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Fullagar J.

the Full Court that these contain no material on which the findings of *Gibson* J. can be challenged.

After referring to the findings of *Gibson* J., and after quoting from the judgments of *Dixon* J. in *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (1), and in *Humberstone* v. *Northern Timber Mills* (2), *Morris* C.J. said: "It is obvious that each case must depend upon its own facts. This one has the characteristics which weighed with *Dixon* J. in *Humberstone's Case* (3) . . . I think the learned trial judge was right in coming to the conclusion that Lee was an independent contractor and not an employee".

I agree, with respect, with the passage which I have quoted. There were features in *Humberstone's Case* (3) which are not present in this case. On the other hand, the actual terms of the relevant contract are perhaps established more clearly in this case than they were in *Humberstone's Case* (3). It is, I think, true in this case, as it was in that case, to say, as *Dixon* J. said: "The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. There is no ground for imputing to the parties a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents" (4).

With regard to the argument of the appellant based on negligence in the construction of the road, as distinct from Lee's negligence in driving it is enough to say that the evidence did not establish that any negligence other than Lee's negligence in driving was a material cause of the collision, and the Crown cannot be made liable unless Lee was its servant.

The appeal should, in my opinion, be dismissed.

KITTO J. I am of the same opinion, and have nothing to add.

Appeal dismissed with costs.

Solicitors for the appellant, *O. N. Waterworth*, Wynyard, by *Murdoch, Cuthbert, Clarke & Neasey.*

Solicitor for the respondent the Attorney-General for the State of Tasmania, *D. M. Chambers*, Crown Solicitor for the State of Tasmania.

M. G. E.

(1) (1945) 70 C.L.R. 539, at p. 552.
(2) (1949) 79 C.L.R. 389, at p. 404.
(3) (1949) 79 C.L.R. 389.
(4) (1949) 79 C.L.R. 389, at pp. 404, 405.

[HIGH COURT OF AUSTRALIA.]

NEALE . . . . . APPELLANT;
INFORMANT,

AND

ATLAS PRODUCTS (VIC.) PROPRIETARY LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS, VICTORIA.

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MELBOURNE, *March* 16.

SYDNEY, *April* 1.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Income Tax (Cth.)—Offences—Failure by employer to deduct tax from "salary or wages" in excess of certain amount received by employee "in respect of a week or part thereof"—"Salary or wages"—Inclusion of payments under a contract wholly or substantially for the "labour" of the persons paid—Independent contractor—Not bound personally to perform contractual work—Payments not for "labour" of person paid—"In respect of a week or part thereof"—No evidence of period occupied in performance of work for which payments made—Income Tax and Social Services Contribution Assessment Act 1936-1952 (*No.* 27 *of* 1936—*No.* 4 *of* 1952) *ss.* 221A (1), 221C (1) (2) (*a*) (*c*).

Section 221C of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 provides: (1) For the purpose of enabling the collection by instalments from employees of income tax, where an employee receives or is entitled to receive from an employer in respect of a week or part thereof salary or wages in excess of two pounds, the employer shall, at the time of paying the salary or wages, make a deduction therefrom at such rate as is prescribed. Penalty: twenty pounds. (2) For the purposes of this section, where an employee receives from an employer salary or wages, he shall—(*a*) if the salary or wages is or are paid in respect of piece-work performed by the employee, or in respect of services rendered under a contract which is wholly or substantially for the labour of the employee—be deemed to be entitled to receive that salary or those wages in respect of the period of time from the commencement of the performance of the work or services until the completion of the work or services; (*c*) if he is entitled, or deemed to be entitled, to receive the salary or wages in respect of a period of time in excess

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of one week—be deemed to be entitled to receive, in respect of each week or part of a week in that period, an amount of that salary or those wages ascertained by dividing the salary or wages by the number of days in the period and multiplying the resultant amount—(i) in the case of each week—by seven; and (ii) in the case of a part of a week—by the number of days in the part of a week. Section 221A (1) defines "employer" to mean a person who pays or is liable to pay any salary or wages, "employee" to mean a person who receives, or is entitled to receive, salary or wages and "salary or wages" to mean salary, wages, commission, bonuses or allowances paid (whether at piece-work rates or otherwise) to an employee as such, and includes, *inter alia*, any payments made (*a*) "under a contract which is wholly or substantially for the labour of the person to whom the payments are made".

A company commonly undertook to supply and fix roofing tiles to buildings in the course of construction, for which purpose it utilized the services of a number of tilers, over whom it exercised no control or supervision appropriate to the relationship of master and servant. The practice was for the company to inform a particular tiler at or towards the end of his previous job that another job was available, which he was free to accept or decline. More or less regular weekly payments were made by the company to each tiler on the basis of jobs completed, or deemed to be completed, in that week. At the completion of each job the tiler concerned would sign a written form of contract with the company for that job. The job was done on the understanding that the contract would be signed. Each contract provided for the supply by the tiler of labour, his own or other if he chose, and material, including wire and colouring, involved in the particular job. In prosecutions under s. 221C of the *Income Tax and Social Services Contribution Assessment Act* against the company for failing to make the appropriate tax deductions from the amounts paid to the tilers there was no evidence or averment of the period of time occupied in each job.

Held, that the tilers were not servants but independent contractors, payments to whom were neither "salary or wages" within the general words of the definition nor within sub-cl. (*a*) thereof, since they were not required, by the terms of their contracts, to perform personally the contractual work, whatever might have been the position if they had been so required.

Held, further, that even if the tilers were to be regarded as employees engaged in piece-work, the offences were not proved in the absence of evidence or averment of the period of time occupied in performing any of the work for which the payments in question were made so as to bring into operation the deeming provisions of s. 221C (2).

Decision of the Court of Petty Sessions at Oakleigh, Victoria, affirmed.

APPEAL from the Court of Petty Sessions at Oakleigh, Victoria.

John Arnold Neale, Deputy Commissioner of Taxation for the State of Victoria, as informant, laid two informations, dated 30th June 1954, against Atlas Products (Vic.) Pty. Ltd., a company

incorporated in the State of Victoria. Each contained two averments pursuant to s. 243 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952. The averments in one information related to payments made by the defendant to G. Mulder and in the other information to payments made by the defendant to F. Marston. With immaterial exceptions the averments were in common form, of which the following is representative, namely : " that on 10th July 1952 at Oakleigh the defendant being an employer who paid £26 18s. 6d. in wages to an employee one G. Mulder in respect of a period of one week ending on 10th July 1952 did fail at the time of paying such wages to make a deduction therefrom at the rate prescribed as required by s. 221c of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 ".

The informations were heard before W. N. Thompson, Esquire, a stipendiary magistrate sitting as a court of petty sessions exercising federal jurisdiction at Oakleigh, Victoria. The evidence was as follows. The defendant had paid sums of money to the tilers Mulder and Marston and had not made any deduction on account of tax therefrom. It had no power to direct a tiler to take a job, although the tilers were almost continuously doing jobs for it, nor control over their hours of work or mode of working. Payments more or less at weekly intervals were made by the defendant to each tiler on the basis of jobs completed or deemed to be completed that week. Each job was done on the understanding that a written form of contract with the company would be signed by the tiler on completion of the job. The form of contract was as follows :—

"ATLAS PRODUCTS (VIC.) PTY. LTD.
CR. ATKINSON & DALGETY STS.
OAKLEIGH, S.E. 12 UM 3490

Dear Sir,

I/We hereby contract to supply the necessary labour and/or materials including wire and colour for roof tiling of jobs for . . . As I/we will be employing other persons in respect to this work I/we hereby undertake to make :

(a) the necessary income tax deductions in regard to the earnings of myself and other persons engaged in the said work,
(b) the necessary pay roll tax payments to the Commissioner of Taxation,
(c) will also be responsible for covering the said persons under the provisions of the *Workers' Compensation Act*,
(d) pay all employees award rates inclusive of holiday and sick leave and/or any other special benefits under any such award.

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RECEIPT

Received the sum of | POUNDS | SHILLINGS | PENCE

being in full settlement of the above.

(Signature) "

On 9th August 1954 the said stipendiary magistrate dismissed the information.

The informant appealed to the High Court.

Dr. *E. G. Coppel* Q.C. (with him *B. J. Dunn*), for the appellant. The magistrate failed to take into proper account the averment made under s. 243 of the *Income Tax and Social Services Contribution Assessment Act*. The form of agreement made between the respondent and the tilers was not signed until after the work was done. The evidence is that four of the tilers never employed anybody while the fifth did on odd occasions employ casual labour. The tilers were paid at weekly intervals. All materials were supplied by the respondent. The moneys paid to the tilers were wages paid under contracts which were wholly or substantially for their labour. The sums paid were in respect of a week or part thereof. Under s. 221c (1) of the Act if there has been a payment of wages in respect of a week it is unnecessary to make use of the provisions in sub-s. (2) to ascertain the period for which the worker has been paid. Alternatively, it is put that the agreements between the respondent and the tilers were sham agreements, the real agreement being for the employment of the tilers by the respondent at piecework rates.

K. A. Aickin, for the respondent. The tilers were not servants of the respondent but independent contractors. The degree of supervision and the right to control appropriate to the master-servant relationship was lacking. The evidence shows that jobs were offered by the defendant to tilers although the tiler was at liberty to refuse to do that particular job. He was not bound to start on a particular day or finish on a particular day, or to work any particular hours. If he wished to take a holiday he took it, without asking anyone's permission. [He referred to *Queensland Stations Pty. Ltd.* v. *Federal Commissioner of Taxation* (1), per *Latham* C.J. (2).] I do not rely upon the written contract as constituting, of itself, the whole of the arrangement. It was a document executed after the event by the parties, but it was contemplated before the event

(1) (1945) 70 C.L.R. 539. (2) (1945) 70 C.L.R., at p. 545.

that the document would be executed in that form at the time when the payment was being made. It was not a mere label tied on to the transaction *ex post facto*. It is clear that the definition " salary or wages " in s. 221A (1) extends to some payments to independent contractors. The critical sub-par. is (*a*). It is submitted that it is not concerned with a contract which does not require the person to whom payment is made personally to perform the work. If it is open to him to do it personally or to procure someone else to do it, or to help him, then it is outside the section. Further it is concerned not with contracts to produce stated results or to do particular jobs but with contracts to labour day by day, in effect. The word " labour " is not defined in the Act. The authorities suggest, although they do not decide, that its primary meaning is manual labour. [He referred to *Morgan* v. *London General Omnibus Co.* (1); *Yarmouth* v. *France* (2); *Hume Pipe (Australia) Ltd.* v. *John Lawson* (3).] Assuming that a particular payment made to an independent contractor at common law is none the less within the scope of these sections by reason of falling within the artificial extension of the meaning of the expression " salary or wages ", it becomes necessary to apply s. 221C (2) (*a*). What is required there is that the time taken for the work or services is to be ascertained, and then, under sub-s. (2) (*c*), a method is given for reducing that to a weekly figure in order to fit within the prescribed rates of deduction. In this case, upon the evidence before the magistrate, it is impossible to apply this section. The evidence shows that although the payments were made substantially, or almost, every week, they were not made in respect of a week. They were made in respect of jobs completed during the week, or in respect of jobs deemed by the foreman to be completed irrespective of the starting date. They may have been started and finished within the week. There is no evidence or averment of the time occupied in each job. Consequently there is nothing to show that the weekly figure arrived at under sub-s. (2) (*c*) is more than two pounds.

Dr. *E. G. Coppel* Q.C., in reply.

Cur. adv. vult.

April 1.

THE COURT delivered the following written judgment :—

These two appeals are brought from the orders of a magistrate dismissing two informations which alleged offences under s. 221C of the *Income Tax and Social Services Contribution Assessment Act*

(1) (1884) 13 Q.B.D. 832, at pp. 833, 834.

(2) (1887) 19 Q.B.D. 647, at p. 651.

(3) (1925) S.A.S.R. 385, at p. 389.

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Dixon C.J. McTiernan J. Webb J. Kitto J. Taylor J.

1936-1952. The offence alleged in each instance was said to have been constituted by the failure of the respondent, as an employer, to make the appropriate deduction pursuant to the above-mentioned section when paying wages to an employee in respect of a period of one week. The initial difficulty in the way of the prosecutor was to establish that the payments made to the persons in question were "salary or wages" within the meaning of the section and this difficulty, in the opinion of the magistrate, he failed to overcome.

The evidence showed that the respondent company commonly undertook to supply and fix roofing tiles to buildings in the course of construction and, for this purpose, it was necessary to utilize the services of a number of working tilers. The effect of the arrangements made between the respondent and these tradesmen is a critical matter in the case, it being urged by the appellant that the evidence established that the arrangements resulted in the creation of relationships of master and servant whilst the respondent maintained that the working tilers were, and at all times remained, independent contractors.

Consideration of the relevant statutory provisions may, perhaps, tend to diminish the importance in this case of the general distinction between these two conceptions. Section 221c (1) is in the following terms :—" For the purpose of enabling the collection by instalments from employees of income tax, where an employee receives or is entitled to receive from an employer in respect of a week or part thereof salary or wages in excess of two pounds, the employer shall, at the time of paying the salary or wages, make a deduction therefrom at such rate as is prescribed." For the purposes of this section " employer " is defined to mean a person who pays or is liable to pay any salary or wages and " employee " means a person who receives, or is entitled to receive, salary or wages. " Salary or wages " is defined to mean " salary, wages, commission, bonuses or allowances paid (whether at piece-work rates or otherwise) to an employee as such " and includes, *inter alia*, any payments made " under a contract which is wholly or substantially for the labour of the person to whom the payments are made ". Before the magistrate the competing submissions of the parties were, apparently, directed mainly to the latter provision but, for reasons which will presently appear, the respondent's liability does not necessarily turn upon it. It is clear that moneys paid to an independent contractor in satisfaction of a contractual obligation do not, in the ordinary legal sense, represent salary or wages. Nor are the general words of the definition of " salary or wages " appropriate

to assimilate the remuneration of an independent contractor to the defined term. "Salary or wages" means salary, wages, commission, bonuses or allowances *paid to an employee as such*. The question then arises whether the particular provision that the defined term shall include payments made under a contract which is wholly or substantially for the labour of the person to whom the payments are made sufficiently widens the meaning of the term to embrace, at least in some circumstances, the remuneration of an independent contractor. In the argument addressed to this Court there may have been a suggestion that if in the case of any independent contractor it appeared that the parties contemplated that the contractual work would be substantially performed by the independent contractor himself, although the terms or conditions of the contract, whether express or implied, did not actually require it, the particular extension of the defined term would be sufficient justification for characterizing his remuneration as salary or wages for the purposes of s. 221c. This suggestion, however, is without validity, for if the contract leaves the contractor free to do the work himself or to employ other persons to carry it out the contractual remuneration when paid is not a payment made wholly or at all for the labour of the person to whom the payments are made. It is a payment made under a contract whereby the contractor has undertaken to produce a given result and it becomes payable when, and only when, the contractual conditions have been fulfilled. Moreover, the nature of the payment is not affected by the circumstance that the contractor has himself performed the bulk of the work under the contract or that it was the expectation of the parties that he would do so if, in truth, the contract did not create the relationship of master and servant. It may be, however, that in cases where an independent contractor is required by the terms of his contract to perform the contractual work himself the addition to the general definition may have some application, but it is unnecessary, in the circumstances of this case, to express any concluded view concerning contracts of such a special class. If this be so, however, it is the result rather of chance than design for the extension of the defined term was not, in our view, directed to considerations of the nature referred to. Its language is, in our opinion, designed to deal with circumstances of another kind. It is not unusual for contracts of employment to create obligations on the part of the servant not only to make his services or labour available to the master but also to do additional things. He may, for instance, be required to provide his own tools or equipment:

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(cf. *Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). Or, on the other hand, the contract may provide for additional payments to be made to the employee based on circumstances which, in one sense, may be thought to be extraneous to the mere provision of his services such as a special living allowance in specified areas : (cf. *The Tergeste* (2) and *Midland Railway Co.* v. *Sharpe* (3)). Probably the word " allowance " in the general definition would, at least in most cases, be sufficient to embrace payments of the latter kind (*Mutual Acceptance Co. Ltd.* v. *Federal Commissioner of Taxation* (1)), but the reasons of the minority in that case may have afforded grounds for making some form of special provision for such cases. In many such cases the payments stipulated for may be said to be payments made under a contract wholly or substantially for the labour of the person to whom the payments are made, though it is a simple matter to conceive examples of the former class where remuneration might be said to be *substantially* for the hire of plant or equipment : see, e.g. *Humberstone* v. *Northern Timber Mills* (4) and *Wright* v. *Attorney-General for the State of Tasmania* (5). In any such cases, however, the critical question will be one of fact, but no such question arises in the present case for if the tradesmen, in any of the instances under review, were free to carry out the contractual work themselves or to engage others to perform it for them, either in whole or in part, the payments received by any particular tradesman were in no sense made under a contract for his labour.

According to the facts proved in the case there was substantial regularity, or perhaps continuity, of the relationship—whatever it amounted to in law—between the respondent and each tradesman. The practice was for the respondent to inform a particular tradesman at or towards the end of his previous job that another job was available. It was not, however, established that the respondent had the right to direct the tradesmen to any particular new job and the reasonable inference from the evidence was that there was nothing in their legal relationship to oblige any particular tradesman to undertake or to prevent him from declining any new job. The basis of their relationship, it was said, could be found in a form of document which was tendered in evidence and which, if taken at its face value, indicated clearly that the tradesmen did not become servants of the respondent. This document was in the following form :

(1) (1944) 69 C.L.R. 389.
(2) (1903) P. 26.
(3) (1904) A.C. 349.
(4) (1949) 79 C.L.R. 389.
(5) (1954) 94 C.L.R. 409.

"

H.2936
F. Marston
17.7.52

ATLAS PRODUCTS (VIC.) PTY. LTD.
CR. ATKINSON & DALGETY STS.
OAKLEIGH, S.E. 12 UM 3490

Dear Sir,

I/We hereby contract to supply the necessary labour and/or materials including wire and colour for roof tiling of jobs for
T. LAWRIE, Marlborough St. E. Bentleigh
£24 12s. 9d.

As I/we will be employing other persons in respect to this work I/we hereby undertake to make :

(a) the necessary income tax deductions in regard to the earnings of myself and other persons engaged in the said work,
(b) the necessary pay roll tax payments to the Commissioner of Taxation,
(c) will also be responsible for covering the said persons under the provisions of the *Workers' Compensation Act*,
(d) pay all employees award rates inclusive of holiday and sick leave and/or any other special benefits under any such award.

RECEIPT

Received the sum of Twenty-four POUNDS
twelve SHILLINGS
nine PENCE
being in full settlement of the above.
£24 12s. 9d.

F. C. MARSTON."

But, as appeared from the evidence, these forms were not signed until the completion of each job. Nevertheless, it was said that the terms set out constituted the basis of the contract for each job. The parties were well acquainted with the contents of the form and, it was contended, the evidence established that each job was undertaken on the understanding that a form would be signed on completion and that in the meantime its known provisions should govern the rights of the parties.

Counsel for the appellant ultimately conceded—and we think rightly conceded—that if this was so the appeal must fail and he ultimately sought to establish that, upon the evidence, the terms of this document should be disregarded. In the main he relied

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upon the circumstances that each tiler concerned was regularly, and virtually consistently, employed, that regular weekly payments were made to each of them and that the degree of control and supervision which was exercised was inappropriate to the work of an independent contractor. Whilst there are reasons inherent in the document itself for doubting if it was the real measure of the relationship between the parties, it should be borne in mind that there was no reason whatever why they should not have arranged their affairs in this fashion if they were minded so to do and we should not be disposed to ignore it unless it can be said that the evidence establishes quite clearly that the conduct of the parties was inconsistent with it as the basis of their relationship. But this was not, in our opinion, established by the evidence. There was nothing to show that the tilers were not, in fact, free to perform the contractual work themselves or to employ other labour to carry out or assist in the carrying out of that work. Nor was there anything to establish that any form or degree of control appropriate to the relationship of master and servant was ever exercised. The circumstance that one job succeeded another with regularity and that more or less regular payments were made to the tilers did not furnish any safe basis for ignoring what was quite clearly said to have been the basis of their contractual relationships. On the whole we are of the opinion that there is no sufficient ground for reversing the decision of the magistrate based as it was on the belief that the terms of the document substantially set forth the conditions upon which each tiler was employed upon each job.

But even if our view on this point had been different there was still a difficulty in the way of the appellant. It will be observed that s. 221c requires deductions to be made where an employee receives or is entitled to receive from an employer in respect of a week or part thereof salary or wages in excess of two pounds. By sub-s. 2 (*a*) if the salary or wages is or are paid in respect of piece-work performed by the employee, or in respect of services rendered under a contract which is wholly or substantially for the labour of the employee, the latter is deemed to be entitled to receive that salary or those wages in respect of the period of time from the commencement of the performance of the work or services until the completion of the work or services. Further ancillary provision is made by sub-s. 2 (*c*) which provides that if an employee is entitled, or deemed to be entitled, to receive the salary or wages in respect of a period of time in excess of one week, he shall be deemed to be entitled to receive in respect of each week or part of a week in that period an amount of that salary or those wages ascertained by