

Frederick Charles Vincent - - - - - Appellant

v.

The Tauranga Electric-Power Board - - - - - Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1936

Present at the hearing:

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

LORD ALNESS.

SIR LYMAN POORE DUFF.

SIR GEORGE RICH.

[*Delivered by* LORD ALNESS.]

This is an appeal by special leave *in forma pauperis* from an order of the Court of Appeal of New Zealand, dated 21st July, 1933, dismissing an appeal by the present appellant from an order of the Supreme Court of New Zealand, and allowing a cross-appeal by the present respondents from the aforesaid order of the Supreme Court of New Zealand.

The sole question at issue before the Board is whether the appellant's right of action against the respondents is barred, as being out of time, by the terms of section 127 of the Electric-Power Boards Act of 1925.

The relevant facts in the case are few in number, and are not in dispute. The appellant was a linesman in the employment of the respondents, who are a body corporate constituted under the provisions of the Electric-Power Boards Act, 1925, for the Tauranga District. The respondents *inter alia* generated and supplied electric power to consumers of electricity within their area. The appellant alleges that, on 6th June, 1930, while working, in the employment of the respondents at Te Puke, on a transformer connected with highly powered lines, he met with an accident, and sustained severe burning and other injuries.

On 1st April, 1932—i.e. admittedly more than six months after the cause of action first arose—the appellant issued a writ against the respondents in the Supreme Court of New Zealand, claiming general and special damages resulting

from his injuries. On 5th July, 1932, the appellant delivered an amended statement of claim. His claim was based alternatively (a) on a breach of an implied term of his contract of employment with the respondents or (b) on a breach of duty owed by the respondents to the appellant as a workman in their employ. The respondents, on 30th August, 1932, delivered their statement of defence, pleading *inter alia* that the action, having regard to the terms of section 127 of the Electric-Power Boards Act, 1925, was time barred.

It may be convenient at this point to set out the precise terms of section 127. They are as follow :—

“ (1) No action shall be commenced against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any alleged irregularity or trespass or nuisance or negligence, or for any act or omission whatever, until the expiry of one month after notice in writing specifying the cause of action, the Court in which the action is intended to be commenced, and the name and residence of the plaintiff and of his solicitor or agent in the matter has been given by the plaintiff to the defendant.

“ (2) Every such action shall be commenced within six months next after the cause of action first arose, whether the cause of action is continuing or not.”

On 8th July, 1932, it was ordered by the Court, by consent, that the question of law—viz. : “ Whether section 127 of the Electric-Power Boards Act, 1925, is applicable to the plaintiff's cause of action, and an effective bar to the proceedings instituted by him ”—should be argued, before the trial of the action, the action being meanwhile adjourned. In short, the defence tendered by the respondents was treated by the Court as a demurrer point.

On 27th September, 1932, the question of law referred to was argued before Smith J., and on 21st October, 1932, the learned judge found:—(1) that, if the appellant could, at the trial of the action, show circumstances from which the contract alleged in the amended statement of claim was to be implied, section 127 of the Electric-Power Boards Act, 1925, would not bar the action; and (2) that, if and in so far as the appellant's claim rested solely upon the respondents' omission to perform a statutory duty, section 127 was a bar to the action.

The appellant appealed against finding (2), and the respondents cross-appealed against finding (1).

On 21st July, 1933, the appeal and the cross-appeal were heard by the Court of Appeal of New Zealand, when it was ordered by the Court that the appeal be dismissed, and that the cross-appeal be allowed. From that order, special leave to appeal *in forma pauperis* having been granted by an Order in Council, the present appeal has been taken.

The decision of the appeal must, in their Lordships' opinion, turn upon the proper construction to be attached to section 127 of the Act of 1925, and its application to the facts of the case. Mr. Stable, in the course of a forceful and ingenious argument, invoked the assistance which he conceived that he obtained from certain decisions pronounced in England under an analogous statute—viz.: the Public Authorities' Protection Act, 1893. In their Lordships' judgment, these decisions, to say the least of it, fall to be handled with care, inasmuch as the wording of the two statutes differs in material particulars. Their Lordships think that they must steadily bear in mind the terms of section 127 of the New Zealand statute.

The form of that section is somewhat peculiar, and it will repay analysis. The section falls into two parts. The first subsection is negative, and forbids an action of the character there described, unless the plaintiff has complied with certain conditions precedent. These are that written notice be given by the plaintiff to the defendants, a month before the raising of the action, of (*a*) the cause of action, (*b*) the Court in which it is to be commenced, and (*c*) the name and residence of the plaintiff and of his solicitor or agent.

The second subsection is positive, and provides that every action described in subsection (1) shall be commenced within six months after the cause of action first arose.

Now, their Lordships cannot doubt that this is an action against the Board for something done or omitted to be done in the execution or intended execution of the Act. The statutory words are characterised by the utmost amplitude, and they seem to their Lordships to leave the appellant no loophole of escape.

It matters not whether one regards the appellant's claim as based on implied contract or on tort. The nomenclature employed appears to their Lordships, in the circumstances, to be immaterial. The appellant, in his amended statement of claim, has chosen to christen his first cause of action as implied contract, and his second as tort: but both sound in breach of Regulation 178 of the Electrical Supply Regulations, 1927.

In any event, the first alternative appears to their Lordships to be difficult to maintain. Mr. Stable was constrained to admit that he was unaware of any precedent for so basing such a claim as this, and he also admitted, that, if his argument was sound, the doctrine of implied contract might, with equal force, have been invoked, and successfully invoked, in any action of damages by a workman against his employer, for breach of the Factory Acts.

If Mr. Stable is right, then the supineness of learned counsel in failing sooner to discover and apply this sovereign remedy against time limitation is, to say the least of it, remarkable.

On analysis, the implied contract on which the appellant founds is revealed as being one of peculiar character. It is a contract on the part of the employer, as was pointed out in the course of the argument, to observe the requirements of regulation 178—in other words, to obey the law. But the employer has no option to do otherwise. Moreover, if Mr. Stable is right, then, as he admitted, not only is any employee of the Electric-Power Board unaffected by the statutory time limit, but, wherever the relation of master and servant exists, that limit does not apply. This, it seems to their Lordships, is a *reductio ad absurdum* of the argument under consideration.

Mr. Stable demurred to the importance attached by the Court of Appeal to an alleged admission made by counsel in the course of the hearing before them. Their Lordships do not propose to proceed either upon that admission, or upon the English decisions cited by Mr. Stable. While not desiring to cast the slightest doubt upon the soundness of these decisions, their Lordships, placing the terms of section 127 of the New Zealand Act *vis-a-vis* of the proceedings in this case, cannot resist the conclusion that the appellant's claim is out of time. They will therefore humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the Court of Appeal of New Zealand should be affirmed.

In the Privy Council

FREDERICK CHARLES VINCENT

THE TAURANGA ELECTRIC-POWER
BOARD

DELIVERED BY LORD ALNESS

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