worker therefore had to satisfy the learned Magistrate as to one or other of the following two matters, on the balance of probabilities:-
>
> 7.1 That Mr Zagorianos made tax deductions from the monies paid to the worker.
>
> 7.2 If Mr Zagorianos did not make tax deductions from the monies paid to the worker, he did not make such tax deductions only because of the shortness of time during which the worker had been in his employment."

[33] Mr Barr referred to Exhibits 2 and 4 which state Mr Lewis worked a 38 hour week and was receiving $21 per hour. He asks the Court to contrast this with the evidence given by Mr Lewis (tp 21) where he said he had wanted $25 per hour. Mr Barr submits on the evidence there was no set figure, there was no evidence that the agreement was the rate of pay would be not less $20 per hour and that Mr Lewis gave evidence at variance with the statements in the claim form.

[34] Mr Barr submitted that neither party had called Mr Zagorianos who it appeared was not available to either party. It was pointed out by Mr Barr that Mr Zagorianos had kept in contact with Mr Lewis for some months after the accident and that both Mr Zagorianos and Mr Lewis completed the claim forms (Exhibits 2 and 4).

[35] It is Mr Barr's submission that the role of John Holland P/L means the worker's evidence is not supported by documentation. However, this is a case where the respondent is not the employer and it was not possible to take issue with the worker's case. The learned stipendiary magistrate was not required to accept Mr Lewis' evidence. This was a case in which the learned stipendiary magistrate found the witness Mr Lewis to be honest but was not convinced he was reliable. Honesty is not synonymous with reliability. Reference was made to pars 14 - 16 of his Worship's reasons for decision in which the learned stipendiary magistrate made the following findings:

> "14. There was further contact between Mr Lewis and Mr Zagorianas, who kept in touch with Mr Lewis for about 6 months after the accident. (His whereabouts are presently unknown to the parties. I was told from the bar table by Mr Barr, counsel for the John Holland Group, that he is believed to have left Australia and to be residing in Greece.) On 29 July 2000, at a time when Mr Zagorianas was visiting the convalescent Mr Lewis, Mr Zagorianas filled in the "Employer's Report" section of Mr Lewis's Worker's Compensation Claim Form. In fact, as emerged in Mr Lewis's evidence to the surprise of both counsel, Mr Zagorianas filled in two such forms. His first effort (Ex 4) was not acceptable to Mr Lewis. In it, Mr Zagorianas answered the question "When was the Worker first employed by you?" by writing "3/7/00", that is, omitting any mention of the week commencing 26/6/00.

This is a further indication that that week's work was paid under the table, and that Mr Zagorianas wished it to stay there. Mr Lewis insisted that the work be acknowledged, and Mr Zagorianas's second effort, (a copy of which is Ex 2) has "26/6/00" in answer to that question. On both Ex 2 and Ex 4, Mr Zagorianas wrote "none" in answer to the question. "What is your worker's compensation insurer's name?"

15. Mr Lewis had been in touch with the Work Health Authority before this meeting with Mr Zagorianas on 29/7/02. He had plainly come to believe that this was necessary to acknowledge the period of work in the week commencing 26/6/00. He lodged the second form, Ex 2 and kept the first Ex4. He appears not to have mentioned its existence to anyone until he guilelessly referred to it in the course of his evidence in chief. As to his own section of the form, there are some differences between his writings in Ex 4 and Ex 2. They are not differences, which, in themselves, manifest any desire on Mr Lewis's part to improve the situation between the Ex 4 version, filled in on 21/07/00, and the Ex 2 filled in, it would seem, on 29/7/00 but dated by Mr Lewis, consistently with his irregular approach to all matters official, 21/7/00. In section 2, on both forms, he described himself as a painter, working full time, and he answered "Yes" to the question "Does your employer deduct PAYE tax from your pay?".

16. Mr Lewis's description of his injury speaks of lacerations to his knee. In his evidence before me, the more debilitating injury was one to his back, which is not mentioned on the claim form at all, nor, so far, in the pleadings in the matter. That aspect of the case may be a problem for another time. For present purposes, its relevance is limited to my consideration of the significance of Mr Lewis's writing in another part of the form, the authorisation for Medical Information, wherein Mr Lewis wrote, on Ex 2 "Note. Personal details regarding knee injury only"(and to similar effect on Ex 4). In cross-examination Mr Barr suggested that Mr Lewis imposed this reservation in order to keep secret the effects of the previous injury to his neck. Mr Lewis denied this: without telling me what it is, he says there is some other - and, I infer embarrassing - medical history that is irrelevant to the case and which he thought ought not to be disclosed. Mr Barr's suggestion was mildly put, at this stage, and Mr Lewis's answer, though mysterious, was convincing enough. I am not of the view at this stage that Mr Lewis, in imposing that reservation was demonstrating any calculated

> cunning directed to the unfair advancement of his claim. On the other hand, by 21/7/00, Mr Lewis was well aware that there might be problems with his worker's compensation, and it is only to be expected that self-interest might influence his choice of answers to some of the questions, especially in those cases where the true answer was not altogether clear, but the question in the form permits only "Yes' or "No" answers. In short, I do not find the Claim Form of any assistance in assessing Mr Lewis's credit: neither for nor against. I can only assess his credit from his testimony. 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 more regular relationship with the taxation authorities."

[36] Mr Barr referred to the fact that there was no documentation to support the fact that Mr Lewis was a PAYE taxpayer.

[37] Further, Mr Barr submitted that if the learned stipendiary magistrate did not accept evidence not challenged in cross-examination, then it is an error of fact and not an error of law and is accordingly not appealable.

[38] It was submitted on behalf of the respondent, that the Court of Appeal decision in *Herbert v KP Welding Construction Pty Ltd* makes no reference to rebuttable presumptions. The relevant extract from that case is at 302-3:

> "… it is necessary for that relationship to be determined by the Work Health Court. It must make a decision 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 off the Income 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."

[39] It is Mr Barr's argument that the word "assumption", which he underlined in his written submissions, and which I have set out in bold type, does not refer to any legal presumption. He further argues that a court may assume something in the absence of evidence, which it will not necessarily assume if evidence is available. On the respondent's argument, the learned stipendiary magistrate did not make the assumption in this case because:

> "1. There had already been one pay;
> 2. There was no pay slip;
> 3. Apparently, no deductions were made by the employer;
> 4. The appellant did not raise any issue over deductions;
> 5. The appellant had not given the employer any tax file number, and did not ever do so subsequently."

[40] Mr Barr pointed to the fact that Mr Lewis had good reasons not to raise any issue; he was on Centrelink benefits. Further, Mr Barr stated that any tax

would be unlikely to be recovered by him, so that he would be worse off if any payments were deducted.

[41] Finally, Mr Barr drew my attention to the Court of Appeal decision in *Thompson v Groote Eylandt Mining Company Limited* [2003] NTCA 05, but submitted this decision did not affect the outcome in the present case and, if anything, supported the conclusion of the learned stipendiary magistrate.

Conclusion of the Court

[42] I accept the appellant's argument made by Mr Southwood QC that the learned stipendiary magistrate misdirected himself as to who bore the onus of proof in the circumstances of this case.

[43] 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.

[44] Mr Lewis gave evidence to the effect that he believed he was a PAYE taxpayer when he commenced work on 3 July 2000 and that he assumed he would receive the appropriate paperwork in his first pay. He gave examples of other employment he had as a PAYE taxpayer. The evidence as to the payment of $525 is neutral. There is no evidence as to whether tax was deducted and if so the amount of such tax. The fact that the cash payment did not have documentation with it, is not evidence to the required standard

of proof that it was a cash payment made with the intention of avoiding income tax (*Neat Holdings P/L v Karajan Holdings P/L* (1992) 67 ALJR 170). The preparation of any documentation was the responsibility of Mr Zagorianos. Mr Lewis did not know how the amount of $525 was calculated or what amount may have been deducted for tax. Mr Zagorianos gave no evidence.

[45] Mr Lewis' explanation that he expected there would be documentation for PAYE tax in his first pay packet after the trial period was reasonable and the learned stipendiary magistrate found him to be an honest witness.

[46] Accordingly, the onus of proof reverted to the respondent to prove on the balance of probabilities that the worker was being paid on a cash basis at the time of his injury. The respondent has not discharged this onus of proof.

[47] In the matter of *Neat Holdings P/L v Karajan Holdings P/L* (supra), the trial judge had heard evidence given on behalf of the appellant that was completely contradictory to evidence given for the respondent. It was on this basis he found for the appellant on the balance of probabilities. In the matter on appeal before this Court, the learned stipendiary magistrate did not have contradictory evidence. The only evidence was that presented by the appellant. The appellant specifically denied he had received a cash payment with the intention of defrauding the tax office. The learned stipendiary magistrate found him to be an honest witness. There was no evidence to the contrary. The objective facts were not sufficient to

establish, on the balance of probabilities, that there was an intention to defraud the tax office.

[48] As was stated by the Court of Appeal in *Herbert v KP Welding Constructions Pty Ltd* at 302, if there is a dispute between the parties as to the relationship which existed as at the date of the injury, it is necessary for that relationship to be determined by the Work Health Act.

[49] The Court of Appeal stressed in the matter of *Herbert v KP Welding Construction Pty Ltd* that the reasons not be given application other than the facts of that case warrant. However, the facts in the matter before this Court bear a striking similarity to the factual situation in *Herbert v KP Welding Construction Pty Ltd*. There was no evidence of agreement between Mr Lewis and Mr Zagorianos as to what rate tax was to be deducted. The appellant was injured on the first day of employment although he had already completed a five day trial period and been paid for this. The accident occurred before any agreement was reached as to taxation deductions, or even the exact rate of pay. The Court 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 it was for taxation purposes. Taxation deductions were not made because of the shortness of time during which the worker was in the employment of his employer. Accordingly, the evidence is the appellant was a PAYE taxpayer as submitted by counsel for the appellant.

[50] I allow the appeal and make the following orders as sought on behalf of the appellant:

1. A declaration that the appellant is a “worker” within the meaning of the Work Health Act.

2. An order that the decision of Mr Wallace SM be set aside.

3. The parties are given leave to apply on the issue of costs.

4. An order that the matter be referred back to the Work Health Court for hearing of the appellant’s application for worker’s compensation.

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