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No 18 of 1960

Workers' Compensation, Governing Director of Company.
Whether a Servant where Company's powers delegated to
him for life. Was he a "worker" ?
Reported 1959 N.Z.L.R. 393.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

- 7 FEB 1961

ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

INSTITUTE OF ADVANCED
LEGAL STUDIES

50981

BETWEEN

CATHERINE LEE *Appellant*

AND

LEE'S AIR FARMING LIMITED *Respondents.*

Case for the Respondents.

RECORD.

1. This is an appeal from a Judgment of the Court of Appeal of
10 New Zealand given as their Opinion upon a point of law which arose in an
action by the Appellant against the Respondents in the Compensation
Court. The Judge of that Court stated a Case for the Opinion of the
Court of Appeal pursuant to Rule 5 of Chapter VIII of the Workers'
Compensation Rules, 1939, the text of which is set out in paragraph 5
hereof. The Judgment was delivered by Mr. Justice North on
18th December, 1958. The Case is dated 29th August, 1958. pp. 2-5.

2. The action was brought under the Workers' Compensation Act,
1922, as amended by a series of later Statutes and by her Claim the
Appellant claimed compensation in respect of the death of her husband
20 Geoffrey Woodhouse Lee which she alleged arose out of and in the course
of his employment by the Respondents. The sum claimed was £2,430
plus £50 funeral expenses, total £2,480 and subject to liability there was
no dispute as to that figure. Nor, if, in the work which he was performing
when he met with the accident which caused his death, he was performing
it pursuant to a contract of employment as a worker, was there any
dispute as to liability. The sole issue was whether he was working as a
worker within the meaning of that word in the relevant Acts. p. 2, 1, 3.

3. The present Code which regulates the rights and liabilities as
regards Workers' Compensation is the Workers' Compensation Act, 1956,
30 which came into force on the 1st April, 1957 ; but by Section 1 (3) of that
Act its applicability, with certain immaterial exceptions, is confined to

accidents occurring after that date. As appears from the Case, the fatal accident to Geoffrey Woodhouse Lee occurred on 5th March, 1956. The Code then in force was the Workers' Compensation Act, 1922, as amended by several subsequent Acts including the Workers' Compensation Amendment Act, 1952. By Section 2 of that Act the Compensation Court was established, which took the place of the Court of Arbitration referred to in the said Rules. By Section 9 of that Act all the jurisdiction and powers conferred upon the Court of Arbitration by the Workers' Compensation Act, 1922, as amended became exercisable by the Compensation Court.

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4. By Section 3 of the 1922 Act it was provided that if in any employment to which that Act applied personal injury by accident arising out of and in the course of the employment was caused to a worker his employer should be liable to pay compensation in accordance with the Act. The quantum of compensation in the case of death resulting from the injury is regulated by the 1922 Act and by later Acts which amended the 1922 Act. "Worker" is defined in the 1922 Act as any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether remunerated by wages, salary or otherwise. There was an exception as regards persons employed otherwise than by way of manual labour whose remuneration exceeded £400 per annum. This exception was abolished in 1945.

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5. By Section 19 of the 1922 Act all proceedings for the recovery of compensation were to be taken in the Court of Arbitration and not elsewhere. By Section 22 (2) no appeal lay to any other Court from any order made by the Court or Arbitration. Nor could any such order be removed by certiorari or otherwise into any other Court to be there quashed or varied on any ground other than want of, or excess of Jurisdiction. Consequently the Court of Arbitration was the final judge of both fact and law except as stated. The Compensation Court is in the same position. A practice however grew up, which is referred to by this Honourable Council in the case of *Brooker v. Thomas Borthwick and Sons (Australia), Ltd.* [1933] Appeal Cases 669, whereby it was possible upon agreed facts to obtain the decision of the Supreme Court on a question of law and that decision was subject to further appeal. In the cited case the proceedings took the form of Originating Summons stating agreed facts for the Opinion of the Court upon the question of law. The Workers' Compensation Rules of 1939 now provide a Code for obtaining the decision of the Court of Appeal upon a point of law; in this respect the procedure has some similarity to that under the former English Code where an appeal upon a question of law lay direct to the Court of Appeal from the Arbitrator. The following are the terms of Chapter VIII of the Workers' Compensation Rules, 1939 :—

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1. If at any time in the course of the proceedings in an action it appears to the Court or to a Judge thereof that the matter in dispute is one of law only, or that a substantive question of law is involved which ought to be decided before the trial of the action, the Court or a Judge thereof may order that such matter or point

of law be argued before the Court before the trial of the action, and that the trial of the action do stand adjourned pending the decision of the Court thereon.

2. The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court.

3. On the argument of any such case the Court shall be at liberty to draw from the facts and documents set forth or referred to in the case, any inference, whether of fact or law, which might have been drawn therefrom if proved at the trial.

4. On the argument of such special case the Court may give judgment in the action, or may order the issues of fact or any of them to be tried before giving judgment.

5. In any action or other proceeding the Court or a Judge thereof may state a case for the opinion of the Court of Appeal on any point of law arising in the action or proceeding.

6. The action which led to this Stated Case was commenced by the Appellant on 15th April, 1957. She claimed the said sum of £2,430 as Compensation for herself and her four infant children and £50 funeral expenses. Her claim was in respect of the death of her husband Geoffrey Woodhouse Lee who was killed in an aeroplane accident on 5th March, 1956, whilst doing work called top-dressing over farm land. She claimed that he was serving the Respondents under a contract of service at the time of the accident. The Respondents by their Defence denied that he was a "worker" within the meaning of the word in the Acts.

7. The facts as found by the Judge of the Compensation Court appear in paragraphs 5 to 17 of the Case and it is not necessary to set them out again in this Case. The question upon which the Opinion of the Court of Appeal was sought was whether at the time of the said accident the deceased was employed by the Respondents as a "worker" within the meaning of the Acts.

8. The Court of Appeal regarded the question as framed by the Judge as being one of mixed fact and law but they interpreted it to mean whether on the admitted facts of the Case the deceased could hold the office of Governing Director of the Respondents and also be a servant of them. They however accepted that in certain circumstances a Director of a Company can also be a servant of that Company, and indeed so also could a Governing Director. It is submitted that the question must in such cases depend upon what powers reside in the Company in relation to his work for them. If he is not only in complete control by holding all the shares save one, as here, but holds his Directorship for life, has the "full government and control of the Company vested in him" so that he "may exercise all the powers and authorities and discretions vested in the Directors generally and that notwithstanding he is the sole Director holding office and he may exercise all the powers of the Company which are not by Statute required to be exercised by the Company in General Meeting," then it is submitted there is no room for any inference that the position is one of Master and Servant.

9. It is submitted that the proper tests to be applied are, or at all events, include :—

(A) Were the Respondents entitled to give him orders as to the work he should do for them ?

(B) Were the Respondents entitled to direct him as to the manner in which he should do the work ?

(C) Had the Respondents the right to dismiss him either if he disobeyed a lawful order given by them or in any case upon reasonable notice ?

Other tests can no doubt be applied but unless the above tests are satisfied 10 it is submitted that the relationship is not that of Master and Servant.

10. The Respondents in no way seek to qualify the law as laid down by the House of Lords in *Salomon's* case [1897] Appeal Cases 22. The Respondents and the late Mr. Lee were in the view of the law separate entities. The question here is not whether they were separate entities or one person. It is whether the contract between them, assuming that there was a contract, was one of Master and Servant.

11. The Respondents submit that the correct answer to the three questions set out in paragraph 9 is in the negative.

p. 22, l. 11.

12. It is true that by Article 33 of the Articles of Association of the 20 Respondents it was provided that "the Company shall employ the said Geoffrey Woodhouse Lee as the Chief Pilot of the Company at a salary of £1,500 per annum from the date of the incorporation of the Company and in respect of such employment the rules of law applicable to the relationship of Master and Servant shall apply as between the Company and the said Geoffrey Woodhouse Lee."

p. 33, l. 1.

13. Shortly after the incorporation of the Company this Article was amended by erasing the words underlined in paragraph 12 and substituting the words "a salary to be arranged by the Governing Director". He therefore fixed his own salary. Moreover, as the Court 30 of Appeal pointed out, the effect of the Articles was that all the powers of the Company were delegated to him for life and the Company retained no power of management whatever except through him.

p. 14, l. 15.

14. The Respondents respectfully adopt the reasoning of the Court of Appeal. By all the relevant tests the relationship of Master and Servant did not exist. The wording of Article 33 in so far as it provided that the relationship in respect of his "employment" should be that of Master and Servant is incompatible with Article 32 under which he was given for life all the powers of the Respondents, so that they retained none independently of him. 40

p. 21, l. 40.

pp. 5-10.

15. The Respondents desire to draw attention to the introduction into the Case of matters relating to the Insurance effected by the Respondents against various risks, including Employers' Liability. It seems that

the object of introducing that matter was to show that there was included in the risks covered by the Employers' Liability Policy a risk under the Workers' Compensation Act of accident to Mr. Lee. This oblique method of ascertaining the relationship between the Respondents and Mr. Lee is, it is submitted, not permissible. The relationship is clearly to be ascertained from the Articles of Association and the facts found by the Judge of the Compensation Court in the Case. If it be the fact that the Respondents covered in their Employers' Liability Policy some risk that could not arise such fact is not material to the issue. In that event they
 10 have paid part of premiums they need not have paid; but this does not affect the relationship determined by the Respondents' Articles of Association.

16. The Judge of the Compensation Court attached to the Case not only the documents which he incorporated in it but also the Notes of evidence taken by him. It is respectfully submitted that this is not correct procedure. He is the final Judge of fact and his duty is to find the facts relative to the question of law. His Notes of the Evidence taken before him cannot qualify his findings of fact. In this respect, it is submitted, he is in a similar position to that of an Arbitrator who states
 20 a Case, either consultative or as a final award. The Respondents respectfully submit that the Notes of Evidence should not be regarded.

17. The Respondents submit that this Appeal is not well-founded and should be dismissed for the following, amongst other

REASONS

- (1) BECAUSE the Court of Appeal applied the right tests in answering the question.
- (2) BECAUSE on the facts found in the Case the true view is that the relationship of the Respondents to the late Mr. Lee was not that of Master and Servant.
- 30 (3) BECAUSE on those facts the late Mr. Lee was not a worker within the meaning of the Workers' Compensation Act, 1922.
- (4) BECAUSE the accident which caused the death of the late Mr. Lee did not arise in the course of or out of any work being done by the late Mr. Lee as a servant inasmuch as he was not employed as such by the Respondents.
- (5) BECAUSE the decision of the Court of Appeal was right and ought to be affirmed.

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F. W. BENEY.

J. H. C. GOLDIE.

In the Privy Council.

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Case for the Respondents

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