TOMLINSON v RAMSEY FOOD PROCESSING PTY LIMITED (S7/2015)

Court appealed from: New South Wales Court of Appeal
[2014] NSWCA 237

Date of judgment: 21 July 2014

Special leave granted: 12 December 2014

Mr Grant Tomlinson worked at an abattoir operated by the Respondent ("Ramsey"). Ramsey had initially employed Mr Tomlinson directly, before formally terminating his employment on 16 October 2006. On the following day however Mr Tomlinson entered the employ of Tempus Holdings Pty Ltd ("Tempus"), a recently registered labour hire company. He continued however to work at the abattoir, under the direction of Ramsey. His employment was finally terminated in November 2008 (along with that of other workers at the abattoir).

In June 2011 Mr Tomlinson sued Ramsey in negligence in the District Court, claiming damages for a workplace injury he had suffered in June 2008 ("the Injury Claim"). He alleged in those proceedings that at the time of his injury he had been employed by Tempus. Ramsey contended however that *it* was the true employer at that time. If it could establish that position, the Injury Claim would fail, by reason of Mr Tomlinson's non-compliance with various requirements imposed by the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) and the *Workers Compensation Act* 1987 (NSW).

Meanwhile, the Fair Work Ombudsman ("FWO") was pursuing separate proceedings in the Federal Court against Ramsey (and its manager, Mr Stuart Ramsey) under s 719 of the *Workplace Relations Act* 1996 (Cth) ("the WRA Claim"). Those proceedings, for the recovery of unpaid severance entitlements, were taken by the FWO on behalf of a group of former employees that included Mr Tomlinson. In a judgment delivered on 19 October 2011, Justice Buchanan found that Tempus had not been an employer in its own right. His Honour found that, from at least 17 October 2006, Mr Tomlinson's employer had been Ramsey ("the Finding").

In resisting the Injury Claim, Ramsey contended (in its filed defence) that the District Court was bound by the Finding ("the Estoppel Defence"). On 17 May 2013 Judge Mahony gave judgment in favour of Mr Tomlinson, awarding him damages of $155,069. This was after striking out the Estoppel Defence. His Honour held that the Finding could not be used by Ramsey to raise an issue estoppel. This was because the subject matter of the WRA Claim was different from that of the Injury Claim, and because there had been no privity of interest between the FWO and Mr Tomlinson, since the latter was unable to control the former's conduct of the WRA Claim.

The Court of Appeal (Meagher, Ward & Emmett JJA) unanimously allowed an appeal by Ramsey. Emmett JA, with whom Ward JA agreed, found that Judge Mahony had erred by considering that differences in cause of action and

evidence, as between the WRA Claim and the Injury Claim, were material to the question of issue estoppel. The concept of employment that arose in the Injury Claim was no different from that in the WRA Claim, and the question of which company was Mr Tomlinson's employer at the relevant time had been conclusively determined by the Finding. Their Honours all found that, since the WRA Claim was made by the FWO on behalf of Mr Tomlinson and for his benefit, the privity of interest required for an issue estoppel existed. The Court of Appeal therefore held that Ramsey should have been permitted to raise the Estoppel Defence, with the result that Mr Tomlinson could not succeed on the Injury Claim.

The ground of appeal is:

- The Court of Appeal of the Supreme Court of New South Wales erred in holding that the Appellant [is] issue estopped by the Federal Court decision in *Fair Work Ombudsman v Ramsey Food Processing Pty Limited* NSD 1005 of 2010.

The Respondent will be seeking leave to rely on a proposed notice of contention, the ground of which is:

- The Court of Appeal of the Supreme Court of New South Wales ought to have held that the evidence established that the Appellant was an employee of the Respondent in the course of his employment at the time of the said accident, as expressed by Emmett JA (at paragraph 99 of the judgment), with whom Ward JA agreed.