Court of Appeal 'trashes' attempt to broaden Contractors & Labour Hire policy exclusion

Penrith City Council v Healey [2016] NSWCA 161

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Summary

In the recent case of *Penrith City Council v Healey* the NSW Court of Appeal was required to resolve interesting issues involving an injury sustained in the performance of a council contract by a worker on an internal labour hire arrangement. The labour hire policy exclusion clause was strictly interpreted against the liability insurer of the internal labour hire company, which won on appeal anyway due to a finding that it had not been negligent.

Facts

- The plaintiff, Mr Healey, was injured in the course of his employment as a garbage collector on 29 November 2004, while lifting and emptying a heavy, damaged bin.
- From February 2000, Mr Healey was employed by Usshers Pty Ltd (Usshers), an independent subcontractor engaged by Penrith City Council (the Council), to collect and empty garbage bins.
- From 1 December 2004, due to a restructure, Healey was employed by Usshers Solid Waste Pty Ltd (Solid Waste), a related company. The contract between Usshers and the Council was not assigned to Solid Waste and Usshers continued to perform the contract using labour from Solid Waste.

The Claim

- Healey brought claims in negligence against both the Council and Usshers' liability insurer – the latter pursuant to s601AG *Corporations Act 2001* (Cth) as Usshers had by then been deregistered.
- Healey alleged that the Council had breached its duty of care as a 'quasi-employer', and caused both his 29 November 2004 injury and an accumulated injury due to the nature and conditions of his work, including during the period from 1 December 2004.
- In his proceedings against the liability insurer for Usshers, Healey claimed that Usshers continued on and after 1 December 2004 to owe him a duty of care and that it had breached the duty, which was similar to that of an employer.

Policy Exclusion

- The court had to consider whether the liability insurer could rely on a 'Contractors and Supplied Labour' policy exclusion in respect of the claim against Usshers, as a complete defence to the claim.
- The exclusion relevantly provided:

  "Exclusions
  This policy section does not insure liability arising directly or indirectly out of or caused by, through, or in connection with, or for:

  ...

  13. Contractors and Supplied labour
  personal injury to any person who is not your employee

but 'has been engaged to perform work on your behalf or for your benefit where the contract price or value of the total works relating to the engagement of the person (whether the work of the person forms all or part of such works) exceeds $20,000 during the period of insurance.

However, this exclusion only applies to personal injury to persons:

(a) who are employed by an employment or placement agency, labour hire company or any other organisation, government body or person whose business is, or includes, the supply of labour; and,

(i) whose work is performed in whole or part under your care, control, direction or supervision; or"

Supreme Court

The trial judge, Adams J, largely accepted the plaintiff's arguments and found the Council and the liability insurer for Usshers liable. Adams J held:

1. The Council was responsible for maintaining and repairing the bins and Mr Healey had been injured by lifting damaged and heavy bins.
2. Usshers retained a sufficient degree of involvement in Mr Healey's contract of employment to have a duty of care, and it breached that duty of care.
3. The policy exclusion did not apply, as Solid Waste's business '*was not the supply of labour; rather it was the emptying of the litter bins for which purpose, of course, labour happened to be necessary. Its business utilised labour but did not supply it*'.

Court of Appeal

Both defendants appealed the decision, which was heard by Emmett AJA, Basten JA, and Simpson JA.

The Council

The Court of Appeal unanimously allowed the appeal by the Council, finding that:

- The Council had not breached its duty of care, as it had no responsibility over the day to day operations of the work of Mr Healey, an employee of an independent contractor. This finding was held to be consistent with the principles established by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd*[1].
- Simpson and Basten JJA also found that, while Mr Healy had suffered a nature and conditions injury it was an injury due to his duties generally and he had not established that it was caused by the Council's failure to repair damaged bins.
- Also, while their Honours accepted that the discrete injury of 29 November 2004 was caused by lifting a damaged bin, no breach of duty by the Council was established in respect of this bin.

Usshers' Liability Insurer

There were two broad issues for consideration by the Court of Appeal in relation to the other defendant:

- Whether Ussher owed the plaintiff a duty of care analogous to an employer and if so, whether that duty of care had been breached.
- If Ussher was negligent, whether the 'Contractors and Supplied Labour' policy exclusion operated to preclude cover under the policy.

While the insurer's appeal was ultimately successful, there was no unanimous finding in the Court of Appeal on either issue.

The insurer's argument for the application of the policy exclusion was not accepted by the majority. Simpson JA and Emmett AJA agreed with the trial judge that the 'Contractors and Supplied Labour' exclusion did not apply. This was because Solid Waste was not a 'labour hire company'. However, as Emmett AJA found that there was no breach of duty by Usshers in any event, the insurer's appeal was allowed.

Implications

This case exemplifies the strict approach that will be taken to the interpretation of policy exclusion clauses.

The Court of Appeal was not prepared to extend the application of a 'labour hire' exclusion clause to companies that incidentally supplied labour in the course of their operations, despite one section of the clause referring to entities '*…whose business is, or includes, the supply of labour*'.

Insurers must always take particular care when drafting exclusion clauses to ensure that they are carefully framed to capture the risk they intend to exclude.

This decision also confirms that courts will closely examine the evidence in each case to determine the true nature of the parties' relationship in a work context, with particular regard to the element of control. This element of control and obligations concerning supervision will largely inform the scope of a duty of care owed to a worker, where the relationship falls outside the employer/employee category.

[1] Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16

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