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INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation and Rehabilitation Act 2003 - s. 561(1) - appeal against decision of industrial magistrate

Q-COMP AND William Noel Green (C/2008/30)

PRESIDENT HALL

31 October 2008

DECISION

By an Application for Compensation dated 27 September 2006 and lodged 29 September 2006, William Noel Green sought benefits under the *Workers' Compensation and Rehabilitation Act 2003* for an injury described as "lung cancer, pleural plaques". The Application attributed the injury to an exposure to asbestos at the Plane Creek Sugar Mill over a period of approximately six weeks in April/May 1965. At the time, Mr Green was employed by a business trading as Bells Asbestos.

By a letter dated 10 March 2007, WorkCover Queensland informed Mr Green that his Application had not been accepted. By a letter to Q-COMP dated 6 June 2007, Mr Green's solicitors sought a Review of WorkCover's decision. The Application for Review related only to WorkCover's rejection of the injury "lung cancer". By a letter of 10 July 2007, Q-COMP advised Mr Green through his solicitor that the decision of WorkCover had been confirmed. On 23 July 2007, Mr Green appealed to the Industrial Magistrate at Brisbane. By a decision of 19 June 2008, the Acting Industrial Magistrate into whose hands the matter had fallen, allowed the Appeal. By an Application to Appeal dated 8 July 2008, Q-COMP appeals to this Court.

Although Mr Green's application for benefits was made under the *Workers' Compensation and Rehabilitation Act 2003*, that Act genuflects to the reality that other statutory measures dealt with the matter of workers' compensation in this State prior to the gradual commencement of the Act over the period April/July 2003. The general rule appears at s. 603 which provides:

"603 Injury under former Act

- (1) This section applies if a worker sustained an injury before the commencement of this section.
- (2) A former Act, as in force when the injury was sustained, applies in relation to the injury.

- (3) Section 558 of the repealed Act continues to apply in relation to a former Act mentioned in the section.
- (4) However, a person entitled to lump sum compensation, weekly payments or dependant allowances under a former Act is entitled to the benefit of every increase in QOTE.
- (5) In this section –
injury means injury as defined in the former Act."

To understand s. 603, it is necessary to know that the section commenced on 1 July 2003 and that s. 558 of the repealed Act, *viz.*, *WorkCover Queensland Act 1996*, provided:

"558 How to apply provisions of former Acts

- (1) This section applies if, after the commencement of this part, a provision of a former Act is to be applied for any purpose.
- (2) A reference in the provision to the general manager may, if the context permits, be taken as a reference to WorkCover's chief executive officer.
- (3) A reference in the provision to the body corporate constituted by the workers' compensation board under a former Act may, if the context permits, be taken as a reference to WorkCover.
- (4) A reference in the provision to the workers' compensation board operating as a board under a former Act may, if the context permits, be taken as a reference to WorkCover's board.
- (5) A reference in the provision to the Workers' Compensation Fund is taken to be a reference to the corresponding WorkCover fund."

There is a departure from that general rule in the case "latent onset injuries"; a phrase which is defined by Schedule 6 of the *Workers' Compensation and Rehabilitation Act 2003* to mean, "an insidious disease". It is, as I understand the arguments, common ground that "lung cancer" is an "insidious disease". Having regard to the third meaning of "insidious" developed by the Macquarie Dictionary (2nd Revised Ed), *viz.*, "operating as proceeding inconspicuously but with grave effect, an insidious disease", I share the view that "lung cancer" is a "latent onset injury".

Section 36A of the *Workers' Compensation and Rehabilitation Act 2003*, which commenced on 2 November 2005, provides:

"36A Date of injury

- (1) This section applies if a person –
 - (a) is diagnosed by a doctor after the commencement of this section as having a latent onset injury; and
 - (b) applies for compensation for the latent onset injury.
- (2) The following questions are to be decided under the relevant compensation Act as in force when the injury was sustained –
 - (a) whether the person was a worker under the Act when the injury was sustained;
 - (b) whether the injury was an injury under the Act when it was sustained.
- (3) Section 131 applies to the application for compensation as if the entitlement to compensation arose on the day of the doctor's diagnosis.
- (4) Subject to subsections (2) and (3), this Act applies in relation to the person's claim as if the date on which the injury was sustained is the date of the doctor's diagnosis.
- (5) To remove any doubt, it is declared that nothing in subsection (4) limits section 236.
- (6) Subsections (2) to (4) have effect despite section 603.

(7) In this section –
relevant compensation Act means this Act or a former Act."

Schedule 6 to the Act defines "former Act" to mean:

- (a) the *Workers' Compensation Act 1916*; or
- (b) the *Workers' Compensation Act 1990*; or
- (c) The *WorkCover Queensland Act 1996*.

The purpose sought to be achieved in referring to a "former Act" is identification of a definition of "worker" and of "injury". The "former Acts" did not maintain static definitions throughout the period of their operation, e.g. the *WorkCover Queensland Act 1996* originally required the workers' employment to be "a significant contributing factor to the injury", later required the employment to be "the major significant factor contributing to the injury" and later still, reverted to the original requirement of "a significant contributing factor". In those circumstances, I construe the reference to "as in force" in s. 36A(2) as a reference to the form which the relevant former Act took when the injury was sustained.

Each of the WorkCover claims assessor and the Q-COMP Review Officer proceeded on the view that s. 36A required application of the definitions under the *Workers' Compensation Act 1916*. On the appeal to the Industrial Magistrate, Q-COMP submitted that the correct legislative measure to apply was the *Workers' Compensation and Rehabilitation Act 2003*. (The Act of 2003 is itself a "relevant compensation Act" for the purposes of s. 36A, see s. 36A(7)). The Acting Industrial Magistrate upheld a submission for Mr Green that the Act of 1916 was the "relevant compensation Act". The matter has been revisited on the Appeal to this Court.

It is understandable that there is debate about which of the present Act and the former Acts is the "relevant compensation Act". The critical word "sustained" is not defined and must be construed in a context in which s. 32(3)(a) refers to the notion of a disease being "contracted". However, if "sustained" is given its third meaning in the Macquarie Dictionary (2nd Revised Ed), viz., "to undergo, experience, or suffer injury, loss, etc", it seems to me that on the medical evidence one cannot find that the *Workers' Compensation Act 1916* is the "relevant compensation Act".

The non-small cell carcinoma involving the apex of Mr Green's left lung and invading neurovascular structures, bone and mediastinum was first diagnosed in early June 2006. The diagnosing doctor Dr Bowler, a thoracic physician who was called for Mr Green, thought that the point at which the cells might have been identified as malignant "was probably only a couple of years" earlier. Whilst Dr Oliver a thoracic surgeon, who was called by Q-COMP would have been prepared to say that such cancers were possibly diagnosable up to ten years earlier, Dr Oliver was more comfortable with four years, Dr Bowler rejected the ten year hypothesis.

To adopt a four year period is not to deny persons such as Mr Green the opportunity to point to an exposure to asbestos many years before the cancer is diagnosable. Although the medical evidence is neither precise nor confident, it is currently generally accepted that whilst exposure to carcinogenic agents may act to alter or damage DNA and change molecular structure, the alterations and changes may or may not lead to the uncontrollable or proliferation of damaged cells leading to a tumor or cancer. An exposure (or event, see s. 31) which occurs long before a tumor or cancer is capable of being diagnosed may well justify a finding that a tumor or cancer is within the definition of injury in the "relevant Compensation Act". There is a clear distinction between selecting a definition and applying the definition to a set of facts. The point presently being developed is merely that until the tumor or cancer is identifiable it has not been "sustained", and that is the touchstone for selecting a definition. For completeness, I should add that I have put to one side the decision of this Court in *Q-COMP v. Robinson* (2007) 186 QGIG 695. That case was one in which the actual diagnosis preceded s. 36A. The only similarity is in the description of the development of non-melanoma skin cancer and the description of the development of Mr Green's lung cancer. A finding of fact may not be converted into a proposition of law, see *Qualcast (Wolverhampton) Limited v. Haynes* [1959] AC 743 at 760 per Lord Denning.

Junior Counsel for Mr Green presses a submission that regard should be had to the Explanatory Note to the Bill which added s. 36A to the Act. I doubt that the operation of s. 14B of the *Acts Interpretation Act 1954* has been triggered. One may accept that the time when the injury was "sustained" must be the same whether one is applying s. 36A(2)(a) or s. 36A(2)(b). There is nothing absurd or unreasonable in applying the statutory definition of "worker" at the time that the latent onset injury was identifiable to a gentleman retired (as a claimant in a latent injury case will often be). One applies the definition to the facts at an earlier time in history when the employment was on foot to determine if the employment had sufficient nexus with the injury to render it an "injury" for the purposes of the relevant Compensation Act. In any event, the short answer is that the Explanatory Note contradicts the language of the statute. The Explanatory Note asserts:

"Insertion of new ch 1, pt 4, div 6, sdiv 3A"

Clause 6 introduces a new subdivision into Chapter 1, Part 4 to establish the date of injury for latent onset injuries as the date of diagnosis by a medical practitioner of the latent onset injury. For deciding whether a claimant is entitled to compensation or damages the insurer must apply the relevant tests applicable at the time that the event occurred. These tests may be in a former Act. The current Act will apply to the other elements of the claim such as provisions for application for compensation and review/appeal rights.

For example, a person is diagnosed with pleural plaques on 2 January 1996. At the time, the doctor states that, given the person's history of exposure to asbestos, the person may develop asbestosis. On 2 February 2006 the person is diagnosed with asbestosis, and advised that this disease will develop to the point where it will significantly affect their life. The relevant date of injury for the purposes of the proposed s 36A is 2 February 2006. For the purposes of determining whether the person is entitled to compensation the insurer must apply the legislation in force at the time of the person's exposure to the asbestos fibres. [Emphasis added.]

In the example given, for the purposes of s. 36A, the injury is plainly "sustained" on 2 February 2006. The Bill and the Act require the application of the legislation in force "at that time" to the person's exposure to the asbestos fibres. The language gives no support to selection of legislation in force "at the time of the exposure".

In my view the correct test to apply was the test in the *Workers' Compensation and Rehabilitation Act 2003*, or in the *WorkCover Queensland Act 1996*, in the form which it took post 1 July 1999.

It is sufficient to reproduce s. 32(1) of the *Workers' Compensation and Rehabilitation Act 2003*. In its relevant form, s. 34(1) of the *WorkCover Queensland Act 1996*, was in the same terms, save that where it first appears, the noun injury is within quotation marks. Section 32(1) provides:

"An *injury* is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury."

In this case the critical phrase is "a significant contributing factor". The phrase cannot be equated with "a significant cause". If the phrase had that meaning, every injury falling within the phrase would also arise out of the employment. The structure of the subsection suggests that each of those phrases may potentially have work to do. Something of the same point was made by Windeyer in *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 641, with reference to the definition of "injury" in the *Workers' Compensation Act, 1926 to 1960* (NSW). His Honour said:

"Law when concerned with fixing responsibility upon persons often seeks for the 'effective cause' or the 'proximate cause' of an event. But here all that the statute requires is 'a contributing factor'."

The subsection is quite different to s. 9A of the *Workers' Compensation Act 1987* (NSW). Materially, that Act requires a "substantial contributing factor" and negates the significance of an injury "arising out of and/or in the course of" the worker's employment. Sub-section (1) and (3) provide:

"(1) No compensation is payable under this Act in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.

...

(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:

- (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment.
- (b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or occupational rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury."

The other obvious difference to the New South Wales formula is that the local statute uses the adjective "significant" not the adjective "substantial". In *Mercer v. ANZ Banking Group* (2000) 48 NSWLR 740 at 746 to 747, Mason P gave consideration to the adjective "substantial" as qualifying the words "contributing factor". His Honour concluded:

"The term 'substantial' may have various shades of meaning. Having regard to the context, it may mean 'large or weighty' or 'real or of substance as distinct from ephemeral or nominal' (*Tillmanns Butchery Pty Ltd v Australasian*

Meat Industry Employees' Union. (1979) 42 FLR 331 at 348 per Deane J; Wong v. Silkfield Pty Ltd (1999) 73 ALJR 1427 at [27].

...

Here the word 'substantial' qualifies 'contributing factor'. Obviously it is the extent of the causal link which is at issue. Judge Bishop recognised this. At para 29 of his judgment he held that the meaning to be adopted was that 'substantial' meant 'more than minimal, large or great'. In my view this was the correct approach, remembering that word is used in a relative sense, recognising that the other causative factors may be present. S9A does not require that the employment must be 'the' substantial contributing cause, nor does it attempt to exclude predisposition or susceptibility to a particular condition (cf *University of Tasmania v Cane* (1994) 4 Tas R 156.).

Senior Counsel for Q-COMP does not seek to maintain that the adjective "significant" requires the same sizeable contribution as substantial. Having regard to the first meaning attributed to "significant" by the MacQuarie Dictionary (2nd Revised Ed), viz., "important; of consequence" that approach seems to me to be correct. I mention those matters about the noun "contribution" and the adjective "significant" because Mr Green seeks to make out his case, not on the basis of medical evidence that his cancer flowed from the exposure to asbestos, but on the basis of epidemiological evidence said to show that the exposure to asbestos so elevated the risk of the cancer that, as a matter of inference, one may conclude that the exposure was a "significant contributing factor" to the injury.

The proposition that a defendant's breach of duty significantly contributing to an already potentially harmful situation and thereby increasing the risk of injury, entitles a tribunal of fact to find that any foreseeable injury which in fact resulted was the result of the breach of duty is a proposition of some antiquity, see *Bonning Castings Ltd v Wardlaw* [1956] AC 613 and *Bennett v. Minister of Community Welfare* (1992) 176 CLR 408 at 420 to 422 per Gaudron J. Attempts to extend the principle and apply it in the resolution of issues about causation have had little success. On the current state of the authorities the issue is:

"Was there evidence on the basis of which the trial judge could conclude, on the balance of probabilities, that there was an increased risk of injury and that *that* risk had 'eventuated' in the specific disease of the respondent?".

Seltsam Pty Ltd v. McGuinness (2000) 49 NSWLR 262 at 279 per Spigelman CJ. Proof of an increase in risk does not establish that in law the requirements of causing or materially contributing to an injury are made out, *Bendix Mintex Pty Ltd v. Barnes* (1997) 42 NSWLR 307 at 315 to 316 per Mason P. It follows that even accepting that "contribution" does not equate with "cause" and accepting that a "contribution" may be "significant" without being substantial, the evidence at first instance leaves the Respondent in a difficult situation.

As to the matter of risk, the Respondent's first difficulty is the lack of clarity about the extent of exposure. It is unclear whether the Respondent worked at the Plane Creek Sugar Mill for five or for six weeks. It is unclear whether he worked overtime. It is clear the he performed work removing old asbestos lagging from pipes, but unclear whether he performed work affixing fresh asbestos lining to the pipes or worked at mixing the asbestos slurry. There is certainly no basis for attributing a proportion of total worked time to any particular activity.

It is clear that there were three types of asbestos, viz., amosite, crocidolite and chrysotile, and equally clear that the risk varied with the type of asbestos. It is unclear which type of asbestos was used in the old lagging and which type was used in the new laying. The possibility that a mixture of types was in use cannot be excluded.

The evidence about the intensity of Mr Green's exposure is unsatisfactory. Mr Green considered that the removal of the old lagging was particularly very dusty work. The specialist in occupational hygiene (Mr Kottek) who was called by Mr Green estimated the intensity of exposure at that point as 20f/ml. Yet in calculating Mr Green's cumulative exposure to asbestos, the occupational hygiene expert assumed an average intensity of 7½ - 40f/ml. How the higher average figure could exceed the dusty figure is not explained. Further, although ventilation is acknowledged to be a relevant factor, the evidence of ventilation at the Plane Creek Mill in 1965 is (understandably) vague.

Turning to the actual physical injury, it is important to note that asbestosis was absent and that the pleural plaques did not indicate exposure to asbestos. There was a completely plausible alternative cause of the cancer. Mr Green had smoked since the age of 15. After he abandoned the smoking of cigarettes he took up smoking a pipe. At the interview with Dr Bowler he said that when smoking a pipe he smoked 60gms of tobacco per week. (Mr Green, on oath, denied ever smoking 60gms of tobacco per week). It seemed to be common ground amongst the experts that 90% of lung cancers are found in smokers and ex-smokers. On the evidence of the epidemiologist (Dr Berry), much relied upon by the Appellant, there was a 90% chance that the cancer was all attributable to smoking. The presence of the smoking related emphysema is some evidence that the chance may have been larger.

Senior Counsel for the Appellant sought to meet the contention that smoking was an obvious and plausible cause of the cancer by submitting that the two agents, smoking and asbestos, act synergistically. That was certainly the evidence of

Professor Berry. However, to understand the point developed by Professor Berry one must read the evidence with some care. The Acting Industrial Magistrate summarised the evidence as follows:

"12. Professor Berry was referred to his statement dated 22 February 2008 and after discussing some of the authors' works to which he referred was asked by Mr Little if he was able to say there is a unanimous and concluded opinion in the medical and scientific community on the interaction between tobacco smoke and asbestos fibre in the induction of lung cancer. His reply is from line 28 of page 42 of the transcript -

Yes. I think there's a lot of evidence and I think most people would accept that evidence that when the two agents are acting together, that is smokers who are also exposed to asbestos then the two agents act synergistically, that is there's an interaction between them, which makes the effect bigger than the sum of the two parts and often that has been expressed as a multiplicative model, that is the two risks multiplied by - multiplied together to produce the risk of the joint action. It may not be quite as high as a multiplicative effect but certainly it's a lot nearer than additive effect. (I have amended spelling errors by the transcriber to give sense to the answer)."

With respect to the Acting Industrial Magistrate, the passage portrays a critical error. Professor Berry was not talking about the interaction of smoking and asbestos exposure in the induction of lung cancer. Professor Berry is talking about the interactive effect of smoking and of asbestos exposure on the level of risk. The same error, and given Professor Berry's choice of language I can well understand how it occurs, appears in the Acting Industrial Magistrate's ultimate conclusion:

"78. While I accept the opinions of Dr Oliver and Dr Foley rejecting Mr Green's exposure to be a significant contributing factor to his lung cancer, on balance I find that not only is it possible (Dr Bowler's initial assessment of 'likely' in his report of 03 October 2006) for the exposure to have contributed to the lung cancer, but that it is more probable than not that his exposure did contribute to his lung cancer to the degree as expressed by Professor Berry."

At no point did Professor Berry seek to quantify the contribution of the asbestos exposure to the development of the cancer. Professor Berry sought to quantify the level of risk (or chance) of the asbestos exposure making a contribution to the cancer. And so, treating far from the combined contribution to risk as composite and indissoluble, Professor Berry (by his written opinion) was able to tease the composite risk apart. Dr Berry opined:

"Based on the multiplicative model, it is possible to subdivide Mr Green's risk of lung cancer into components representing the percentage contributions of the different risks. The calculations are summarized in Table 1 based on relative risks of 1.04 and 1.2 for the asbestos exposure, and a relative risk for Mr Green's smoking history of 10.

Table 1 - Percentage contributions to the total risk

	RR due to asbestos Exposure	
	1.04	1.2
a) Due to asbestos alone	0.4%	2%
b) Due to smoking alone	86%	75%
c) Addition due to asbestos - smoking combination	3.5%	15%
d) Background risk	10%	8%

For a relative risk due to asbestos exposure of 1.04 (corresponding to Mr Kottek's lower assessment of exposure) the contribution from asbestos alone is 0.4% and the contribution from the interaction between asbestos and smoking is 3.5%. These two contributions add to 3.9%.

For a relative risk due to asbestos exposure of 1.2 (corresponding to Mr Kottek's upper assessment) the contribution from asbestos alone is 2% and the interactive effect 15%, and these two contributions add to 17%.

It should be noted that although the calculations have been done with a smoking relative risk of 10 the same values for the total of the asbestos contribution and the interactive effect would have been obtained for any other relative risk due to smoking. These totals, of the asbestos contribution and the interactive effect, are simply the attributable fractions defined in §1, that is $(1.04 - 1)/1.04 = 3.8\%$ and $(1.2 - 1)/1.2 = 17\%$ (the difference between 3.8 and 3.9 in the former is due to rounding)."

Accepting that on the Australian authorities a risk may be found to have caused (not contributed to) the injury though the relative risk is less than 2, the relative risk here is very low, the total contribution of asbestos exposure is minimal and if the hygiene experts upper figures on intensity of exposure are incorrect, the upper relative risk and asbestos contribution will be lower still. For completeness, before leaving the matter of synergism, I should note that Dr Bowler

thought that the impact on risk was merely additive. Indeed, on Dr Bowler's evidence about the infrequency of lung cancer in persons who were neither smoker's nor exposed to secondary smoke, one may well understand his concerns about any sample used to assess the risk arising out of asbestos exposure alone. Dr Bowler makes the further point that if cumulative exposure be the key, low level intensity of exposure arising from the use of asbestos in roofs, gutters and dwellings over a period of many years would burden many people in the community with a higher cumulative exposure than that with which Professor Berry's mathematical calculations are concerned. If asked Professor Berry may well have said that Mr Green carried that risk of exposure also as a background risk. The point is that the Plane Creek risk was not high.

The very reason for rejecting the suggestion that an increase in risk is sufficient to establish cause or material contribution, is the inconsistency between the proposition and the established rule that possibility is insufficient to establish cause for legal purposes, compare *Seltsam Pty Ltd v. McGuinness* (2000) 49 NSWLR 262 at [118] to [119] per Spigelman CJ. In this case not only does the low level of relative risk and the great risk posed by Mr Green's smoking confine one to saying "possibly" in assessing whether the cancer eventuated from the exposure, the evaluation of the increase in the level of risk is so speculative and involves so much conjecture that no reasonable mind could act upon it.

For completeness, I should add that this Appeal was heard on 26 September 2008. On that very day the Western Australian Court of Appeal delivered judgment in *The State of South Australia v. Ellis* [2008] WASCA 200. Subsequently, the Respondent's legal representatives sought to make additional submissions based on the Court of Appeal's decision. By consent of Q-COMP, submissions from both parties were taken in writing. Having read the decision in *Ellis, supra*, and having perused the submissions, I am satisfied that I should put the decision entirely to one side.

The general factual situation in *The State of South Australia v. Ellis* [2008] WASCA 200 is not dissimilar to the general nature of the case now on appeal. However, the evidence in the matter is quite different. In particular, in the matter on appeal, there is not medical evidence (as distinct from epidemiological evidence) that there was an actual inter-dependent or cumulative effect of tobacco smoke and asbestos. Neither is there medical evidence that Mr Green's level of smoking would not ordinarily have been expected to lead to lung cancer as early as it did in the absence of some additional factor (which, as a matter of inference, might be found to be the exposure to asbestos).

By s. 561(3) of the *Workers' Compensation and Rehabilitation Act 2003*, appeals such as this are to be determined "on the evidence and proceedings before the Industrial Magistrate", while the Court has a statutory power to order that "additional evidence be heard", the Court has no authority whatsoever to have regard to evidence given in other proceedings in a different court by quite different expert witnesses. Neither should the Court be lured into treating as propositions of law what are in truth (entirely accurate) conclusions on particular established primary facts.

I allow the Appeal. I set aside the decision of the Acting Industrial Magistrate given on 19 June 2008. I confirm the Review Decision of Q-COMP dated 10 July 2007. I reserve all questions about costs at first instance and grant liberty to apply on seven days' notice.

Dated 31 October 2008.

D.R. HALL, President.

Appearances:

Mr G.P. Long SC and with him Mr S. McLeod, directly instructed for the Appellant.

Mr G.F. Little SC and with him Mr A.K. Herbert, instructed by Turner Freeman Lawyers, for the Respondent.

Released: 31 October 2008

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 274A - power to make declarations

William Hamilton Hart

AND

Robert James Cunningham
Michael John Douglas Meadows
David John Herbert Watt
Brian Walter Smith
Warren Grant Denny
Robyn Gay Lyons
Stephen John Tonge

**Brian Francis Ward
James William Alley
Sharon Ann Winn
(B/2007/79)**

COMMISSIONER THOMPSON

28 October 2008

Application for declaration under s. 274A - Declarations sought: superannuation, annual leave, remuneration - Witness evidence - Applicant an employee - Piecework not applicable - Application granted - Parties to prepare a draft Order.

DECISION

An application was filed with the Industrial Registrar on 21 December 2007 by William Hamilton Hart (the applicant) in which he sought declarations under s. 274A of the *Industrial Relations Act 1999* (the Act):

"274A Power to make declarations

- (1) The commission may, on application, make a declaration about an industrial matter.
- (2) The commission may make the declaration whether or not consequential relief is or could be claimed.
- (3) The application may be made by -
 - (a) a person who may be directly affected by the declaration; or
 - (b) an inspector; or
 - (c) an organisation of employees or employers of which a person mentioned in paragraph (a) is a member, if it is acting with the person's written consent; or
 - (d) an organisation of employees or employers who may be directly affected by the declaration.
- (4) Subject to chapter 9, a declaration made by the commission under this section is binding in any proceeding under this Act in relation to the issue determined by the declaration."

The application identified Flower and Hart Solicitors as the other party to the matter.

On 5 February 2008, an amended application was filed with the Industrial Registrar by the applicant which, in effect, altered the identity of the other party from Flower and Hart Solicitors to reflect the names of persons who were both current and past partners of the said solicitor firm.

The partner's names were Robert James Cunningham, Michael John Douglas Meadows, David John Herbert Watt, Brian Walter Smith, Warren Grant Denny, Robyn Gay Lyons, Stephen John Tonge, Brian Francis Ward, James William Alley and Sharon Ann Winn (the respondents).

The declarations sought were set out at point 2 of the application:

- "(a) A declaration under section 274A of the Act that the remuneration paid to me as an employee of ROBERT JAMES CUNNINGHAM, MICHAEL JOHN DOUGLAS MEADOWS, DAVID JOHN HERBERT WATT, BRIAN WALTER SMITH, WARREN GRANT DENNY, ROBYN GAY LYONS, STEPHEN JOHN TONGE, BRIAN FRANCIS WARD, JAMES WILLIAM ALLEY, SHARON ANN WINN who are currently trading as, or who have traded as, Flower & Hart (a firm) of Level 16, Central Plaza Two, 66 Eagle Street, Brisbane, Queensland (the respondents) should have been paid without deduction of superannuation contributions;
- (b) A declaration under section 274A of the Act that remuneration should have been paid to me by the respondents for periods of annual leave taken during my employment at the rate specified in the Act; and
- (c) A declaration under section 274A of the Act that remuneration should have been paid to me by respondents for periods of accrued but unused annual leave as at the termination of my employment at the rate specified in the Act."

Prior to the allocation of the application to the Commission as constituted, the matter was the subject of other proceedings before Deputy President Bloomfield (B/2008/11) and President Hall (C/2008/20).

Applicant

The applicant had been a partner in the firm of Flower and Hart from 1 January 1969 until 31 December 2001 at which time he ceased to be an equity partner by selling his interest in the partnership.

In being approached by other partners to retire from the partnership, he was given the opportunity to continue to work as either a consultant or a non-equity partner, for which he would receive one third of the fees that were received by the firm as a result of his work after 31 December 2001.

The arrangement suggested allowed for him to work as he had previously, but made no mention of holiday pay or superannuation.

A proposal document setting out the terms of engagement that would apply following his retirement from the partnership was provided to him and accepted by him (subject to a minor alteration) in December 2001.

The proposal (attachment WHH3 to Exhibit 1) was as follows:

- "1. WHH* to retire as an equity partner at 31 December 2001.
2. WHH to become a consultant at 1 January 2002.
3. Consideration for the purchase of WHH partnership interest to be paid by 31 March 2002.
4. Consideration on sale to be calculated as for SJT**.
5. Firm to pay WHH's registration and insurance as a solicitor and Notary Public.
6. WHH to be paid one third of cash received for professional fees for which he is responsible from 1 January 2002 in respect of bills raised after 1 January 2002 to be calculated and paid at the end of each month but with a minimum payment of \$100,000.00 per annum during the year to 31 December 2002 to be paid monthly.
7. WHH to retain his car space until this agreement is terminated.
8. Either party may terminate paragraphs 2, 5, 6 (so far as it is to operate after 31 December 2002) and 7 on 6 months notice in writing to the other."

* WHH - The applicant

** SJT - Stephen Tonge

Note: A further provision (at point 9) set out the acquisitions of interest following the sale of the applicant's partnership.

In discussions around the terms of the proposal, it had never been stated that payments made to him would be inclusive of superannuation contributions.

The guarantee of a minimum payment of \$100,000.00 for the period ending 31 December 2002 was made for reasons relating to a perceived difficulty in generating significant income in the first year as a consultant.

The role of consultant commenced on 1 January 2002 and continued until his termination on 30 June 2006.

In terms of the work arrangements, the applicant worked from the office of the firm, at times from home, and chose what hours he worked, as well as having the responsibility for generating almost all work undertaken in the course of the employment.

In relation to the billing of clients, he prepared such bills which were then checked and issued by the firm's accounts department.

In cases where bills were unpaid, he had the responsibility of contacting the clients concerned and where bills remained unpaid, he did not receive any payment for the work undertaken.

In the first year of employment (2002) he was paid a fortnightly, minimum guaranteed payment (proportionate to the \$100,000.00) less superannuation payments which were deducted without his authority. He also took periods of sick and annual leave for which he received payment.

At the end of 2002, he received a payment in respect of untaken annual leave he had accrued for that year.

The applicant completed a fresh employment declaration form to cover his employment from 1 January 2003. In or around March 2003, a memorandum was received from Robert Cunningham which sought to reduce the applicant's earnings from work done on his files by others, however upon his refusal to accept the changes envisaged, his current arrangements continued.

Beginning on 1 January 2003, and each subsequent year of employment, the applicant was paid one third of the cash received for professional fees billed to clients for which he was responsible.

No payment was received from 1 January 2003 and onwards for any days of annual leave taken by the applicant.

The applicant's evidence was that in February 2004, he spoke to Richard Kloza (General Manager of the firm) about not being paid for annual leave and was subsequently advised that Brian Smith had confirmed there would be no annual leave payment.

A conversation was had with Brian Smith around Easter 2004 where his concerns about annual leave and the deduction of superannuation were raised, with Brian Smith agreeing to look in to the matter.

Sometime later advice was received from Warren Denny which responded to the annual leave inquiry but did not go to the issue of superannuation.

The applicant was informed that he had no annual leave entitlements because he was a pieceworker.

No further complaints were raised in respect of annual leave or superannuation for the duration of the employment as the applicant did not believe the outcome would alter and he held concerns that the partners might give notice of termination of his employment if further complaints were raised.

The applicant tendered an affidavit in reply (Exhibit 2) where he stated that he had, at no time, given written authorisation for superannuation contributions to be deducted from remuneration payable to him in 2002 and subsequent years of employment.

An attachment (WHH12) went to the billing arrangements documentation presented to the applicant on a monthly basis.

There was a practice of discounting in place, but such discounting did not happen in a uniform way.

It was evidenced that there was not a clear relationship at all times between the work performed by the applicant and the remuneration he received.

The applicant was subjected to extensive cross-examination across a range of issues including:

- Reliance on statutory entitlements of the Act
- Exercise of professional judgement on the delegation of work to subordinate persons
- Professional fees
- Work arrangements including hours of work and location (office or home)
- Time costings
- Discounting - write down - reduction of bills
- Period of time that elapsed before raising issues of superannuation and annual leave
- Pieceworker classification.

Mr Herbert, of Counsel, went also to the matter of the employment arrangements including this exchange at line 48, page 1-55 of transcript:

"Herbert: So that the current employment arrangements in place as at 23rd August and 26th August 2005 were that your superannuation was being deducted from the 33 per cent and remitted and you were being paid salary amount after that and you were not being paid annual leave on the contention that you were not entitled as a pieceworker?

Hart: No.

Herbert: They were the arrangements in place?

Hart: No, that was the way in which the arrangements were being administered by the firm but I will not agree that they were the current arrangements."

Respondents

The respondents relied upon evidence from Michael Meadows, Brian Smith, Richard Kloza and Robert Cunningham.

Meadows

Michael Meadows, a member of the firm Flower and Hart, gave evidence of meeting with the applicant in the company of Robert Cunningham on or around 16 November 2001 where the level of the financial performance of the applicant was discussed. It was suggested to the applicant that he cease being a full equity partner in the firm and change to a position where he received only a percentage of his actual billings.

At a later date, the applicant informed him that he was prepared to retire as a partner but would continue on as a consultant.

The fundamentals of an ongoing relationship were discussed by Michael Meadows and Robert Cunningham in early December 2001 which included the following term identified at paragraph 6(b) of his affidavit:

". . . if William Hart chose to stay on with the firm as a consultant or employee, his total remuneration was to be calculated at the rate of one third of the actual billings received for work done by him after 1 January 2002".

It was agreed that a guaranteed minimum payment of \$100,000.00 in the first year of the applicant's engagement as a consultant would be made for reasons relating to an initial period of low income generation.

Smith

Brian Smith was a joint managing partner of Flower and Hart from about March 2003 until March 2005.

In the period between March 2003 and December 2003, he became aware that the applicant had raised an issue relating to paid annual leave with Richard Kloza, the firm's General Manager.

Having regard to the terms of the applicant's employment arrangements, he believed that the remuneration paid was an all encompassing amount.

The witness consulted with Brian Ward, a partner of the firm (at the time of consultation) who had experience in the area of employment, and who expressed an opinion that the applicant was a "pieceworker" for the purposes of the Act.

Having reviewed the Act, and carried out further research, he came to the same conclusion in respect to the pieceworker finding and reported his findings to a meeting of partners.

He could not recall whether he advised the applicant of his findings.

On 2 May 2003 the witness forwarded a memorandum (BWS1) to the applicant following the applicant's refusal to agree to proposed changes to his employment arrangements. Contained within the memorandum was the following extract:

"The matter was discussed at the last Partner's meeting when it was agreed that the current arrangements (as agreed when you retired) should continue."

Mr Watson, of Counsel, raised in cross-examination of the witness whether or not the applicant had received a minimum payment (\$100,000.00 in 2002), and would that payment influence the issue as to whether he was a pieceworker.

At line 18, page 1-94 of transcript, the witness replied:

"Yes, I agree with you that the question of whether or not he was a pieceworker was not a matter that was affected by the minimum payment."

Kloza

Richard Kloza gave evidence that he was the General Manager of Flower and Hart from 18 November 1997 until 2 February 2007 and duties of that position included:

- The financial management of the firm
- Providing efficient and effective administration of the firm including overseeing the payroll.

The applicant was employed as a consultant solicitor from 1 January 2002 where he was to receive, for the first year of employment, one third of the cash received for professional fees raised by him with a guaranteed minimum payment of \$100,000.00 for the year.

Taxation was deducted from the monies as well as superannuation contributions.

The applicant's employment from 1 January 2003 until 30 June 2006 was remunerated at the rate of one third of monies received on account of professional fees rendered with taxation and superannuation contributions continuing to be deducted from that amount.

The calculation of remuneration was subject to a practice, which was set out at paragraph 12 of the witness's affidavit:

"In order to calculate the total remuneration (salary and superannuation contributions) to be provided to and on behalf of William Hart each month I adopted the following practice:

- (a) I would obtain from the firm's internal accounting program, Open Practice, a 'Cash Received Analysis Report' for the relevant month for the files opened in William Hart's name. This report detailed the total cash received on account of professional fees for bills rendered on William Hart's files during the relevant month.
- (b) I then used a proforma remuneration/superannuation calculation sheet (which I had prepared specifically for this purpose) to calculate William Hart's remuneration and superannuation contributions. This calculation was based on the amount of the total cash received for professional fees, which information was obtained from the 'Cash Received Analysis Report'. I calculated and recorded on the proforma remuneration/superannuation calculation sheet the following information:
 - (i) the cash received on account of professional fees for the month less bad debts ('total cash received');
 - (ii) the quantum of 1/3 of total cash received, which amount was recorded as the 'Total Remuneration Due for Period'; and
 - (iii) the amount of 9% of the 'Total Remuneration Due for Period' which was deducted from the 'Total Remuneration Due for Period' on account of the superannuation guarantee levy (which was then forwarded in accordance with William Hart's instructions to the relevant superannuation fund).
- (c) The remaining monies were William Hart's 'gross salary' from which PAYG taxation was deducted."

The witness recalled a discussion with Robert Cunningham that occurred shortly after the applicant had retired as a partner for the purposes of clarifying how the applicant's superannuation payments were to be calculated.

The witness informed Robert Cunningham that "normally" superannuation would be paid at the rate of 9% of the gross salary that was paid to an employee but was informed by Robert Cunningham that, in this case, the superannuation payments were included in the one third of cash received for professional fees.

The witness was said to have raised the issue of superannuation on more than one occasion due to the lack of documentation clarifying the arrangement.

It was the usual practice of the witness to deliver to the applicant each month a *pro forma* remuneration/superannuation calculation sheet, a Cash Received Analysis Report and his payslip.

At no time did he recall the applicant making any comment questioning the methods used to calculate and deduct the superannuation guarantee levy from the total remuneration.

Matters addressed in cross-examination included:

- Accounting practices used by the firm
- Non-payment (by clients) of legal fees
- Impact of fees written off on the applicant (line 1, page 2-7 of transcript):

"Watson: And if at one stage he may not have - sorry - the firm may not have received fees and they'd been written off that he didn't get paid for them; that's right, isn't it?"

Kloza: That's right."

- Charge out arrangements.

Cunningham

Robert Cunningham, the Managing Partner of Flower and Hart, gave evidence that he was authorised by the respondent's to make an affidavit (Exhibit 9) on their behalf in these proceedings.

In November 2001, along with Michael Meadows, he met with the applicant where it was suggested that he ceased as a full equity partner and move to a position as a salary partner or consultant on one third of gross fees recovered.

In early December 2001, further discussions occurred with Michael Meadows resulting in a "proposal for retirement from partnership of WHH" being formulated and subsequently given to the applicant.

Shortly thereafter the applicant agreed to the terms contained in the offer.

In March 2003, the witness ceased being a Managing Partner (returning to that position in March 2005) and, in handing over various administration files, he mentioned the need to finalise remuneration arrangements with the applicant.

The witness, on 5 March 2003, prior to retiring as Managing Partner, gave a memorandum to the applicant regarding his "retirement arrangements".

The memorandum (RJC9) contained the following passage:

"The partners requested me to inform you that the arrangement is one of employer and employee rather than that of a principle and independent contractor".

The Commission took the witness to (RJC9) and sought some detail as to why the applicant was informed of his employment arrangement in that memorandum.

At line 43, page 2-21 of transcript, Robert Cunningham stated:

"Well, my recollection, Commissioner, is that because it wasn't a straight salary arrangement, it was a little bit unusual in the sense that he was paid a third of his fees, it was held to be important to define as far as possible what the nature of the relationship was - whether he was an independent contractor or an employer/employee."

Further on in the exchange, the witness indicated that the applicant had been regarded as a pieceworker employee.

At line 20, page 2-22 of transcript, the matter of pieceworker was further dealt with:

"Commissioner: But when you say piecework employee, piecework employee is not mentioned within that memorandum, is it?"

Cunningham: No.

Commissioner: So why would you raise that in terms of an answer to your question? Was it an omission from the affidavit - from the memorandum, or - the reference to pieceworker, or - ?

Cunningham: No, well, I don't think so - not at the time."

The witness stated that the applicant did not respond to him in respect of the memorandum, nor was there any discussion around annual leave or superannuation.

On 22 August 2005, the witness met with the applicant to advise that the current arrangements should continue until 30 June 2006 when he should be ready to retire. The applicant was informed that there was no question over his legal ability, but some concern existed with his practice methods and, in particular, the delegation cost structure.

In concluding his evidence-in-chief, he stated that the applicant had not raised issues about his remuneration at any meeting.

Submissions

Applicant

The application was seeking declarations regarding two issues which were related to the payment of superannuation pursuant to the *Superannuation Guarantee (Administration) Act 1992* (SGAA) and failure to pay out unused annual leave accumulated by the applicant at the cessation of his employment.

Parallel proceedings for actual amounts are before the Industrial Magistrates Court.

The question for the Commission involves the proper construction of a written document (WHH3) and, in particular, at paragraph 6 which stated:

"WHH to be paid one-third of cash received for professional fees for which he is responsible from 1 January 2002 in respect of bills raised after 1 January 2002 to be calculated and paid at the end of each month but with the minimum payment of \$100,000 per annum during the year to 31 December 2002 to be paid monthly."

The submission was that, in the matter of *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 before the High Court of Australia, the proper approach to the construction of a contract was said to be:

"The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction."

The language of the document (WHH3) was said to be pellucid as the evidence has shown that no preliminary discussion or attention had been raised in the question of superannuation.

Mr Watson took the Commission to the matter of *Jumbo King Limited v Faithful Properties Limited Others* in Final Appeal No. 7 of 1999 (Civil) Court of Final Appeal, Hong Kong Special Administrative Region where Lord Hoffman made comment relating to the language of contracts:

"Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other. The court is not privy to the negotiation of the agreement - evidence of such negotiations is inadmissible - and has no way of knowing whether a clause which appears to have an onerous effect was a quid pro quo for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, in spite of linguistic problems the meaning is clear, it is that meaning which must prevail."

The respondents had, through the contract, agreed that from 1 January 2002, the applicant would be paid one third of cash received for professional fees for which the applicant was responsible with a guarantee of \$100,000.00 minimum in the first year.

The applicant was to be paid monies, which would be calculated in arrears, however the applicant had not actually been paid the one third cash received because part of that cash had been used by the respondents to make payments in respect of superannuation.

The document (WHH3) does not say that the applicant is to receive one third of cash received less an amount for superannuation. The document is clear on its fact.

It was submitted that no room existed for an interpretation whereby part of the cash paid could be for the payment of the applicant's superannuation for the following reasons:

- The clear language of the document
- The fact that there was no discussion concerning superannuation prior to the execution of the document by the applicant and, in particular, no discussion whereby the monies would be so divided that the payment to a superannuation fund would be, in fact, a discharge of the respondent's obligation. This follows from s. 16 of the SGAA
- That payment of only part of an amount to the applicant is not a payment of the whole of the amount as identified in the clause.

To suggest that the respondents, by paying monies to the applicant's superannuation fund in the way that they did, in effect satisfied the requirements of the document (WHH3), would be to rewrite the clause.

The actions of the respondents was said to be a fundamental breach of their obligation and repudiatory conduct breach of s. 391 of the Act.

In a matter before the House of Lords in *Rigby v Ferodo Ltd* (20 July 1987) Lord Oliver of Aylmerton was said to have stated at page 33, paragraph B:

"It is common ground that the unilateral imposition by an employer of a reduction in the agreed remuneration of an employee constitutes a fundamental and repudiatory breach of the contract of employment which, if accepted by the employee, would terminate the contract forthwith."

An attempt was made by the respondents to renegotiate the document (WHH3), however when the applicant refused to renegotiate, the original terms continued to apply.

The respondents had, according to the submission, asserted that the applicant was a pieceworker for the purpose of excluding him from the annual leave entitlements set out in the Act.

Pieceworker is defined in the Act to mean:

"A person employed in a calling on piecework rates".

A written outline of submissions handed up to the Commission provided a further definition of pieceworker at paragraph 19 of the document:

"The word is defined in the Law Book Company's *Industrial Information Digest* at page 511 as follows:

'Piecework is a system of payment under which an employee is paid a stipulated amount for each unit or article produced by him. In some instances this piecework rate remains constant irrespective of the quantity produced, but in others the rate increases with greater output.' "

The reference in the *Industrial Information Digest* was to a stipulated amount for each unit or article produced by the pieceworker and was said to "focus" upon a physical output of the labour used.

The concept of piecework was not applicable to services such as legal services because the results of services can vary and fees which are rendered are more likely to be rendered on the basis of hours employed in the service provided rather than a particular product being produced.

In relation to the applicant's employment, no particular rate had been set and fees paid as part of the one third arrangement could be made up from the impact of a number of persons (including the applicant) who had worked on the files. It had also been evidenced that fees rendered could (and had) been subjected to a discount.

Mr Watson went on to state that if the applicant is not found to be a pieceworker, then the annual leave section of the Act should apply to him.

Authorities were submitted from matters *Trovas Holdings Pty Ltd v Gannon* (1999) 162 QGIG 337, *Property Sales Association of Queensland, Union of Employees v Trovas Holdings Pty Ltd* (2000) 164 QGIG 128 and *Property Sales Association of Queensland, Union of Employees v Queensland Real Estate Industrial Organisation of Employers* (2002) 169 QGIG 287 (President Hall), in which real estate salespersons employed on a commission may be found to be pieceworkers.

Those cases were distinguishable from this matter for reasons that the applicant was not employed on a commission basis but received a salary, the quantum which depended on the fees received.

In the matter *Property Sales Association of Queensland, Union of Employees v Queensland Real Estate Industrial Organisation of Employers* Commissioner Fisher referred to comment from President Hall with respect to piecework sometimes being used as a reference to payment by results.

Piecework was said to be a species of the genus payment by results but is not the equivalent of payment by results.

Payment by results is not a synonym for piecework. It was submitted that piecework has to be looked at on its own.

The applicant effectively was not paid by results in that he was only paid for those fees received and would not receive payment for work when fees were written off through bad debts therefore the applicant was paid on what was received from clients and not the results.

The Commission was requested to make the declarations sought in the application.

Respondent

The submission, on behalf of the respondent, acknowledged that it was common ground that the contract (WHH3) established the terms upon which the applicant was to be employed following the sale of his equity in the firm.

There was also no dispute that the relationship was one of employer and employee and not of contract or independent consultant, a position articulated by Robert Cunningham in evidence before the Commission.

The contract document was described as an extraordinarily brief and uncommunicative document when one considers the amount of money involved.

The Commission was taken to *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at page 461 in reference to the meaning of a document:

"The case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to Pacific. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction."

The above passage was said to not only go to the relevance of the meaning of the document, but also what it did not say.

The contract (WHH3) was between persons, all of whom are legally qualified and experienced persons and all of whom can be accepted as knowing and understanding how to read, interpret and understand legal documents and relationships.

In the circumstances where the applicant moved from the position of a Senior Partner to Employee Consultant, one would not expect a contract with fulsome detail as might be the case with other parties.

The agreement was silent on a raft of things, including annual leave, sick leave, hours of work, overtime, taxation and travelling expenses, so it was not surprising that the notion of superannuation was not mentioned.

The applicant, as a partner of the firm, received a share of partnership profits and transitioned to an employee who continued to receive a share of a particular activity, which was to be the totality of his reward.

According to Mr Herbert, the inescapable conclusion was that the parties had known that the one third cash received from professional fees for which he was responsible was to be the total reward.

The General Manager of the firm, from an accounting perspective, had deducted superannuation from the gross amount and paid it into the fund nominated by the applicant.

In 2004 the applicant's evidence was that he had looked at the SGAA and thought that he had an entitlement to which he was not benefiting. His concern was raised with the respondents and rejected.

The applicant took no proceedings at that time and gave the employer no indication that he was reserving a position where he might later seek to recover those superannuation payments.

The applicant had accepted the superannuation arrangement for 28 months before questioning the implementation of the payment which would indicate an acceptance by reasonable people of the respondent's interpretation of the agreement.

The claim by the applicant was said to be selective and when the sums were done the figure of one third (received by the applicant) would go to 44 per cent if the applicant was to be paid superannuation (on top) and receive annual leave.

In terms of a breach of s. 391 of the Act argued by the applicant, the respondent submits that such claims should be disregarded.

In relation to the question of pieceworker, the authorities relied upon by the applicant do not establish for the purposes of these proceedings whether the applicant is a pieceworker or otherwise.

A definition of piecework from the CCH Macquarie Dictionary was provided by the applicant to the Commission and was the same definition referred to by President Hall in *Trovas Holdings Pty Ltd v Gannon*.

The definition referred to payment by results:

"Payment-by-results - piecework

Payment-by-results worker - an employee paid under piecework arrangements, output bonus schemes, or any payment schemes which vary according to the output of individuals, groups or departments."

It was submitted that the opinion expressed by President Hall was that a payment-by-results worker and a pieceworker are considered to be interchangeable.

The Commission was led to a question that if the applicant was neither a contractor or on commission, then he would have to be an employee.

An employee either works piecework or time work and in this case it can not be time work as he is not paid for the time he spends at work.

The applicant, in making the agreement, had agreed to terms which meant that if work was undertaken and not paid for, he would not receive payment.

On the exclusion of pieceworkers from the benefits of annual leave at s. 11 of the Act, it was submitted that pieceworkers by virtue of the arrangements they enter into have a capacity as they see fit and earn very significant amounts of money or earn less by not working as much as they might normally.

The Commission was taken to the *Sugar Industry Award - State* (No. 353 and 515 of 1957) Volume XLIII QIG 943 (September 30, 1958) where a claim for annual leave was to apply to pieceworkers.

At page 944, it was stated:

"We do not think in regard to annual leave entitlement that the cases of piecework cancutters and, for example, contract butchers are comparable. The terms of employment are so different.

Piecework rates for cancutters have been determined with the full knowledge that such employees do not become entitled to either annual leave or sick leave. There was no suggestion that a monetary adjustment should be made if annual leave were to be granted.

The application is refused."

A difficulty was said to exist with the question of pieceworkers receiving annual leave payments in respect of the calculation of entitlements due to income earning capacity.

In a matter before the Industrial Court of Queensland in No. 160 of 1957 - *Interpretation - Meat Export Award - State* Volume XLII QIG 1154 (December 31, 1957), it was found contract slaughtermen were pieceworkers for the purposes of long service provisions but the fact that a minimum daily rate is provided does not mean that such employees were not pieceworkers.

The payment and payout of annual leave in the first year also does not necessarily answer the question on whether the applicant was a pieceworker.

Applicant (In Reply)

Mr Watson acknowledged, on the question of piecework, that the broad interpretation of real estate commission people may cover payment by results, however the Act does not go to payment by results, it is linked to "piece" - the piecework rate.

Pieceworker rates have to be linked to the work a person does because that is what a pieceworker does, a work that produces something. It is the work that person produces, that piece, which is then paid at piecework rate.

There is no question that, in the first year when the applicant was guaranteed a minimum of \$100,000.00 that he received a salary.

Onwards, the applicant received one third of cash received, meaning that a disconnect between the work completed and the fees which were paid.

In terms of the contract between the parties, it was breached by the respondent from 1 January 2002 when the superannuation guarantee was deducted and continued thereafter.

It is obvious that the parties did not turn their mind to the question of superannuation, however the words used in WHH3 "William Hamilton Hart to be paid one third of cash received" are clear in that they do not say that his remuneration will amount to one third of cash received.

It is a strange proposition to say that you should construe a document which is clear on its face by things that are not said.

It is conceded that annual leave is not mentioned in WHH3, but annual leave is set out in the Act.

The Common Law would, in effect, pick up the like of expenses and allowances not mentioned in the contract.

Conclusion

The application before the Commission is made under relatively new provisions that were inserted in the Act in May 2007.

The declarations, subject of the application, require different considerations.

In the case of 2(a), the SGAA is of importance in establishing whether the applicant is firstly an employee for the purposes of the SGAA and secondly if found to be an employee, should the superannuation guarantee charge imposed on the employer be paid without deduction from remuneration paid to the applicant.

In relation to 2(b) and (c), these particular declarations need to be considered under the terms of the Act.

Fundamental to proceedings, acknowledged by both parties, is the meaning of paragraph 6 of WHH3 which, in essence, put in place the arrangements to be relied upon for the period of employment from 1 January 2002 until 30 June 2006.

Also of relevance in respect of the declarations is whether, as the respondent argues, the applicant's employment is that of a pieceworker and not employee. This issue is of particular relevance in respect of an entitlement or otherwise under s. 11(1) of the Act:

"Annual leave

11 Entitlement

- (1) This section does not apply to –
- (a) casual employees; or
 - (b) pieceworkers; or
 - (c) school-based apprentices or trainees."

SGAA

The SGAA commenced on 1 July 1992 having been enacted by the Parliament of Australia to establish and cover the administration of the Superannuation Guarantee Scheme.

The liability of employers to pay the superannuation guarantee charge is set out at s. 16:

"Superannuation guarantee charge imposed on an employer's superannuation guarantee shortfall for a year is payable by the employers."

An interpretation of employee, according to s. 12, gives employee its ordinary meaning, however goes on to expand the meaning in addition to making particular provision to avoid doubt in respect of certain persons status.

At s. 12(3) it states:

"If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract."

The Australian Taxation Office (ATO) released a number of Superannuation Guarantee Rulings (SGR) covering the period of the applicant's employment.

The rulings were:

- SGR 93/1 - 18 March 1993 (commenced)
- SGR 2004/01 - 25 August 2004 (commenced)
- SGR 2005/1 - 23 February 2005 (commenced)

Each ruling contained the following *proviso*:

"Superannuation Guarantee Rulings do not have the force of law. Each decision made by the Australian Taxation Office is made on the merits of each individual case having regard to any relevant Rulings and Determinations".

Clearly, the rulings have limitations in that they do not have the force of law, nevertheless the rulings are of benefit to the extent they establish the criteria relied upon by the ATO when determining who is an employee for the purposes of the SGAA.

The rulings provide information that, when placed beside the circumstances of the applicant's employment arrangements, assist in the determination of the application.

In SGR 93/1 (under the heading of "Explanations") the following was said in respect of employees at common law:

"20. The courts have developed a method for applying the ordinary, or 'common law', meaning of 'employee'. Their approach is to look at a wide range of factors which indicate whether a person is an employee or not. For example, if the employer provides the place of work, this might indicate an employment relationship, while the absence of holiday pay might suggest the opposite. The courts' decisions tend to be taken on balance, after considering the relevant factors. Many of those factors are discussed in Income Tax Ruling 2129."

The ruling went on to describe tests relied upon to determine whether a person was an employee:

"21. Historically, the two most important (often decisive) factors have been the control test and the integration test. The control test asks whether the employer has the right to control how, when and where the work is done (even if control is not actually exercised)."

22. The integration test examines whether the individual's services are an integral part of the employer's business or merely ancillary to it. Some of the factors to be taken into account in deciding whether the integration test is satisfied include:
- (a) whether the relationship between the worker and the master is a continuing one; and
 - (b) whether the worker's activities are effectively restricted to providing services to only one master; and
 - (c) whether the worker generally profits commercially from sound management in the performance of his tasks."

The replacement ruling (SGR 2004/D1) that followed SGR 93/1 addressed the issue of employees on "Results" contracts:

- "40. The phrase 'the production of a given result' means the performance of a service by one party for another where the first-mentioned party is free to employ their own means (such as third party labour, plant and equipment) to achieve the contractually specified outcome. Satisfactory completion of the specified services is the 'result' for which the parties have bargained. The consideration is often a fixed sum on completion of the particular job as opposed to an amount paid by reference to hours worked. If remuneration is payable when, and only when, the contractual conditions have been fulfilled, the remuneration is for producing a given result.
41. In contracts to produce a result, payment is often made for a negotiated contract price, as opposed to an hourly rate. For example, in *Stevens v. Brodribb*, payment was determined by reference to the volume of timber delivered, and in *Queensland Stations* where it was a fixed sum per head of cattle delivered.
42. While the notion of 'payment for a result' is expected in a contract for services, it is not necessarily inconsistent with a contract of service, for example, in contracts for commission only sales. Accordingly, the other terms of the contract must still be considered to determine the true character of the relationship between the parties."

The ruling further went on to offer information regarding delegation of work:

- "43. The power to delegate (in the sense of the capacity to engage others to do the work) is a factor in deciding whether a worker is an employee or independent contractor. If a person is contractually required to personally perform the work, this is an indication that the person is an employee. . .
45. A common law employee may frequently 'delegate' tasks to other employees, particularly where the employee is performing a supervisory or managerial role. However, this 'delegation' exercised by an employee is fundamentally different to the delegation exercised by a contractor outlined above. When an employee asks a colleague to take an additional shift or responsibility, the employee is not responsible for paying that replacement worker, rather the workers have merely organised a substitution or shared the work load. This is not delegation consistent with that exercised by a contractor."

The applicant, for the purposes of the SGAA, would, by the nature of the employment, fit the definition prescribed at s. 12(3) of the SGAA.

The SGAA, at Part 2, s. 11, provides an interpretation in terms of salary or wages:

"Interpretation - salary or wages

- (1) In this Act, salary or wages includes:
- (a) commission; and
 - (b) payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate; and
 - (ba) payments under a contract referred to in subsection 12(3) that are made in respect of the labour of the person working under the contract; . . ."

Any reference to piecework/pieceworker is not to be found in either the SGAA or previously mentioned rulings.

Meaning of paragraph 6 of WHH 3

It would be difficult for any reasonable person to describe WHH3 as anything but the "bare basics" in terms of its status.

The document of some nine dot points dealt with the applicant's retirement as an equity partner in the first instance, an offer of on going employment, purchase of the partnership and conditions relating to the applicant's conditions of future employment.

The author of the document was a qualified legal practitioner as was the applicant, so there is some safety in assuming that each of the parties understood the importance of the document.

The applicant was to receive a benefit (and did so) in that his registration and insurance as a solicitor, along with Notary Public, were met in terms of payment by the firm.

The applicant was to retain his car space for the life of the agreement which was paid for by the firm.

The remuneration provisions of the document, at paragraph 6, allowed for the applicant to receive one third of cash received for professional fees, for which the applicant was responsible, which remained the basis of remuneration for the entire period of employment.

The evidence before the proceedings was that if full payment was not received by the firm, either through discounting or bad debts the applicant was on paid only for the cash received and not necessarily the work completed.

The applicant received a percentage (one third) for work delegated to employees of the firm who were required to work on the files, subject to his custody.

There was evidence that the firm in 2005 sought to change the arrangement in relation to the applicant receiving a benefit for work performed by others, however the applicant refused to agree to the proposal, therefore the agreement remained in its original form.

For the first year of the arrangement, the applicant was guaranteed a minimum payment of \$100,000.00 which was honoured. The applicant received, in that first year, payment for annual leave taken and, at the end of the year, was paid out the balance of annual leave accrued for the 2002 year.

The payment was made in respect of annual leave despite the document pertaining to the employment being silent on payment for such leave.

From 1 January 2003 until the applicant's termination of employment in 2006, he continued to have his remuneration calculated at the one third of cash received with the only difference being that there was no minimum guarantee in place. The applicant received no payment for annual leave beyond 31 December 2002.

In the view of the Commission, the initial payment of annual leave must be regarded as the firm accepting that the status of the applicant, at least in 2002, was that of employee, and therefore the requirements of the Act at s. 11 were said to apply.

In 2003, it is true that the applicant completed a new taxation declaration form, but the Commission was not requested to attach any significance to that particular action.

In March 2003, prior to ceasing as Managing Partner, Robert Cunningham, in a memorandum to the applicant, stated:

"The partners requested me to inform you that the arrangement is one of employer and employee rather than that of a principle and independent contractor".

The memorandum carried no mention of the term pieceworker, now relied upon by the respondents as the mode of the applicant's employment.

Robert Cunningham, in evidence (line 20, page 2-22 of transcript) said that the non-use of the term pieceworker in the memorandum was not, at the time, an omission.

The Commission expects that, on receipt of the memorandum from the Managing Partner relating to "employee" status, the applicant would have had genuine and reasonable grounds to believe, for all intents and purposes, he was an employee in every respect.

In terms of WHH3, it must be said that what is not contained within that document, more than what is in the document, has been the genesis of the dispute between the parties.

In the matter *Donald Porter of An Inquiry into an Election in the Transport Workers' Union of Australia* 91989) 34 IR 179 (23 June 1989), Gray J stated:

"A Court determining whether a particular relationship is that of employment or of some other kind can therefore only resort to the process of balancing all of the factors, or as they are called in Stevens and other cases, the 'indicia'. In truth, the result may be a matter of impression. It is unfortunate that this is so. It should not be necessary for people to obtain a decision of a court, in order to know the true nature of their relationship. Unfortunate or not, that is the case. Although the parties are free, as a matter of law, to choose the nature of the contract which they will make between themselves, their own characterisation of that contract will not be conclusive. A court will always look at all of the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it. As Mr. Black put it in the present case, the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck."

The impression that emerges when all of the factors relating to the employment are taken into account is that the employment arrangement in WHH3 is that of employer/employee.

However, before concluding finally that the employment arrangement is as mentioned, employer/employee, the Commission must examine the issue of piecework/pieceworker as raised by the respondent.

Piecework/Pieceworker

The applicant had raised the issue of annual leave in or around Easter of 2004, subsequently being advised that he had no entitlement because he was a pieceworker.

Pieceworker is defined in Schedule 5 of the Act as:

"A person employed in a calling on piecework rates".

Other definitions of pieceworker include:

- Industrial Information Digest - Revised 15 February 1972 at page 1108:

"Piecework is a system of payment under which an employee is paid a stipulated amount for each unit or article produced by him. In some instances this piecework rate remains constant irrespective of the quantity produced, but in others the rate increases with greater output."

- The Macquarie Concise Dictionary - 2nd Edition - first published 1988:

"**piecework** /'pi:swɜ:k/, *n.* work done and paid for by the piece. – **pieceworker**, *n.*".

Mr Herbert, in submissions took the Commission to the CCH Macquarie Dictionary where piecework was linked to payment by results.

The applicant, in the course of performing work, "charged out" his services at a standard billing rate system that operated within the firm.

Other employees required to work on files in the custody of the applicant had their time billed under the standard billing rate system.

The firm, on behalf of the applicant, would issue accounts to the clients and the applicant would be remunerated by the payment of one third of cash received.

Evidence before the Commission was that discounting and bad debts meant, at times, the applicant received an amount less than one third of the account total. Under this scenario it could hardly be argued that he was paid totally on the results of his labour.

In terms of being paid for each unit or article produced, as might be the case in the shearing of sheep or slaughter of cattle, the work undertaken by the applicant is a far cry from such a comparison.

The Commission accepts the submissions of Mr Watson that the Act does not go to payment by results but is linked to a "piece".

The "tag" piecework is not one that fits the applicant's work arrangement.

The employment arrangement was one where the applicant, in essence, provided wholly and principally his labour.

Section 5 of the Act sets out the definition of employee:

- "(1) An *employee* is -
- (a) a person employed in a calling on wages or piecework rates; or
 - (b) a person whose usual occupation is that of an employee in a calling; or
 - (c) a person employed in a calling, even though -
 - (i) the person is working under a contract for labour only, or substantially for labour only; or
 - (ii) the person is a lessee of tools or other implements of production, or of a vehicle used to deliver goods; or
 - (iii) the person owns, wholly or partly, a vehicle used to transport goods or passengers; or
 - (d) a person who is a member of a class of persons declared to be employees under section 275; or
 - (e) each person, being 1 of 4 or more persons who are, or claim to be, partners working in association in a calling or business; or
 - (f) for proceedings for payment or recovery of amounts - a former employee; or
 - (g) an outworker; or
 - (h) an apprentice or trainee.
- (2) A person who is undertaking a vocational placement within the meaning of the *Vocational Education, Training and Employment Act 2000* is not an employee."

The applicant's employment could reasonably be said to sit under s. 5(c)(i) of the Act.

Findings

The Commission, having considered the evidence, submissions and material placed before proceedings, finds the applicant has made its case in respect of the three declarations sought at points 2(a), (b) and (c) of the application and, as such, the declarations are granted.

For reasons relating to the various times in which the respondents were partners, or had ceased to be partners in the firm, in the course of the proceedings, each party raised concerns with orders that may emanate from the application if the Commission was disposed to find in favour of the applicant.

The Commission would direct the parties to confer in respect of preparing a final draft order so as to allow the declarations to be issued in precise terms.

The parties are further directed to provide to the Commission the draft order as mentioned above within 22 days of the release of this decision.

I so order.

J.M. THOMPSON, Commissioner.

Hearing Details:

2008 6 and 7 October

Released: 28 October 2008

Appearances:

Mr K. Watson, of Counsel, instructed by Mr E. Emery of Milner Lawyers. for the Applicant.

Mr A. Herbert, of Counsel, instructed by Ms T. Jessie of Flower and Hart Solicitors, for the Respondents.

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