HIGH COURT OF AUSTRALIA

Humberstone

Vs.

Northern Timber Mills

(Latham C.J.(1), Rich(2) and Dixon(3) JJ.)

16 November 1949

CATCHWORDS

Workers' Compensation (Vict.) - "Worker" - Person regularly and exclusively engaged in carrying goods in own truck for one firm - Payment on weight-mileage basis - Whether servant or independent contractor - Contractor agreeing to perform work not incidental to trade or business regularly carried on by him - "Enters into a contract" - Statute - Retrospective operation - Workers' Compensation Act 1928-1946 (No. 3806 - No. 5128) (Vict.), s. 3 (1), (6).

HEARING

Melbourne, 1949, October 24, 25;Sydney, 1949, November 16. 16:11:1949 APPEAL from the Supreme Court of Victoria.

DECISION

November 16.The following written judgments were delivered: -

LATHAM C.J.

W. R. C. K. Humberstone died on 3rd December 1947 as the result had taken off his motor truck. His widow made a claim against the respondent firm, Northern Timber Mills, under the Workers' Compensation Act 1928 (Vict.) as amended. The firm denied liability. The Workers' Compensation Board held that the deceased was a worker within the definition of "worker" contained in s. 3 of the Workers' Compensation Act 1928, holding that he worked under a contract of service with the firm as his employer. The Board also held that his injury arose out of and in the course of his employment by the firm. The Board proposed to make an award in favour of his widow, the claimant, for 1,000 pounds with costs. The Board stated a case under s. 9 (3) of the Workers' Compensation Act 1937 for the determination of the Full Court of the Supreme Court upon the following questions of law: - "(1) Whether there was any evidence upon which the Board could find that the deceased was a 'worker' within the meaning of the Acts. (ii) If the answer to (i) is Yes, whether there was any evidence on which the Board could find that the injury by accident arose out of or in the course of the employment." The Full Court answered the first question "No" and accordingly it became unnecessary to answer the second question. The claimant appeals to this

Court. (at p395)

2. The evidence showed that Humberstone had been working since 1924 in carrying timber, boxes and sometimes logs from the North Fitzroy Railway Siding. Originally he held himself out as a carrier for general employment. There was a signboard at his residence and he used to carry furniture and provide transport for picnic parties. But for twelve or fourteen years he had, with only occasional exceptions, done work only for the respondent firm. He attended at the firm's timber mills at a regular hour in the morning and carried timber &c. as required by the firm. He stopped work at a regular hour in the evening and at a regular time for lunch. On occasions he carried for some other persons when otherwise he would have returned with an empty truck, but he then mentioned the proposal that he should do such work to the management of the firm. Apparently he retained for himself payments by other persons on these infrequent occasions. (at p396)

3. The truck which Humnerstone used belonged to him. It was not owned by the firm. The Carriers and Inkeepers Act 1928 (Vict.), s. 13, provides that "Every person . . . who carries on business as a carrier by land for hire without having obtained a licence shall be liable to a penalty of not more than fifty pounds" and in default of payment to imprisonment. Section 14 provides for application for licences to be made to two justices who must be satisfied that the applicant is a fit person t be licensed to carry on business as a carrier. Humberstone annually took out a licence under the Act and paid for it. "K. Humberstone Carrier," not the name of the firm, was painted on the truck. He obtained petrol from the firm but paid for it himself. He paid for insurance and maintenance of the truck. The truck was under his own management and control. He was paid on a weight and mileage basis for each job that he did. The firm prepared weekly accounts showing what was due to him, deducting the money due for petrol supplied to him. The payment made to him covered payment for his services in carrying and therefore for the use of the truck for that purpose. (at p396)

4. The distinction between a servant and an independent contractor was explained in the case of Performing Right Society, Ltd. v. Mitchell & Booker (Palais de Danse) Ltd. (1924) 1 KB 762 . If the work done by one person for another is done subject to the control and direction of the latter person as to the manner in which it is to be done the worker is a servant and not an independent contractor. If, however, the person doing the work agrees only to produce a given result but is not subject to control in the actual execution of the work he is an independent contractor. This principle was applied in this Court in the case of Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation (1945) 70 CLR 539 . Humberstone was in my opinion a carrier in business on his own account but found that the requirements of the firm kept him fully occupied with all the work which he wished to do. The firm utilized his services on the same basis as that upon which any carrier is ordinarily employed, payment being based on the weight or some other characteristic of the goods carried and the distances for which they were carried. There is no evidence of any control exercised or exerciseable by the firm as to the manner in which the work was to be done. (at p397)

5. I am therefore of opinion that Humberstone was an independent contractor, and that there is no evidence to support a finding that he worked under a contract of service with the firm so as to show that he was a worker within the definition of that term contained in s. 3 (1) of the 1928 Act. (at p397)

6. But the claimant relies upon s. 3 (6) of the Act, which was added to the principal Act by the Workers' Compensation Act 1946. This provision is in the following terms: - "Notwithstanding anything in this Act or any law where any person (in this sub-section referred to as 'the principal') in the course of and for the purposes of his trade or business enters into a contract with any other

person (in this sub-section referred to as 'the contractor') - (a) under or by which the contractor agrees to perform any work not being work incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name; and (b) in the performance of which the contractor does not either sublet the contract or employ workers or although employing workers actually performs some part of the work himself - then for the purposes of this Act the contractor shall be deemed to be working under a contract of service with an employer and the principal shall be deemed to be that employer." (at p397)

7. The idea of this provision is evidently to extend the benefits of the Act to persons who agree to do work which is not work belonging to a trade or business carried on by them, even though they may regularly carry on a trade or business. In the first place, there must be an agreement by B (a contractor) to perform some work for A (a principal). Next, B may or may not regularly carry on a trade or business in his own name or under a firm or business name; that is, on his own account. If he does regularly carry on any such business, then the work agreed to be performed must be work which is not incidental to that business. If B, however, undertook for A a job which was quite different from, so as not to be incidental to, any of the work which belonged to a trade or business regularly carried on by him, then, in relation to any such work agreed to be done by him he would be deemed to be working under a contract of service with A. But if B did not carry on any trade or business of any kind on his own account, then no work which he agreed with A that he should do could be work incidental to a trade or business being carried on by him. Therefore in such a case if B agreed to do any work at all for A he would come within the section. The position would be the same if he carried on some trade or business but did not carry it on regularly and the work which he agreed to do fell outside work incidental to that trade or business. I illustrate my understanding of the sub-section by taking the case of a man who is a plumber. Such a man may be employed as a servant, and then he works under a contract of service and is a worker within the definition of "worker" contained in s. 3 of the principal Act. But if he carries on business on his own account as a plumber and agrees to do plumbing work for a person A he is prima facie an independent contractor and not a servant of A. If, however, he agrees with A to do any work for A other than plumbing (e.g. carpentry) then he is to be treated as a worker within the meaning of the Act by virtue of s. 3 (6), whether or not he carries on business on his own account as a plumber and whether or not he carries on that business regularly. If s. 3 (6) applies to him, then A becomes liable under the Act as his employer to pay compensation for personal injury by accident arising out of or in the course of his employment: Principal Act, s. 5 as amended by Workers' Compensation Act 1946, s. 3 (a). (at p398)

8. In order that s. 3 (6) should apply it is necessary in my opinion that the work agreed to be done should be work which is outside any trade or business regularly carried on by the person described as a contractor. In this case Humberstone did carry on a trade or business as a carrier. He spent his whole working time in that trade or business and he carried it on regularly. The work which he did for the firm was carrying work. It was not outside the trade or business which he carried on with his registered truck - it was that business itself. He was in the same position as the plumber in the example given where a plumber who carries on trade or business on his own account agrees to do plumbing work. For these reasons in my opinion s. 3 (6) does not apply to the present case. In my opinion the result is the same whether the case is considered as depending upon a contract made about 1924 between the parties which was performed during the subsequent years or upon separate contracts for separate carrying jobs made from day to day or upon a contract not necessarily the same as that originally made in 1924 but to be inferred from the course of conduct of the parties in the last twelve or fourteen years. In my opinion the last-mentioned view is to be preferred. But upon any view of the contract it was a contract for doing the work of carrying which was work in a

business which Humberstone regularly carried on upon his own account. (at p398)

9. Upon a further ground the application of s. 3 (6) is in my opinion excluded in the present case. The extension of the application of the Act enacted by s. 3 (6) applies only where a "principal" "enters into a contract" with a "contractor." The words are not "has entered into a contract." A statute is prima facie prospective: Gloucester Union v. Woolwich Union (1917) 2 KB 374 , and see In re School Board Election for Parish of Pulborough (1894) 1 QB 725, at p 737 - "It is a well-recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended." The words in s. 3 (6) are where a person "enters into a contract." These words in my opinion refer to contracts entered into after the statute had come into operation and they should not be given the same effect as if the words were "where any person has entered into a contract." For this reason also s. 3 (6) does not apply in favour of the claimant in the present case. The contract in this case should, as I have said, be regarded as a contract which existed before the 1946 Act was passed and continued in existence thereafter. For this reason s. 3 (6) does not in my opinion apply in favour of the claimant. The only means of escaping this conclusion would be to hold that each carrying job constituted a new and separate contract so that many new contracts were made from day to day after the 1946 Act came into operation. But upon this view it could hardly be argued that Humberstone was a servant of the firm - he would most obviously be in the same position as any carrier which the firm might use from time to time so that he would not be acting under a contract of service: and s. 3 (6) would not apply for reasons already given. (at p399)

10. I am therefore of opinion that the decision of the Full Court was right and that the appeal should be dismissed. (at p399)

RICH J. In my opinion sub-s. 6 of s. 3 of the Workers' Compensation Act (Vict.) as amended is not framed so as to give it a retrospective operation. The facts in the case lead to the failure to establish that the firm had such control of the acts of the deceased as would constitute the relation of master and servant. The tests applicable in such a case were discussed in Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation [1945] HCA 13; (1945) 70 CLR 539, at p 548 ; and cf. Dowd v. W. H. Boase & Co., Ltd. (1945) 1 All ER 605 . I consider that on the facts the Board should have held that the contract in question was an independent contract. (at p399)

2. I would dismiss the appeal. (at p399)

DIXON J. The appellant sought to establish, before the Workers' Compensation Board, that her deceased husband fell within sub-s. (6) of s. 3 of the Victorian Workers' Compensation Act as amended. (at p400)

2. By that provision, where any person (to whom the sub-section refers as the principal) in the course of and for the purpose of his trade or business enters into a contract with any other person (in the sub-section called the contractor) (a) under or by which the contractor agrees to perform any work not being work incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name; and (b) in the performance of which the contractor does not either sublet the contract or employ workers or although employing workers actually performs some part of the work himself - then for the purposes of the Act the contractor shall be deemed to be working under a contract of service with an employer and the principal shall be deemed to be that employer. This sub-section came into operation on 1st September 1946. (at p400)

3. The appellant's husband died on 3rd December 1947 as a result of encephalitis and scattered cerebral haemorrhages which have been held to have been more immediately caused by the exertion and emotional upset associated with an attempt by the deceased on the previous day to remove a tyre from a wheel which he had taken from his carrier's motor truck. (at p400)

4. The deceased was licensed under s. 14 of the Carriers and Inn-keepers Act 1928 (Vict.) to carry on business as a carrier. He owned a two-ton truck the off-side door of which appears to have borne the inscription "K. Humberstone Carrier 118 Blyth Street tare L.C. 17 cwt." The name was that of the deceased and L.C. means licensed carrier. Many years before he had displayed a sign at 118 Blyth Street and apparently he had carried goods for anybody who hired him. But for a very long time, perhaps twenty-five years, his work had been substantially confined to carrying logs, timber and boxes for the respondents, the Northern Timber Mills. There had been probably a few occasions in that period when he did some particular job in the course of a return journey; but there was evidence that he had asked whether the respondents minded his taking a back load from one of their customers. No longer did he hold himself out as a carrier ready and willing to lift the goods of others. He had no telephone and he exhibited no business sign or advertisement. He attended at the premises of the respondents about half-past seven in the morning of every working day except Saturday. He took whatever load he was requested and delivered it at the destination to which it was consigned, though for a time he did not carry logs because he found the work too heavy for him. He was paid at a rate calculated upon the weight of the load and the distance it was carried. The amount due to him was made up weekly by the respondents from their records. He bore the cost of the petrol, though he obtained it from the respondents' pumps, and he paid for the upkeep and licensing of his vehicle. (at p401)

5. The Workers' Compensation Board did not decide whether the deceased fell within sub-s. (6) of s. 3 as the appellant had contended. The Board preferred to place its decision upon a finding that the relation between the respondents and the deceased was actually that of master and servant. (at p401)

6. I agree with the judges of the Supreme Court in the opinion that such a finding was not reasonably open to the Board. I shall state briefly why I concur in this opinion but before doing so I shall deal with the difficult question of the application to the facts of the case of sub-s. (6) of s. 3. (at p401)

7. There are two difficulties in applying the provision to the facts. The first is to say whether, upon the true meaning of the phrase in the sub-section, the work the deceased performed for the respondents was or was not "work incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name." If an affirmative answer is given to this question, the second difficulty arises. That difficulty is to say whether the deceased was working under a contract entered into with him by the respondents before 1st September 1946, when the sub-section came into operation, and if so whether the provision applies to a contractor unless the contract between the principal and him has been entered into after the date of the commencement of the enactment. (at p401)

8. In my opinion the work which the deceased was performing for the respondents was not work incidental to a trade or business regularly carried on by him in his own name within the meaning of the sub-section and of course no such trade or business was carried on by him under a firm or business name. I think that the purpose of the exception or exclusion expressed by the words in question was to confine the benefit of the conclusive presumption which it establishes to persons who do not conduct an independent trade or business, who are not holding themselves out to the

public under their own or a firm or business name as carrying on such a trade or business and who do not in the course of that trade or business, as an incident of its exercise, undertake the work by entering into the contract. The provision will thus cover men who work for the principal but have no independent business or trade and men who though carrying on an independent trade or business undertake a contract outside the scope or course of that trade or business. The word "trade" is capable of including any handicraft and in that sense it may seem to lack the element of systematic practice or holding out which the idea of openly conducting a distinct or independent trade or business and seeking custom implies. But a consideration of the policy of the provision as well as of its text appears to me to show that the distinction it seeks to draw is between on the one hand an independent contractor whose relation with the principal is special or particular either because it is outside the course of the general business of the contractor or the general practice of his trade or because he has no such general business or is not a general practitioner of his trade, and on the other hand an independent contractor who performs work successively or perhaps concurrently for his customers or others in the course of a definite trade or business carried on systematically or who holds himself out as ready to do so. The language of the sub-section is derived from the provision that stands as s. 14 (1) (a) of the Victorian Workers' Compensation Act 1928, where the words are "where any person . . . in the course of or for the purposes of his trade or business contracts with any other person." The suggestion which this language conveys of the existence of a business or the practice of a trade is much strengthened in sub-s. (6) by the words "carried on," "regularly" and "in his own name or under a firm or business name." These all indicate a business or trade conceived as independently existing or exercised by a person holding himself out to the public under a name or style. No doubt the policy is a matter of inference but it seems reasonable to suppose that it was considered proper that a person conducting a business in the course of which he contracted to perform work should himself carry the risk of personal injury as one of the hazards of his business, while the man who worked under contract but only for the employer or without any general trade or business or outside his trade or business should, like an ordinary employee, be insured by the Act against the risk of injury in his work. (at p402)

9. Clearly enough at the time of the accident the deceased was not conducting an independent trade or business and was not holding himself out as ready to carry goods for anyone but the respondents and it was very many years since he had done so. If it appeared that he was still carrying the respondents' goods under a contract made in the course of his early business when his sign was up and he held himself out as a carrier generally open to hire his case might fall outside sub-s. (6) and this was the view taken by the Supreme Court. There is no finding upon the point by the Workers' Compensation Board and it is not our function to make one. But it is evident that in the long period of years during which he worked for them the relation between the deceased and the respondents, in whatever arrangement it may have originated, came to depend upon a mutual course of dealing, and I doubt whether it would be right to go back to the original arrangement and the state of affairs that then existed as if a contract had then been made once for all. (at p403)

10. On the view that the deceased's case otherwise would fall within sub-s. (6) it is necessary to turn to the question whether the deceased carried the respondents' goods under a contract, express or implied, entered into before 1st September 1946 and if so whether that excludes the applicaton of the sub-section. (at p403)

11. The choice must be made between interpreting the relation between the two parties in one of two ways. First it may be interpreted as depending upon a continuing contract requiring the deceased, unless prevented by sickness or other exceptional cause, to attend daily to receive and carry the respondents' goods upon the terms fixed from time to time. That would mean an implied term that

the contract should continue until a reasonable notice of termination was given on one side or the other, perhaps a week's notice. Secondly the relation may be interpreted as nothing but a standing offer on the part of the respondents to hire the deceased upon the terms fixed, an offer accepted by his receipt of each load. If so there would be no general or continuing contract but a particular or separate contract for each load. (at p403)

12. I think that the first is the correct interpretation of the relationship. It appears that there were three or four carriers, including the deceased, who did the work of the respondents and upon the same terms. The respondents obviously depended from day to day upon these carriers carrying goods to and from the respondents' premises. The carriers attended regularly at or about fixed times and relinquished work at the same hour. This went on as a routine. It is reasonable to imply a contractual engagement upon terms impliedly requiring reasonable notice of termination. (at p403)

13. That being so, is there any reason to doubt that the contract subsisted before 1st September 1946 and continued up to the deceased's death without change and without interruption and renewal? I think that it is impossible to hold otherwise. (at p403)

14. It remains to consider whether sub-s. (6) of s. 3 can apply to a case in which the contract was entered into by the principal with the contractor before the commencement of the sub-section. In deciding this question it is necessary to remember that a case such as the present, where a continuing contract of indefinite duration bound the parties, although no doubt within the words of the sub-section is not the typical case for which it provides. The typical case provided for is an express contract for the carrying out of a definite piece of work involving not a continuing relation or a succession of services but the producing of a given result once for all. It would be natural to frame such a provision as sub-s. (6) so as not to affect contracts which had been made and were in course of performance at the time the enactment came into operation. for the provision would vary the responsibilities which arose from the contract. (at p404)

15. When you turn to the language of the sub-section you find that it is expressed in a way to suggest an operation only on contracts afterwards to be made. The material expression is "where any person . . . enters into a contract." This surely is a prospective description representing what formerly would have been written - "where any person . . . shall enter or shall have entered into a contract," and not "has entered into a contract." (at p404)

16. So interpreting sub-s. (6) I am of opinion that the case falls outside its operation, as I have already said. (at p404)

17. I am unable to adopt the view of the Board that in any case the relation of master and servant subsisted between the respondents and the deceased. For a case like the present, the test of the existence of the relation of master and servant is still whether the contract placed the supposed servant subject to the command of the employer in the course of executing the work not only as to what he shall do but to how he shall do it. the regulation of industrial conditions and other laws have in many respects made the classical tests difficult of application and it may be that ultimately they will be re-stated in some modified form: cf. per Lord Thankerton, Short v. Henderson (1946) 174 LT 417, at p 421; 62 TLR 427, at p 429 . But the present case is free from such difficulties. (at p404)

18. The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but

whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions. In the present case the contract by the deceased was to provide not merely his own labour but the use of heavy mechanical transport, driven by power, which he maintained and fuelled for the purpose. The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplied. The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. There is no ground for imputing to the parties a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents. (at p405)

19. In essence it appears to me to have been an independent contract and I do not think that it was open to the Board to find otherwise. (at p405)

20. The subject has recently been dealt with in this Court in Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation [1945] HCA 13; (1945) 70 CLR 539 . As in that case the contract is one for the performance of a service for one party by another who is to employ plant for the purpose and to be paid by the results. Perhaps to that case a reference may be added to Templeton v. Parkin (1929) 140 LT 519 . (at p405)

21. I think that the appeal should be dismissed. (at p405)

ORDER

Appeal dismissed with costs.

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