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Update – Foreign workers and workers compensation

MG Lines Pty Ltd trading as Coniston Station v Lior Navi

Recently, an issue arose as to whether someone working for an Australian / Northern Territory employer illegally per the Federal *Migration Act* could claim workers compensation for work related injury.

A case stated was filed to the Northern Territory (NT) Supreme Court from the NT Work Health Court to analyse this issue and reach a decision, but we won't get an answer for now as that case stated was stayed pending the outcome of a separate common law action for damages against the employer by the same employee.

Facts

Mr Lior Navi alleged that he worked for Coniston Station near Alice Springs. In August 2007, during work duties, Mr Navi injured his leg when he was gored by a bull in the cattle yards.

He claimed workers compensation from the Station under the NT *Workers Rehabilitation and Compensation Act* (WRCA). The employer disputed liability.

According to the Station, Mr Navi (i) was not an Australian citizen; and (ii) had no entitlement to work in Australia under the Federal *Migration Act* (see section 235 and section 245AC) – therefore:

- any employment agreement between Mr Navi and Coniston Station was void for illegality.
- the result is Mr Navi could not be a "worker" (as that term is defined in the WRCA).

Mr Navi filed an action in the NT Work Health Court seeking compensation under the WRCA.

If Mr Navi was not a "worker" under the WRCA, then the section in the WRCA that bans a common law action by a worker against his employer would not apply. On 13 November 2012, Mr Navi filed a Supreme Court action against Coniston Station for common law damages.

According to his lawyer, Mr Navi was likely to receive more by way of common law damages than statutory compensation under the WRCA. Mr Navi's lawyer said that "it is in Mr Navi's interests to succeed in the common law action for damages rather than the Work Health Court proceedings as the damages in the common law action are likely to be substantially higher than any compensation he may receive" under the WRCA "particularly as Mr Navi is resident overseas and therefore not entitled to weekly payments of compensation under s64 and s65" of the WRCA (as a consequence of s65B).

There are now two Court actions on foot (one in the Work Health Court seeking benefits under the WRCA on the basis that Mr Navi was a worker; and the other in the Supreme Court for common law damages (arguing the other way)).

Even though the work injury happened about 6 years ago, Mr Navi's lawyer pointed out that "neither the Work Health proceeding nor the common law proceeding was particularly far advanced. No further steps have been taken in the common law proceeding beyond the filing of the statement of claim and defence. In the Work Health proceeding nothing further has been done other than to state a case for the opinion of the Supreme Court."

On 7 December 2012, the Work Health Court reserved some questions about the issue of whether Mr Navi was a worker under the WRCA for the Supreme Court to decide. That was going to be argued on 24 April 2013.

However, on 16 April 2013, Mr Navi applied to the Supreme Court to stop the Work Health Court matter from proceeding – until the common law action was sorted.

Mr Navi said it was not sensible to run the risk of the Work Health matter being decided one way and the common law case another. He said one of these cases only should proceed for determination – the common law case.

Because of the "very real prospect that the determination of the common law action will render the case stated proceeding unnecessary and put an end to the Work Health proceeding", the NT Supreme Court decided to stay the Work Health Court proceeding and the case stated to the Supreme Court (about whether Mr Navi was a "worker").

Mr Navi is now free to continue with his common law action for damages against Coniston Station. The public liability insurer is different to the workers compensation insurer. It is anticipated one of the defences in the common law action will be that it is barred because Mr Navi is a "worker" under the WRCA and, therefore, the common law bar applies.

Are people working illegally "workers" under the WRCA?

The WRCA does not distinguish between authorised and unauthorised workers under the *Migration Act*. It seems to us employees prohibited from working in Australia under the *Migration Act* can be "workers" under the WRCA. However, Guthrie, R (2004) points out that, given conflicting superior court findings on this topic in other Australian jurisdictions, "an appeal to the High Court on these issues may be needed to finally settle the matter."

In *Australian Meat Holdings P/L v Kazi* (2004), the Queensland Court of Appeal (by majority) determined an illegal worker could not claim workers compensation under the Queensland legislation (which defined "worker" as "an individual who works under a contract of service").

Davies JA (one of the two judges in the majority) said that if "it is in the national interest to prohibit unlawful non-citizens from performing work it must also be in that interest, it seems to me, to prohibit any such person obtaining rights under a contract to perform work…[O]n the contrary it is cast in terms of an absolute prohibition and, for reasons which I have given, it should be construed as one which forbids the making of a contract for the performance of work by an unlawful non-citizen."

In South Australia, the Full Court there in *San Remo Macaroni Co Pty Ltd v Liang Da Ping* (1994) reached a similar conclusion. In the South Australian legislation, "worker" is defined as "a person by whom work is done under a contract or service."

It was argued that the "entitlement to compensation therefore depends upon the existence of a valid contract of service" and as the employee was working illegally, there could be no valid contract of service. King CJ (with who the other judges agreed) said that as the employee was "not working under a valid contract of service [then he] was not a worker" under the workers compensation legislation and therefore he was not entitled to benefits.

On the other hand, the NSW Court of Appeal in *Nonferral (NSW) Pty Ltd v Taufia* (1998) determined, by a majority, that a contract of service entered into by an illegal entrant in breach of the statutory prohibition in the *Migration Act*, s 83(2) did not render the contract illegal and unenforceable so as to disentitle a worker from claiming workers' compensation under the NSW legislation. The definition of "worker" was "any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied or is oral or in writing."

The NT WRCA has a much broader definition of "worker" than the definition of worker that was examined in the Qld *Kazi* and SA *La Ping* cases. The NT definition refers to a worker as a "natural person (a) who under a contract or agreement **of any kind** (whether expressed or implied, oral or in writing or under a law of the Territory or not) performs work or a service of any kind for another person…" (emphasis added).

The issue will be whether, despite ss235 and 245AC of the *Migration Act*, a lawful non-citizen prohibited from working is a "worker" for the purposes of the WRCA.

For a comprehensive discussion on this topic, see Guthrie, R (2004). Guthrie argues the South Australian case was probably wrongly decided. Due to the *Kazi* case, Guthrie points out the "terrain in relation to contracts for work engaged in by illegal non-citizens or persons who are not the holders of appropriate visas is much more uncertain."

Guthrie also notes that Western Australia and New South Wales have legislated to allow compensation, in certain circumstances, to persons employed under apparently illegal contracts of employment.

Guthrie concludes that "although the *Migration Act 1958* (Cth) prohibits a range of persons, particularly tourists, from obtaining employment, it does not exclude them entirely from the protection of Australian employment laws."

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