Privy Council Appeal No. 64 of 1994

New Zealand Forest Products Limited *Appellant*

v.

The Accident Compensation Corporation *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 12th June 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Bridge of Harwich
Lord Ackner
Lord Slynn of Hadley
Lord Nicholls of Birkenhead

*[Delivered by **Lord Slynn of Hadley**]*

This appeal raises the question whether, as it contends, New Zealand Forest Products Limited is entitled, under the Accident Compensation Act 1982, to claim an adjustment of accident compensation levies paid or payable by it in respect of persons employed in businesses which it formerly carried on but which are now carried on by its subsidiaries. Ellis J., in the High Court, and the Court of Appeal held that it was not so entitled but the latter gave the company leave to appeal to Her Majesty in Council.

The relevant facts briefly are that, at all material times until 31st March 1987, the appellant carried on various businesses connected with forestry production and utilisation. For reasons of financial and business efficiency it was decided radically to alter the corporate structure of the company with effect from 1st April 1987. Eight subsidiary companies took over the management and operation of those businesses respectively under agreements with the appellant. The appellant, thus, entirely ceased to carry on those businesses but carried on "the head office function of

managing and controlling the financial affairs of the plaintiff's group of companies" (amended statement of claim paragraph 9). All but 180 of the appellant's 4500 employees terminated their employment with the appellant and took up employment with one or other of the subsidiaries. Prior to 1st April 1987 the appellant and, from 1st April 1987, the subsidiaries were respectively responsible for the payment of wages and the deduction of PAYE tax and accident compensation levies. The amount of the latter varied according to the kind of job done by the employees.

It is convenient to set out firstly the various statutory provisions as to the payment of the levy and secondly those dealing with the adjustments to be made on cessation of business.

The Accident Compensation Scheme came into being on 1st April 1974 under the Accident Compensation Act 1972. By virtue of section 77 of that Act employers on 1st April 1973 (of whom the appellant was one) were required to pay a levy calculated on the total wages paid for the year 1973/1974. That payment was due not later than 30th June 1974. In 1975 they paid levies calculated on the year 1974/1975 and so on in subsequent years. This meant that employers, like the appellant, were required to pay the levy on 30th June 1974 in respect of the year before the Scheme came into force and thenceforward in respect of all wages paid after the Scheme came into force on 1st April 1974. Those employers who began business after 1st April 1973 but by 1st April 1974 and those employers who began business after 1st April 1974 but before the 1st April 1982 made an initial estimate of the levies payable during their first year. That estimate was revised and the balance adjusted on 30th June of the year following that in which they began business taking account of wages actually paid during the period of the estimate.

Amendments to section 77 of the Act of 1972 were made by the Accident Compensation Employer Levy Payment Regulations 1981 to come into force on 1st April 1982. These amendments were subsequently incorporated into section 43 of the Accident Compensation Act 1982. By that section (1):-

> "Every employer who is required to furnish, pursuant to and for the purposes of section 353(1)(e) of the Income Tax Act 1976, a reconciliation statement as defined in that Act shall, within the time in which he is required to furnish that reconciliation statement, deliver a statement of the amount of earnings as employees that have been paid by him in the year to which that reconciliation statement relates and at the same time pay in relation to every such statement a levy calculated in accordance with subsection (3) of this section."

By section 353(1)(e) of the Income Tax Act 1976, as amended, every employer who makes tax deductions from source deduction payments made to employees shall deliver not later than 31st May in each year such a reconciliation statement.

It is common ground, as Ellis J. found, that employers who began business after 1st April 1982 paid no levy until the 31st May after 1st April which followed their commencing business. On 31st May in the next following year and in subsequent years they paid a full year's levy. They thus paid levy only on wages actually paid during the operation of the Scheme. They were accordingly in a different position from employers in business on 1st April 1974 who were required to pay a sum covering a period before the Scheme began.

The legislation to which reference has been made contained provision for adjustments of the levy to be made on cessation of business. By section 79 of the Act of 1972 the Commission administering the Scheme was authorised to make adjustments where a statement had been delivered pursuant to section 77(6) of that Act. Section 77(6) provides that subject to the provisions of the Act:-

> "Any person who ceases to be an employer during any year commencing on the operative date or commencing on any 1st day of April after the operative date shall, within 14 days after the date on which he so ceases, deliver a statement showing the amount of earnings as employees which have been paid or become payable by him during the period commencing on the operative date, or on the 1st day of April last preceding the date on which he so ceases, as the case may be ... and ending at the time at which he so ceases."

That provision was changed in the 1981 Regulations as subsequently incorporated in the Act of 1982. The latter provided by section 43(2):-

> "Every employer who is required to furnish, pursuant to and for the purposes of section 353(1)(f) of the Income Tax Act 1976, a reconciliation statement as defined in that Act shall, within the time in which he is required to furnish that reconciliation statement, deliver a statement of the amount of earnings as employees that have been paid or have become payable by him during the period commencing on the 1st day of April last preceding the date on which he ceases to be an employer and ending at the time at which he so ceases, and at the same time pay in relation to that statement a levy calculated in accordance with subsection (3) of this section."

By section 353(1)(f) of the Income Tax Act 1976:-

> "Not later than the 15th day of the second month after the month in any year in which the employer disposes of or otherwise ceases to carry on any business in respect of which he has made any such tax deductions, comply with paragraph (e) of this subsection in respect of those deductions as if the period from the beginning of that year to the date of the last of those tax deductions were a preceding year."

Before the passing of the Accident Compensation Amendment Act 1985 the position seems to their Lordships to be clear. Section 43(2) of the Act of 1982 required an employer who had to furnish a reconciliation statement for the purpose of section 353(1)(f) of the Income Tax 1976 to deliver a statement of earnings paid by him to employees during the period from 1st April last preceding the date on which he ceased to be an employer and ending at the time when he so ceased. He then had to pay a levy calculated in accordance with subsection 43(3) or to be reimbursed.

By virtue of section 353(1)(f) of the Act of 1976 the reconciliation statement had to be delivered by the employer by the prescribed date after the month in the year in which he disposed of or otherwise ceased to carry on "any" business in respect of which he had made any tax deductions in respect of source deduction payments. This requirement is not limited to the situation where an employer gives up all his business activities. A reconciliation statement under the Act of 1976 must be provided for the periods specified in respect of each business which the employer terminates in the course of a year. The fact that he continues to carry on one or more businesses does not remove his obligation to provide the reconciliation statement for those distinct businesses which are terminated.

It follows that a statement of earnings had to be provided on the same basis under section 43(2) of the Act of 1982. It had to be provided for any (i.e. each) business which terminated. The fact that section 43(2) of the Act of 1982 refers to the date when "he ceases to be an employer" does not detract from this conclusion; it leaves open the question "an employer in respect of what business?". The answer is "any" business including one of several businesses.

It is common ground that the Act of 1985, which amended the Act of 1982, removes the distinction in treatment between those who were employers on 1st April 1973 and those who began business after 1st April 1982. This distinction in treatment which involved the earlier class of employers paying for a period longer than that when they had employed persons covered by the Scheme was recognised to be unfair.

It is said, however, by the respondent that amendments to section 43(2) brought about another change namely that the statement of earnings to be furnished pursuant to that subsection only fell to be furnished where the employer totally ceased business. The new subsection (2) reads as follows:-

"Every employer who, on the disposal or cessation of his business, is required to furnish, pursuant to and for the purposes of section 353(1)(f) of the Income Tax Act 1976, a reconciliation statement as defined in that Act shall -

(a) Within the time in which he is required to furnish that reconciliation statement, deliver a statement of the amount of earnings as employees that have been paid or have become payable by him during the period commencing on the 1st day of April last preceding the date on which he so ceases to be an employer and ending at the time at which he so ceases; and

(b) Either -

(i) Where he was, on the 31st day of March 1980, an employer and has continued to be an employer, in relation to that business, until the date of that disposal or cessation, make an application for an adjustment under section 44A of this Act to the amount of the levy otherwise payable in relation to that statement, and pay the amount (if any) of the adjusted levy then payable within one month of the date of the determination by the Corporation under that section; or

(ii) In any other case, at the same time pay in relation to that statement a levy calculated in accordance with subsection (3) of this section."

The principal point relied on by the respondent is that the obligation to furnish a statement of earnings only arises on the "disposal or cessation of his" business. The respondent says this means on the disposal of the whole of an employer's business activities. The appellant contends that the reference to "his" business is wide enough to cover the disposal of one of several businesses or a part of an employer's business activities.

Their Lordships recognise that the phrase the disposal of "his" business could be construed as meaning the disposal of his entire business. If it stood alone that might be the correct interpretation. But this phrase cannot be read in isolation. In the first place an employer who has to submit a statement of earnings under section 43 is still an employer who is required to furnish a reconciliation statement pursuant to and for the purposes of section 353(1)(f) of the Income Tax Act 1976. As

already shown that obligation on cessation falls upon a person who disposes of or ceases to carry on "any business". If, as must be accepted, the phrase "his business" is capable of either interpretation, it seems to their Lordships, in the absence of any clear indication that a change was intended or any reason for such a change being given, that the natural interpretation is one which continues to read section 43(2) in a way which is the same as or consistent with section 353(1)(f). No such counter-indication or reason is given to justify reading "his" business more widely than "any business".

There is, however, a stronger pointer. Section 43(2)(b) provides that a person who was on 31st March 1980 and has continued to be an employer "in relation to that business", until the date of disposal or cessation, is to make an application for or an adjustment to the amount of the levy. That obligation, it seems to their Lordships, is imposed on any employer who has disposed of a particular business. He must make an application in respect of that business. Such disposal may be of the whole of his business or it may be of one or several businesses. The words "in relation to that business" seems to their Lordships clearly to indicate that the cessation provisions apply to employers who cease one or more of several businesses and are not limited to the cessation of an employer's entire business activity. Accepting that "his business" may be ambiguous, in the context of the section as a whole it is to be construed as meaning the disposal or cessation of any business. On the respondent's construction of "his business", as referring only to the totality of a business activity, it is not possible to give any real meaning to the phrase "in relation to that business" in section 43(2)(b)(i).

It is said by the respondent that if section 43(2) imposes the obligation on an employer who disposes of one of several businesses then the position of such an employer is different from that of a self-employed person since by section 44(6) it is "only the person who ceases to be a self-employed person" who must make an application for an adjustment. The respondent contends that this means that the self-employed person ceases business entirely. Even assuming that that is so it may well have been considered less likely that a self-employed person would be engaged in several businesses and, since the statement to be made by a self-employed person is in respect only of his earnings, it is hardly surprising that the adjustment provisions apply only where he ceases entirely. It is, in any event, not uncommon for social and fiscal legislation to make different provisions for the employer and the self-employed. It would not be surprising if that had been done here. It would be much more surprising if an employer could not apply for an adjustment in respect of the cessation of one business whereas he could apply on the cessation of his entire business activity.

As already stated one of the objects, perhaps the principal object of the 1985 Act, was to remove unfairness to employers in the earliest period. That may not directly affect the question in issue in this case but it would be very strange if, in removing one unfairness, the legislature had deliberately created an unfairness between an employer who ceased business entirely and one who ceased some or, perhaps, all but one of his businesses. If either interpretation is likely to lead to unfairness in the application of the adjustment rules it seems to their Lordships that it is the one which limits the application of those rules to an employer who has wholly ceased business.

Anomalies may remain - there will be no adjustment where the number of employees has been reduced but where the business has not ceased in whole or in part, nor is it clear that the adjustment provisions directly reflect the excess overpaid in the early period. Nonetheless their Lordships are satisfied that the adjustment provisions will apply more fairly if they are applied both where the whole business activity and where one or more of several businesses cease to exist.

The appellant attached importance to the provision in section 43(2)(a) of the 1982 Act as substituted by section 4 of the 1985 Act that the employer is to deliver a statement of earnings paid during a period commencing on 1st April last preceding the date "on which he so ceases to be an employer and ending at the time at which he so ceases". The appellant contends that "so ceases to be an employer" must mean that it is contemplated that the employer may cease business in relation to some businesses - "so" is to be read distributively. If not, it is said, the word "so" is otiose; if disposal of an entire business alone were intended to be included it would have been enough to say "the date at which he ceases to be an employer". It seems, however, to their Lordships that "so ceases to be an employer" can just as well be read as referring to the words "on the disposal or cessation of his business". It is by that act that he ceases to be an employer. Accordingly their Lordships do not find that this argument assists the appellant.

Their Lordships have given full weight to the fact that the Court of Appeal in the judgment of Richardson J., and Ellis J. in the High Court, concluded that under the New Zealand legislation the adjustment fell to be made only on total cessation by an employer of all his business activity. They are satisfied, however, that, this being a question of statutory construction not depending on local knowledge, the legislation is to be construed in the way contended for by the appellant, that is to say that the cessation provisions apply where an employer disposes of one or more of several businesses as well as where he ceases business

altogether. They consider, however, that the declaration sought should be amended, as the respondent contends, to read as follows:-

"(a) a declaration that it is entitled to make application under section 43(2) of the Act for an adjustment of levies paid or payable by it in respect of those businesses now carried on and managed pursuant to the management agreements by the subsidiaries in relation to which the appellant was an employer on 31st March 1980 and continued to be an employer up to the date of transfer to the relevant subsidiary."

Their Lordships accordingly will humbly advise Her Majesty that the appeal should be allowed with costs in the courts below and that the declaration sought by the appellant be granted subject to the amendment indicated. The respondent must also pay the appellant's costs before their Lordships' Board.