Privy Council Appeal No. 30 of 1972

Finemore's Transport Pty. Limited – – – – *Appellants*

v.

Kathleen Mary Cluff – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH NOVEMBER, 1973

Present at the Hearing:
THE LORD CHANCELLOR
VISCOUNT DILHORNE
LORD WILBERFORCE
LORD SIMON OF GLAISDALE
LORD SALMON

[*Delivered by* LORD SALMON]

The respondent's late husband was at all material times a member of the New South Wales Police Force. There were four children of the marriage who, together with the respondent, were entirely dependent on the deceased. During his hours off police duty and during his leaves, he was employed by the appellants as a labourer and motor mechanic at $1·50 an hour. On 27th February 1970 he suffered serious injuries arising out of and in the course of his employment by the appellants. As a result of those injuries he died on 25th March 1970. The respondent on behalf of herself and her four children claimed and succeeded in obtaining an award of compensation under the Workers' Compensation Act 1926. From that award the appellants appealed to the Supreme Court of New South Wales. Their appeal was dismissed and they now appeal to this Board.

The sole point raised on behalf of the appellants is that by reason of the deceased's status as a member of the police force he was not a "worker" within the meaning of that word as defined in section 6 (1) of the Workers' Compensation Act 1926 (as amended); therefore since the Act by section 7 (1) provides for compensation only in respect of personal injuries suffered by a worker, no compensation is payable in the present case. This appeal accordingly turns entirely upon the true construction of section 6 (1) of the Act which defines "worker" as follows:

"'Worker' means 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 the contract is express or implied, is oral or in writing, but does not include—

[(*a*) any person whose remuneration exceeds two thousand pounds per year exclusive of payments for overtime bonus or special allowance; or

(*b*) an outworker; or]

(*c*) a member of the police force; or

(*d*) a person whose employment is casual (that is for one period only of not more than five working days) and who is employed otherwise than for the purposes of the employer's trade or business; or

(*e*) an officer of a Friendly Society whose remuneration from such Friendly Society does not exceed seven hundred dollars per year; or

(*f*) an officer of a religious or other voluntary association who is employed upon duties for the association outside his ordinary working hours, so far as the employment upon such duties is concerned, provided his remuneration from the association does not exceed seven hundred dollars per year; or

(*g*) a member of the police reserve appointed under Part II (*a*) of the Police Regulation Act 1899–1939, employed upon duties as such member, so far as the employment upon such duties is concerned."

Paragraphs (*a*) and (*b*) were finally deleted in 1957 and 1967 respectively but paragraph (*b*) is not irrelevant in considering the true construction of the section. Paragraphs (*f*) and (*g*) were added in 1927 and 1941 respectively and will be referred to later.

It has been argued on behalf of the appellants that the true effect of paragraph (*c*) is that because the deceased was a member of the police force, he was precluded from being a "worker" not only *vis-à-vis* the Crown or the Government but also *vis-à-vis* his employers the appellants. No doubt if paragraph (*c*) could be considered in isolation that argument would appear convincing. Paragraph (*c*) however must be considered in its context in order to arrive at its true meaning.

Quite apart from authority, it seems plain on the natural construction of the definition of "worker" that the question whether A is a "worker" and therefore eligible in certain circumstances to receive compensation from B turns not upon his status but solely upon the nature of his contractual relationship with B. Unless A has entered into the contractual relationship with B specified in the definition he is not a "worker" and cannot be entitled to compensation from B under the Act. Even if he has entered into the necessary contractual relationship with B he is nevertheless excluded from the category of "worker" and ineligible to receive compensation from B should that contractual relationship contain terms which bring it within any of the exceptions in paragraphs (*a*) to (*g*). It seems plain that the definition of "worker" is concerned solely with the contractual relationship of the parties to a contract of service *inter se*. Where A has entered into a contract of service with B containing any of the characteristics described in the exceptions, A is deprived of the right to claim compensation from B and conversely B is protected from any such claim. Neither A's status nor the terms of his contract of service with B can affect his right to claim compensation in respect of any contract of service which he may have entered into with C; it is his contract with

C which alone can be looked at in order to decide whether or not A is a "worker" *qua* C.

Each of the exceptions is concerned only with the contractual relationship between a claimant employee and his employer and applies only to the employee's contractual duties to which it refers. It has been pointed out on behalf of the appellants that paragraphs (*f*) and (*g*) spell this out in express terms but that paragraph (*c*) does not. But nor did any of the paragraphs which were in force when paragraphs (*f*) and (*g*) were introduced. Their Lordships are unable to accept the argument that the absence of express words from those paragraphs can affect their true construction by giving any of them the extended meaning contended for by counsel for the appellants. No one, for example, could suppose that a man was excluded under paragraph (*b*) from claiming compensation from any one who employed him as a labourer merely because he also worked as an outworker for someone else.

The main argument advanced on behalf of the appellants is that since the master and servant relationship is wholly different in kind from the relationship of the Crown to a member of the police force, a member of that force cannot be a "worker" within the meaning of the Act. Accordingly, the Crown could never have needed protection against a claim for compensation under the Act by a police officer and the exception contained in paragraph (*c*) would be wholly unnecessary for such a purpose; its object therefore must have been to deprive a member of the police force of the right to claim compensation from any employer other than the Crown with whom he might enter into a contract of service. This argument is beset by formidable difficulties.

Although it may well have been clear since *The Attorney General for New South Wales v. The Perpetual Trustee Company Ltd.* [1955] A.C.457 that the relationship of master and servant cannot in its strict sense exist between a police officer and the Crown, their Lordships consider that this was far from clear in 1926 when the Act under consideration was passed, still less in 1916 when its predecessor the Workmen's Compensation Act was passed. It is this earlier Act which first introduced into the New South Wales legislation words excluding a member of the police force from the definition of workman.

There are several passages in the High Court judgments in *Enever v. The King* [1906] 3 C.L.R. 969 which would not have encouraged the New South Wales legislature in 1916 or in 1926 to believe that a member of the police force had certainly not entered into a contract of service with the Crown as his employer; see for example O'Connor J. at p. 990:

> "In a general sense, no doubt, the constable was a servant of the Government at the time when the trespass complained of was committed. He held his office under the Police Regulation Act 1898, which gave the Government power to employ, to pay, and dismiss him. He was probably required to perform many duties besides those imposed upon a constable at common law or by Statute, and in the performance of such duties he would be the servant of the Government, and they would be directly liable for any neglect or default committed by him in the course of his employment."

There was also section 10 of the Police Regulation Act 1899 which reads as follows:

> "Every person taking and subscribing such oath shall be deemed to have thereby entered into a written agreement with and shall be thereby bound to serve Her Majesty as a member of the police force . . . "

This section also might well have suggested to the legislature that but for the express exception written into the definition section of the Act of 1916 and the Act of 1926, a member of the police force would be able to claim compensation from the Crown under those Acts for injuries sustained by him in the execution of his duties as a police officer.

It was therefore important to exclude such a claim because, as pointed out by the learned trial judge, compensation for such injuries was already provided for under the Police Regulation Act and ancillary superannuation legislation. Having regard to the state of the authorities in 1916 and 1926 and to section 10 (*ibid.*) no competent parliamentary draftsman could have failed expressly to exclude the possibility of a member of the police force recovering compensation from the Crown under the Workers' Compensation legislation in addition to compensation under the legislation to which the learned trial judge referred. And this in their Lordships' view is the only end which paragraph (*c*) was intended to and did achieve.

It is no doubt true that the New South Wales Police Rules and Instructions, made pursuant to the powers conferred on the Governor by section 12 of the Police Regulation Act 1899 (explaining and expanding section 7 of the Act), contain a general prohibition against a member of the police force accepting any "other remunerative employment from any source". See the first part of paragraph (*a*) of Rule 1 of Section IV. The Rules and Instructions and the Act itself provide powerful deterrents against a member of the police force accepting any extraneous remunerative employment. Paragraph (*m*) of Rule 1 renders such a policeman liable to punishment and dismissal. Section 7 (2) of the Act, so far as material, reads:

> "Any constable of police who is or becomes a . . . hired servant . . . shall forfeit his appointment as such constable, and all . . . salary and gratuity payable to him as such."

It seems incredible to their Lordships that the exclusion of a member of the police force from the definition of a worker was introduced into the Workers' Compensation legislation for the purpose of adding a comparatively mild disincentive against a police officer accepting extraneous remunerative employment when such formidable deterrents already existed.

It is perhaps worth noting that the second part of paragraph (*a*) Rule 1 (*ibid.*) provides that the Commissioner of Police may, in certain circumstances, approve that a member of the police force under suspension from pay and duty may obtain other employment for such period as the Commissioner may direct. Counsel for the appellants frankly concedes that (1) if his construction of the definition of "worker" is correct, then no such police officer would be entitled to Workers' Compensation for injuries arising out of and in the course of such employment and (2) it is impossible to think of any reason why the legislature should be taken to have intended to impose such a burden on an employee and such an immunity upon his employer.

Their Lordships are therefore satisfied, looking at paragraph (*c*) in its context, that the Supreme Court were clearly right in holding that the exception in that paragraph relates only to a member of the police force in relation to his work for the Crown or the Government and that accordingly the relationship of the deceased to the Crown was not that of a worker for the purposes of the Act but that his relationship with the appellants was.

That conclusion on the construction of the Act accords also with all the authorities that were cited in argument relating to section 13 of the English Workmen's Compensation Act 1906 in which the definition of "workman" and the exceptions (including "a member of a police force")

are very similar to those contained in the Act now under consideration; indeed, the language of the New South Wales statute clearly followed that of the English statute. In *Sudell v. Blackburn Corporation* (1910) 3 B.W.C.C. 227 the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.) held that the claimant police officer was not entitled to recover compensation from the Corporation in respect of injuries sustained in fighting a fire because he was deemed under the Police Act 1893 to be then acting in the execution of his duty as a member of the police force. If a member of the police force was excluded from being a workman under the Act in all circumstances and therefore ineligible ever to claim compensation no matter what work he was doing or for whom he was doing it, it would have been unnecessary to enquire whether or not at the relevant time he was deemed to be working as a police officer. In *Skailes v. The Blue Anchor Line Limited* [1911] 1 K.B. 360 Fletcher Moulton L.J. adopted a construction of the relevant section of the English Act which accords with their Lordships' reading of the New South Wales Act. Although Fletcher Moulton L.J. dissented from the other members of the Court on the point in issue on the appeal, neither Cozens-Hardy M.R. nor Farwell L.J. questioned his analysis of the definition section in the Statute.

The true meaning of section 9 subs. (1) of the English Act arose for consideration in *Brandy v. The Owners of the S.S. Raphael* [1911] 1 K.B. 376. That section reads as follows:

> "This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this Act would apply if the employer were a private person . . . "

The judgment of the Court in *Brandy's* case was delivered on the same day as the judgment in *Skailes'* case. Both Cozens-Hardy M.R. and Fletcher Moulton L.J. expressed the view that the object of the section was to exempt only the Crown from liability to pay compensation and that it offered no protection to any other employer if in relation to that employer the claimant was a "workman" within the statutory definition of that word. This view was approved when *Brandy's* case went to the House of Lords (1911 A.C. 413).

It is apparent therefore both on principle and authority that the construction for which the appellants contend cannot be accepted.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

3144134—1 Dd. 178189 70 12/73

In the Privy Council

FINEMORE'S TRANSPORT PTY. LIMITED

v.

KATHLEEN MARY CLUFF

DELIVERED BY
LORD SALMON

Printed by HER MAJESTY'S STATIONERY OFFICE
1973