The chips don't fall on issue of employment

The Star Pty Ltd v Mitchison [2017] NSWCA 149

Graham White | July 2017 | Employers Liability

Link to decision

Summary

The Court of Appeal recently found that a hotel bellboy was not in the course of his employment when he attended a 'soft' opening of the Marquee Nightclub that was operated, managed and controlled by The Star, who was also his employer.

Background

The worker was employed by The Star as a hotel bellboy. In March 2012, The Star asked various department heads to invite their employees to a 'soft' opening of the Marquee Nightclub to test its operation prior to the official opening.

The worker was invited to the event by his Bell Captain and after finishing his shift at about 3pm on 27 March 2012, he attended the nightclub with his Bell Captain at approximately 6pm.

During the evening, at about 9pm, a mock fire drill was conducted during which there was some pushing and shoving by individuals attempting to reach the fire exit, causing the worker to lose his balance and fall down the stairs suffering serious injuries.

The worker received workers compensation payments and then commenced proceedings against The Star, as occupier of the premises, claiming civil damages.

The Star then applied to the court seeking orders that the worker's injury had occurred in the course of his employment. The decision on this issue was important in determining whether The Star should be properly characterised as an employer or as an occupier at the time of injury.

If the worker was held to be in the course of his employment with The Star then he would be required to satisfy a number of pre-conditions under section 315 and section 318 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) before commencing proceedings and the assessment of any damages payable would be based on the modified rights in accordance with the workers compensation legislation.

Decision

Mr Justice Payne delivered the leading judgment in the Court of Appeal noting that a determination of whether the worker was subject to the limitations of the workers compensation legislation depended upon whether he had sustained an injury arising out of or in the course of his employment as defined in section 4 of the *Workers Compensation Act 1987* and the 1998 Act.

Previously, the trial judge had held that the worker was not injured in the course of his employment and his injuries did not arise out of his employment. The judge relied upon the fact that the employer did not require the worker to attend the nightclub opening as part of his employment; the employer had no expectation that the worker would attend and the worker did not know that the nightclub was owned and operated by his employer.

In the Court of Appeal, Justice Payne gave no weight to the fact that the worker had been paid workers compensation benefits, pointing out that if he was not a worker, there was a common law right to recover the payments made.

Justice Payne quoted in some detail from previous High Court decisions in *Hatzimanolis v ANI Corporation Limited* [1992] 173 CLR 473 and *Comcare v PVWY* [2013] 250 CLR 250 as well as the decision of the NSW Court of Appeal in *Pioneer Studios Pty Ltd v Hills* [2012] NSWCA 324.

His Honour considered that in the present case, the worker had attended the event during an interval between two discrete periods of work as distinct from this being within an overall period of employment such as occurred in the 'camp cases'.

Significant weight was given to the fact that the worker was not an employee of the nightclub and his employer did not provide any real inducement or encouragement for him to attend the opening. His Honour pointed out that only 400 of 4,000 staff members had attended the opening before finding that there was insufficient evidence to conclude that the worker's injury was suffered in the course of his employment in circumstances where he was injured in an interval between two discrete periods of work.

The Court of Appeal also considered the question of whether the injury was one that arose out of the worker's employment and in doing so, rejected the 'but for' test i.e. that the injury arose out of employment simply because the worker would not have been at the scene but for his employment. The court observed that it was relevant to note that the worker was not rostered to work at the time of the accident, that he was injured while he was away from the hotel where he worked as a bellboy and he was not required by the employer to be at the nightclub at the time of the accident.

Implications

In determining whether a worker suffers injury *arising out of or in the course of employment* it is important to consider the entire background and circumstances that led to the injury, including whether the worker received any inducement or encouragement from the employer to attend the particular event.

Different outcomes may result where a worker is injured in an interval between two discrete periods of employment and where the injury is suffered in an interval that forms part of an overall period of work.

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