CITATION: *Lewis & John Holland Group* [2002] NTMC 040

PARTIES: Ray Lewis

v

John Holland Group

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health Act

FILE NO(s): 20018624

DELIVERED ON: 25 October 2002

DELIVERED AT: Darwin

HEARING DATE(s):

DECISION OF: Mr Wallace

CATCHWORDS:

WORKERS COMENSATION - WORH HEALTH
Work Health Act s 3 (1)(d) –"worker" *Work Health Amendment Act* 2000 s 3 (c) – "worker"-s 4 –transitional provision
Whether an employee paid cash without income tax deductions was a "worker" before and after the *Work Health Amendment Act* 2000.

REPRESENTATION:

Counsel:
Worker: P McNab
Employer: P Barr

Solicitors:
Worker: Withnall Maley
Employer: Hunt & Hunt

Judgment category classification: C
Judgment ID number: [2002] NTMC 040
Number of paragraphs: 29

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20018624

BETWEEN:

RAY LEWIS
Worker

AND:

JOHN HOLLAND GROUP
Employer

REASONS FOR DECISION
(Delivered 25 October 2002)

Mr WALLACE SM:

INTRODUCTION

1. This is an application for payments of compensation pursuant to the *Work Health Act* ("the Act"). The Worker, Ray Lewis ("Mr Lewis"), was employed on some sense by a Mr John B Zagorianas (or it may be, as spelt in the pleadings, Zagiranos – I take the first spelling from Ex 4, and that is one I shall use for the name). Mr Lewis was injured when he fell from a ladder in the course of that employment. John Holland Group, named as a party – the Employer – in the action was the principal contractor at the site at Shoal Bay where Mr Lewis was injured, and is liable to pay compensation to a Worker employed by a "subcontractor" (e.g Mr Zagorianas), as if the Worker had been employed by the principal contractor. John Holland Group is entitled, pursuant to s 127 (3) to be indemnified by Mr Zagorianas; and Mr Lewis is not prevented from recovering compensation from him – see s 127 (3). John Holland Group's entitlement appears to be worth very little, and Mr Lewis's choice of John Holland Group as the Employer is easily

understood because it seems that Mr Zagorianas did not have a current insurance policy covering Mr Lewis.

2. Mr Lewis was not in Mr Zagorianas's employment for long. He probably started work on Monday 26 June 2000, probably worked five days that week, and certainly was injured on the next working day, Monday 3 July 2000. It happened that, on Saturday 1 July 2000, substantial and relevant amendments to the Act came into force. These amendments potentially bear on the question whether Mr Lewis was, at the time of his accident, a "worker" within the meaning of the Act. The hearing before me on 14 and 15 October 2002 was confined to that question, which has been tried as a preliminary, or separate issue.

THE EVIDENCE

3. Mr Lewis was the only witness called to give evidence on the issue. Four exhibits were tendered through him. Mr Lewis's evidence was that he was born in England on 23/3/59 (at some point in his life the Commonwealth authorities – the CES or a successor - got the impression that he was born on 23/3/60, and Mr Lewis sometimes fallen in with this mistaken but hard -to - correct impression, in order to avoid difficulties). He came to Australia when he was about 15, did not get very far with his schooling, but far enough to qualify for an apprenticeship to a painter. He was discharged from his apprenticeship when his master found out he was taking on extra painting work on the side. He has worked as a painter ever since, and has a good opinion of his abilities. He has worked in many places in most of the states of Australia. His evidence is that he first came to Darwin in 1989: a later piece of evidence suggested he was in Adelaide in the early 90s, perhaps still on the move.

4. He has worked in the Territory pursuant to four different taxation regimes. Some of his employment has been on a permanent PAYE basis. Some was under the Prescribed Payments Scheme ("PPS"). Some was on a cash-in-

hand, unlawful basis. And in 1991 he registered a business name, “RIP Painting”, and tried to run his own business. That formally came to an end in 1994, having ceased to operate in practice a year or so earlier, by reason of a combination of circumstances: first, Mr Lewis’s incapacity with the financial and paperwork side of business; secondly, some personal matters to do with his child.

5. Mr Lewis has never in his working life ie, from about 1976, lodged a tax return with the ATO. He seems to have given his position serious thought at the time the tax file number system was introduced in the late 1980s, and went so far as to instruct accountants with a view to lodging the dozen-odd returns then outstanding, to take advantage of an offered amnesty. During that process he did obtain a tax file number. He was not easily able to advance the required fees to the accountants, and his attempts to regularise his position petered out. Sometime in the mid 90’s he was interviewed by officials of the ATO, which again seems to have concentrated his mind on the matter. The ATO has not harassed him since, far less prosecuted him, and Mr Lewis has understandably allowed the problem to slip in his list of priorities. He testified that he was still trying to put some returns together.

6. Mr Lewis’s evidence in relation to this matter of non-lodgment of returns was given, as far as I could tell, frankly and honestly. His persistent breaking of the taxation laws in this regard did his credit no harm. (Nor for that matter, did his having worked once in a while for cash, thus evading all income tax, although my impression was that his evidence perhaps played down the proportion of his work that had been paid on that basis.) Mr Lewis’s evidence is that he believes that, over the years, he has paid a lot of tax, and that (penalties aside), if he ever sorts out his tax returns, he can reasonably hope for a refund. Perhaps so, depending I suppose, on the view the ATO takes as to how much work he has for cash.

7. Mr Lewis's evidence was that his working career was severely interrupted by an injury he suffered to his neck while working in 1997. He never made a claim for compensation for it, and I infer that he was then working either under the PPS scheme, but without his own insurance, or for cash under the table. The injury left him with chronic neck pain. He was prescribed analgesics for the pain, including eventually the opiates MS Contin and anamorph. I have heard no medical evidence, but Mr Lewis's own short account of this course of treatment suggested that it is likely he became addicted to these drugs. He was for a long time unable to work. In mid 2000, he met Mr Zagorianas by chance (Zagorianas was painting the place next door) and asked him for a job. Mr Zagorianas as it happened did need another painter: he had a sizeable contract coming up – at least a week's work – at the Shoal Bay Receiving Station, the John Holland Group site. In order to see what sort of tradesman Mr Lewis was, Zagorianas proposed that Lewis work for him on some smaller jobs, as a trial. There was some discussion of the rate of pay, Lewis asking for $25 per hour, Zagorianas demurring that that rate was appropriate for the very best tradesman, and the rate of pay was left up in the air, except that Mr Lewis expected at least $20.00 per hour. There was, according to Mr Lewis's evidence, no discussion at all of the basis of payment - PAYE, PPS or otherwise. Mr Lewis did not ask: Mr Zagorianas did not specify.

8. Nor did Mr Lewis inform Centrelink of this offer of work. His explanation for his not doing so – that it would be a nuisance to Centrelink and to him if the Mr Zagorianas changed his mind, or if Mr Lewis failed his trial – likewise does no harm to his credit as a witness. Mr Lewis went further than that saying that at least one officer at Centrelink had in the past counselled him thus to delay notification. Perhaps so, but whether it was his own idea or Centrelink's, whether the delay in reporting was regular or irregular, it is certainly all of a piece with Mr Lewis's approach to government authorities

generally; to take the easiest path, cause as little trouble as possible, minimise paperwork and sort out any mess only when he has to.

9. Mr Lewis worked, on trial, during the week commencing Monday 26 June 2000. Mr Zagorianas was very pleased with his work. The John Holland job was to start on Monday 3 July. On Friday 30 June Mr Zagorianas handed Mr Lewis his pay for the trial week: $ 525.00 in cash in an envelope.

10. Mr Lewis was content with that, as pay, and delighted to be working again. He did not enquire, nor did Mr Zagorianas say anything as to how that total was arrived at. Similarly, there was not a word said as to the taxation status of that payment. As it happens 525 = 25x21, and $25 and $21 per hour are both possible rates of pay : $25 is what Mr Lewis hoped for, at best; $21 appears on Ex 2 and Ex 4, as the rate of pay subsisting at the time of the accident, according to Mr Zagorianas.

11. Everything in Mr Lewis's evidence suggested that the payment of $ 525.00 was cash money, under the table payment. There was no pay slip. Mr Lewis had not given his tax file number to Mr Zagorianas. Whether Mr Lewis would ever have informed Centrelink of that payment in the ordinary course of events is doubtful. (In the event, after the accident, he did.)

12. Mr Lewis went to work with Mr Zagorianas at the John Holland site on Monday 3 July 2000. He fell from a ladder late in the afternoon that day, and was badly hurt. He has not worked since. Neither he, nor Mr Zagorianas, said anything apropos of the status of Mr Lewis's employment earlier that day. Moments after the accident, Mr Zagorianas came into the room where Mr Lewis was lying in a welter of blood and a lot of pain. Mr Zagorianas's first words to him were to this effect: "Have you got your own insurance ?" These seem to have been the first ever words between the two possibly directed at the status of the employment. In my opinion these words, uttered in that context, cannot safely be used as an indicator of Mr

Zagorianas's belief as to that status; only that he then saw that there might be a problem.

13. Mr Lewis's evidence is that he had been under the impression that the work would be on a PAYE basis. His impression was based primarily upon his being told by Mr Zagorianas that everything – tools and equipment – would be provided on the job and that he, Lewis need bring nothing, not even the humblest paint scraper. On a PPS job, Mr Lewis would have expected to be required to supply his own stuff. It did not disturb that impression that he had not filled in any forms regarding PAYE employment, because, he said, as a rule, that was not done, in a new PAYE job, until about the time one's first pay packet was due. Mr Lewis's evidence was shot through with the idea, a feeling he had, that the basis of his employment was different on the John Holland Group site from what it had been during the trial period.

14. There was further contact between Mr Lewis and Mr Zagorianas, who kept in touch with Mr Lewis for about 6 months after the accident. (His whereabouts are presently unknown to the parties. I was told from the bar table by Mr Barr, counsel for the John Holland Group, that he is believed to have left Australia and to be residing in Greece.) On 29 July 2000, at a time when Mr Zagorianas was visiting the convalescent Mr Lewis, Mr Zagorianas filled in the "Employer's Report" section of Mr Lewis's Worker's Compensation Claim Form. In fact, as emerged in Mr Lewis's evidence to the surprise of both counsel, Mr Zagorianas filled in two such forms. His first effort (Ex 4) was not acceptable to Mr Lewis. In it, Mr Zagorianas answered the question "When was the Worker first employed by you?" by writing "3/7/00", that is, omitting any mention of the week commencing 26/6/00. This is a further indication that that week's work was paid under the table, and that Mr Zagorianas wished it to stay there. Mr Lewis insisted that the work be acknowledged, and Mr Zagorianas's second effort, (a copy of which is Ex 2) has "26/6/00" in answer to that question. On both Ex 2 and

Ex 4, Mr Zagorianas wrote "none" in answer to the question. "What is your worker's compensation insurer's name?"

15. Mr Lewis had been in touch with the Work Health Authority before this meeting with Mr Zagorianas on 29/7/02. He had plainly come to believe that this was necessary to acknowledge the period of work in the week commencing 26/6/00. He lodged the second form, Ex 2 and kept the first Ex4. He appears not to have mentioned its existence to anyone until he guilelessly referred to it in the course of his evidence in chief. As to his own section of the form, there are some differences between his writings in Ex 4 and Ex 2. They are not differences, which, in themselves, manifest any desire on Mr Lewis's part to improve the situation between the Ex 4 version, filled in on 21/07/00, and the Ex 2 filled in, it would seem, on 29/7/00 but dated by Mr Lewis, consistently with his irregular approach to all matters official, 21/7/00. In section 2, on both forms, he described himself as a painter, working full time, and he answered "Yes" to the question "Does your employer deduct PAYE tax from your pay?".

16. Mr Lewis's description of his injury speaks of lacerations to his knee. In his evidence before me, the more debilitating injury was one to his back, which is not mentioned on the claim form at all, nor, so far, in the pleadings in the matter. That aspect of the case may be a problem for another time. For present purposes, its relevance is limited to my consideration of the significance of Mr Lewis's writing in another part of the form, the authorisation for Medical Information, wherein Mr Lewis wrote, on Ex 2 "Note. Personal details regarding knee injury only" (and to similar effect on Ex 4). In cross-examination Mr Barr suggested that Mr Lewis imposed this reservation in order to keep secret the effects of the previous injury to his neck. Mr Lewis denied this: without telling me what it is, he says there is some other – and, I infer embarrassing – medical history that is irrelevant to the case and which he thought ought not to be disclosed. Mr Barr's suggestion was mildly put, at this stage, and Mr Lewis's answer, though

mysterious, was convincing enough. I am not of the view at this stage that Mr Lewis, in imposing that reservation was demonstrating any calculated cunning directed to the unfair advancement of his claim. On the other hand, by 21/7/00, Mr Lewis was well aware that there might be problems with his worker's compensation, and it is only to be expected that self-interest might influence his choice of answers to some of the questions, especially in those cases where the true answer was not altogether clear, but the question in the form permits only "Yes" or "No" answers. In short, I do not find the Claim Form of any assistance in assessing Mr Lewis's credit: neither for nor against. I can only assess his credit from his testimony. In general, he seemed to me to be an honest witness. The difficulty with his evidence does not relate to his honesty, but rather to the lack of so many of the documents (which can also serve as aids to memory and a check on imagination) which would exist for any worker who had a more regular relationship with the taxation authorities.

THE LAW

17. Up to and including 30 June 2000, (and applying, therefore, to the period of Mr Lewis's "trial" with Mr Zagorianas) "worker" was defined in s 3(1)d of the Act as " a natural person" for present purposes:

> "who, under a contract or agreement of any kind (whether express 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 and who is a P.A.Y.E taxpayer in respect of any remuneration or other benefit received in relation to the performance of such work or service.."

18. "P.A.Y.E. taxpayer" in relation to a worker, was defined to mean:

> "…that his or her employer makes deductions from money paid to the worker for work performed or service provided to the employer in accordance with Division 2 of Part VI of the *Income Tax Assessment Act* 1936 of the Commonwealth and includes a worker in respect of whom such deductions are not made by his or her employer but only because –

(a) of the shortness of time during which the worker has been with the employment of his or her employer…."

19. Consequent upon, it would seem, the changes to federal taxation law that accompanied the introduction of the Goods and Services Tax, the definition of "worker" was amended by act No 27 of 200 to read (relevantly):

"a natural person –

(i) who, under a contract of 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 unless and until the person notifies the other person, in writing of a number that is or purports to be, the ABN of that person for the purposes of the work or service…"

20. The definition of "P.A.Y.E. taxpayer" was repealed. A definition was inserted for "ABN", which does not concern me in this case because I have not reason to think that Mr Lewis ever possessed one.

21. The Amending Act commenced on 1 July 2000, and was in force, therefore, on the day Mr Lewis worked on the John Holland Group Site, and had his accident. The Amending Act contained transitional provisions; relevantly:

"4. Transitional

(1) If immediately before the commencement of this Act a person was not a worker of person for whom he or she was performing work or a service because he or she was not a P.A.Y.E taxpayer, the person is not to be taken to be a worker of that person for the purposes of the Principal Act in respect of any work or service performed for that person after that commencement despite that the person does not notify the person in writing of a number that is, or purports to be, the ABN of the person for the purposes of the work or service….

(3) Subsection (1) ceases to apply on 1 August 2000…"

22. There is some authority on the old definition of "worker" and "P.A.Y.E. tax payer". In *Michalak v Murlise Pty Ltd* (1995) 125 FLR 305 (Thomas J) and in *Groote Eylandt Mining Co Ltd v Thompson* (unreported judgement of

Bailey J of 21/3/02, File No.LA 21/2000) the decisive fact was that each Employer had certainly not been making deductions at the P.A.Y.E rate. Rather, the Employer had in each case been making deductions of 20%, which was consistent with the Prescribed Payment Scheme. The being so, Nicholak and Thomson were not "P.A.Y.E. taxpayers", and therefore not "workers". This conclusion followed whether the accounting practice of the Employer was right or wrong as a matter of federal taxation law. As Bailey J said in *Thompson* (paragraph 38):

> "[38] In the present case, it was not only an agreed fact that at all material times the employer did not deduct instalments of income tax on a PAYE basis, but the learned magistrate also found the employer never intended to make PAYE deductions on behalf of the respondent. The reason the PAYE deductions were not made had no connection with the "shortness of time" of the respondent's employment. PAYE deductions were not made because the employer had made a conscious decision not to make such deductions. He had made a conscious decision to make deductions of tax on the PPS basis. In such circumstances, it is not to the point that at some future indeterminate time, the ATO may have discovered that tax deductions were being made from the respondent's wages on an incorrect basis and moved to correct the situation. The respondent did not fall within the exception provided for in the definition of PAYE taxpayer."

23. In these cases there was clear evidence of the Employers' conduct and intentions in relation to deductions. In *Herbert v KP Welding Constructions Pty Ltd* (1995) 125 FLR 299, (Court of Appeal: Martin CJ, Angel & Thomas JJ.) as in the present case, there was no such clear evidence. In the court below *KP Welding Constructions Pty Ltd v Herbert* (1995) 102 NTR 20, Kearney J reproduced the trial magistrate's summary of the evidence (at p24-27) and findings of fact, (at p 27). It is apparent from that detailed summary that the only two possible bases for Herbert's employment were PAYE or PPS.

24. This is implicit also in the findings of fact reproduced by Kearney J, and also in the joint judgment of Martin CJ and Thomas J on appeal. Angel J

who concurred in allowing the appeal, appears to have relied on the same findings of fact, which were (125 FLR at 301):

> "1. As at the date of the injury the appellant and the respondent had agreed to the appellant's general working hours
>
> 2. As at the date of the injury the appellant and the respondent had agreed that the appellant would be paid $ 14 per hour.
>
> 3. As at the date of the injury there had been no discussion or agreement between the appellant and the respondent as to whether income tax was to be deducted at the PAYE rate or the prescribed payments rate provided for in Div 3A (the prescribed Payment Scheme Rate) His Worship expressly said that he preferred the evidence of the appellant to the evidence of the respondent in that regard.
>
> 4. That the injury giving rise to the claim was sustained two days after the employment commenced and prior to any moneys being paid by the respondent to the appellant for his work.
>
> 5. That it was because of shortness of time during which the appellant had been in the employment of the respondent that no money was paid to the appellant prior to the date of the injury and thus there had been no deductions from the moneys."

25. As to the approach to be taken in that factual situation , Martin CJ and Thomas J said at p 302-3:

> "If the relationship between the parties as at the date of the injury is in dispute in circumstances such as arose in this case it is necessary for that relationship to be determined by the Work Health Court. It must make a decision whether or not the injured worker fell within the definition., based upon an assumption that the parties would not evade the provisions of the *Income Tax Assessment Act* by "shift or contrivance" *Fox v Bishop of Chester* (1824) 2 B & C 635 at 655; 107 ER 520 at 527. A court of law ought not to contemplate that parties to an employment contract would come to an agreement that, notwithstanding the relationship established by that contract they would or might pretend that the contract was other than it was for taxation purposes. Whenever a situation such as this arises the correct approach is to consider what the position would have been had the worker been paid for his labour immediately prior to the injury giving rise to his claim for compensation. In these circumstances the definition of "PAYE taxpayer" should be adjusted,

> in the grammatical sense on only, so as to read "in relation to a worker, means that his employer should have made deductions from money paid to the worker for work performed or services provided to the employer in accordance with Division 2 of Part VI off the *Income Assessment Act* of the Commonwealth, but such deductions were not made by his employer only because of the shortness of time during which the worker was in the employment of his employer".

Angel J said at p 304:

> "The parties having entered a legal relationship which attracted PAYE obligations and that relationship subsisting at the time of the accident, it follows that the shortness of employment was the only reason PAYE deductions were not made, assuming, as we must, that the respondent would meet its legal obligations."

26. In the present case, the two possible bases for Mr Lewis's employment were PAYE, and cash under the table. There is no evidence, as there was no evidence in *Herbert,* of, a PPS arrangement, even if (as in *Herbert*) given time and barring accidents, that is the arrangement Mr Lewis and Mr Zagorianas may well have arrived at when they got around to putting their minds to the question. Where the present case differs from *Herbert* is the possibility that what they contemplated was in fact a regime of unlawful cash payments with no deductions at all for taxation purposes. In my judgment such an unlawful regime as that is not a "shift or contrivance" by the use of which "parties to an employment contract would come to an agreement that, notwithstanding the relationship established by that contract, they would or might pretend that the contract was other than what it was for taxation purposes."

27. It seems clear that, under the Act as it stood up to 1 July 2000, an employee paid entirely under such an unlawful regime was not a "worker". It seems equally clear that, since 1 July 2000, an employee so paid has been a "worker". The only exceptions would be those included in the transitional provisions of the amending Act. The burden of proof is on Mr Lewis to prove, on the balance of probabilities, that on 3 July 2000 he was a "worker".

28. I have already expressed my reasons why I am strongly of the view that the payment of $525.00 made on 30 June 2000 was a cash payment from which no PAYE deductions had been made by Mr Zagorianas. Unless there is some persuasive reason to characterise the relationship between Mr Lewis and Mr Zagorianas as different on 3 July from what it was on 30 June, it seems to me that the making of that payment, in context, effectively forecloses the argument that deductions were not made only because of shortness of time.

29. I cannot find, in the evidence of Mr Lewis, sufficient material to persuade me that there was any difference. Mr Lewis's feeling, idea, impression of a difference may be correct based upon his experience in the industry, customs of the trade and judgment of his situation. He obviously has reason to want it to be correct now, and seems genuinely to hold that view now. Whether he would have held the same view on Monday morning, 3 July 2000, if asked, is in my opinion unproven. Indeed, on all the evidence my conclusion is that it is at least as likely that a continued regime of cash payments was contemplated. I am therefore not persuaded the Mr Lewis was a "worker". That being so it seems to me that the Application should be dismissed, but I will hear the parties on that question, and as to any ancillary matters.

Dated this twenty fifth day of October 2002.

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R. J. WALLACE
STIPENDIARY MAGISTRATE