CITATION: *Bader v Cyclone City Cleaners Pty Ltd* [2010] NTMC 044

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| PARTIES: | ANDREAS BADER |
| | V |
| | CYCLONE CITY CLEANERS PTY LTD |
| TITLE OF COURT: | Local Court |
| JURISDICTION: | Small Claims |
| FILE NO(s): | 20941863 |
| DELIVERED ON: | 2 July 2010 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 29 June 2010 |
| JUDGMENT OF: | J Johnson JR |

**CATCHWORDS:**

AWARD WAGES - RIGHT TO BE PAID CREATES A STATUTORY DEBT – EMPLOYER NOT TO UNILATERALLY DEDUCT AMOUNT ALLEGEDLY OWED BY THE EMPLOYEE TO THE EMPLOYER. SECTION 22A *LAW REFORM (MISCELLANEOUS PROVISIONS) ACT* – MEANING OF "SERIOUS AND WILFUL, OR GROSS, MISCONDUCT IN THE COURSE OF EMPLOYMENT"

**REPRESENTATION:**

*Counsel:*

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|---|---|
| Plaintiff: | In person |
| Defendant: | Mr Cacciotti |

*Solicitors:*

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| Plaintiff: | N/A |
| Defendant: | N/A |

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| Judgment category classification: | C |
| Judgment ID number: | [2010] NTMC 044 |
| Number of paragraphs: | 35 |

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20941863

BETWEEN:

ANDREAS BADER
Plaintiff

AND:

CYCLONE CITY CLEANERS PTY LTD
Defendant

REASONS FOR JUDGMENT

(Delivered 2 July 2010)

Mr J JOHNSON JR:

**The Issue Stated**

1. Between the months of April and August 2009, the plaintiff was employed as a cleaner with the defendant cleaning company. The plaintiff resigned such employment effective the pay period ending 5 August 2009 and the defendant unilaterally withheld the final week of wages owing to the plaintiff on grounds that he had allegedly caused damage to a company vehicle and was liable for the cost of repairs. The plaintiff, in his Statement of Claim, claims his entitlement to that final week of wages in the amount of $944.33 plus the Small Claims Court filing fee of $72.00.

2. The defendant denies the claim *ab initio* and says, by way of its Counterclaim, that the "plaintiff did wilfully damage a work vehicle he was driving which resulted in (sic) vehicle needing the motor replaced" and that he is thereby liable for the cost of repairs. As far as I can ascertain from the evidence before me the total cost of repairs amounted to $4,959.26 (Exhibits "D3", "D5" and "D7").

3. Further, the defendant says at hearing that, in any event, the plaintiff was overpaid during his employment and was only entitled to wages for the pay period ending 5 August 2009 in the amount of $88.08 (Exhibit "D6").

4. It is not in dispute that the plaintiff was employed pursuant to the *Cleaning Contractors (Hygiene and Pollution Control) Industry (Northern Territory) Award 2003* (the "Award").

**The Defendant's First Argument**

5. The defendant's first argument proceeded on the basis that it was authorised to unilaterally deduct the cost of repairs from the plaintiff's final week of wages by force of a written agreement between the parties executed at the time the plaintiff commenced his employment (Exhibit "P2"). That agreement provided, *inter alia*, at paragraph 15 that:

> … [T]he Company will not be responsible for the repair of machinery, equipment and vehicles that have been damaged either directly or indirectly by Cyclone City Cleaner's employees being negligent or careless when using said equipment, machinery or vehicles.
>
> …
>
> … [T]he responsible employee will be required to contribute part or all of the cost of repairs to the damaged item. Depending on the amount required to repair the damage, payment may be required as a "once off payment" or as a scheduled deduction from employees wages until the full cost of repairs has been repaid to the Company.

6. Upon that basis, the defendant's argument was, essentially, that the damage to the vehicle having been caused by the plaintiff's "negligence" the agreement entered into by the parties at the time of commencement of employment authorised the defendant to deduct the cost of repairs from the plaintiff's final wages.

**The Law**

7. In *Macken's Law of Employment*, Sixth Edition, Law Book Co. 2009 at page 387, the learned authors (with authorities omitted) state:

> Right to award wages as a statutory debt
>
> [10.40] The right to be paid wages creates a statutory debt that arises independently of any agreement between the employer and employee; an employee entitled to the benefit of an award can recover award wages even if she or he agreed to receive a lower wage. It is not open to an employer to unilaterally deduct from award wages an amount owing by the employee to the employer. This right to receive award wages is enforceable not only in the industrial courts but also in the ordinary courts of civil jurisdiction.

8. In my opinion therefore, the state of current Australian law is clear in its terms that the defendant has no lawful capacity to unilaterally withhold award wages owing to the plaintiff against any debt allegedly owed to it by the plaintiff, and the plaintiff is entitled to sue for that amount as a "statutory debt" in this jurisdiction.

9. I countenance some concern as to the *locus standi* of the types of agreement evidenced in Exhibit "P2", particularly in circumstances where they are entered into as part of an offer of employment. However, for present purposes there is no need for me to make any specific finding about that. In my opinion, such agreement does not provide the authorisation asserted by the defendant. As I have recited at paragraph 7 above, "the right to be paid wages creates a statutory debt that arises independently of any agreement between the employer and employee".

10. I take some comfort in that conclusion by reference to section 326 of the *Fair Work Act* 2009 (Cth):

> **SECT 326 Certain terms have no effect**
>
> Unreasonable payments and deductions for benefit of employer

(1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or

(b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;

if either of the following apply:

(c) the deduction or payment is:

(i) directly or indirectly for the benefit of the employer, or a party related to the employer; and

(ii) unreasonable in the circumstances;

…….

11. I therefore find that the defendant was not, and is not, authorised to deduct from the plaintiff's award wages the cost of repairs to the defendant's vehicle.

**The Defendant's Counterclaim**

12. The defendant's second argument that the cost of repairs ought properly be sheeted home to the plaintiff was its Counterclaim in this proceeding (see paragraph 2 above). The exact quantum of the Counterclaim is not revealed in the pleading but, as I understood the defendant's submissions at hearing, it seeks an order that the plaintiff pay the total cost of repairs ($4,959.26).

13. The circumstances giving rise to the alleged damage are that during the course of his employment on the evening 27 July 2009, the plaintiff was driving a vehicle the property of the defendant. At the relevant time he was departing the driveway of a client workplace and drove the vehicle in such a

manner as to cause the vehicle's engine bay area to impact the road or road guttering. This had the effect of damaging the vehicle's oil filter, resulting in a loss of engine oil. The plaintiff stopped the vehicle to assess the damage and, noticing a significant quantity of oil on the ground, rang his supervisor for advice. Notwithstanding the obvious loss of oil, the plaintiff's evidence was that the supervisor instructed him to return the vehicle to the defendant's workshop, which he did. The vehicle was subsequently towed to an automotive repairer who relaced the damaged oil filter, replenished the oil and returned the vehicle to service.

14. The defendant adduced evidence on statutory declaration from Mr Shiv Charan (Exhibit "D1"), Mr Joseph Galea (Exhibit "D2") and Ms Vasos Loppas (Exhibit "D9"). In my opinion, the evidence of Mr Galea and Ms Loppas was largely self serving and I give it little weight. The evidence of Ms Charan, on the other hand, is deserving of more weight as she was the plaintiff's "partner" for work purposes and was present with him in the vehicle at the time of the accident. Her evidence was that the plaintiff had spun the wheels of the vehicle as he accelerated onto the road and that this had been the cause of the accident. None of the authors of the statutory declarations were available for cross-examination.

15. For his part, the plaintiff did not adequately explain the cause of the incident resulting in the damage to the vehicle, and I am left to the view that his conduct was, more likely than not, negligent in the circumstances. However, he was very clear in his evidence that the defendant's supervisor instructed him to drive the vehicle back to the defendant's workshop. This was a matter of contention as the supervisor avers in his statutory declaration (Exhibit "D2") that he gave no such instruction. In that regard I prefer the *viva voce* evidence of the plaintiff (as to which see paragraph 23 below).

**The Law**

16. In my opinion, whether or not the defendant can succeed in its Counterclaim depends upon whether the plaintiff has committed "…serious and wilful, or gross, misconduct in the course of his employment" (section 22A(3) of the *Law Reform (Miscellaneous Provisions) Act*). I am led to that conclusion by the discussion in *Wylie v The ANI Corporation Limited* [2000] QCA 314 at paragraphs 15 to 17 (per McMurdo P):

> [15] There has been some judicial questioning as to whether *Lister v Romford Ice & Cold Storage* [1957] AC 555 remains good authority for the propositions that there is no implied term in a contract of employment that an employee is entitled to the benefit of an insurance policy held by the employer or that the employer is entitled to be indemnified by the employee against any liability for negligent conduct in the course of employment. In *Rowell v Alexander Mackie College of Advanced Education*, Samuels JA was inclined to think that there was implied in every contract of employment under which a person is required to drive his employer's motor vehicle as a matter of law a term
>
> "… to the effect that the employer would maintain in force an insurance policy in standard form covering both the employer's and the employee's liability for loss of or damage to the property caused by the negligent driving of the insured motor vehicle by the employee in the course of his employment and any damage so occasioned to the employer's own property; and to the further effect that the employer would exhaust its rights under the policy before seeking any recovery from the employee. This conclusion would be contrary to *Lister*. But … there is no ground for regarding that case as determinative of industrial conditions at the other end of the world 30 years after it was decided."
>
> [16] *Lister* was followed by the majority (Mackenzie and Helman JJ) in the Queensland Court of Appeal in *A R Griffiths & Sons Pty Ltd v Richards*. Fitzgerald P dissented and noted:
>
> "*Lister* should, in my opinion, now be considered in this State as a decision which related to a different setting, in terms of time, place, social attitudes and legislative context, the majority view which has never, so far as I have discovered, been accepted as correct by the High Court as an integral part of its reasoning or by any other Australian appellate court, but has been questioned and on occasions criticised. In my opinion, the material terms of the contract of employment between the employer and the negligent employee

should be decided by the application of the principles concerning the implication of contractual terms established by the High Court, in the context of the *Workers' Compensation Act* and the *Law Reform (Tortfeasors Contribution, etc) Act* and prevailing industrial attitudes and employer/employee relations in the Queensland community."

[17] The legal principles established in *Lister* allowing an employer to sue an employee for damages arising out of the employee's mere negligence were also criticised by Fox J in *Marrapodi v Smith-Roberts*. Legislative intervention in a number of jurisdictions (although not Queensland) has clarified the position.

17. The "legislative intervention" referred to is, in this jurisdiction, section 22A of the *Law Reform (Miscellaneous Provisions) Act*:

**22A Rights in cases of vicarious liability**

(1) Notwithstanding any other law in force in the Territory, or the provisions, express or implied, of a contract or agreement, where an employee commits a tort for which his employer is vicariously liable:

(a) the employee shall not be liable to indemnify the employer in relation to the vicarious liability incurred by the employer; and

(b) unless the employee is otherwise entitled to indemnity in relation to his liability, the employer shall be liable to indemnify the employee in relation to the liability incurred by the employee,

arising from the commission of the tort.

(2) Where an employer is proceeded against for the tort of his employee, and the employee is entitled in pursuance of a policy of insurance or contract of indemnity to be indemnified in relation to a liability that he may incur in relation to the tort, the employer shall be subrogated to the rights of the employee under the policy or contract in relation to the liability incurred by the employer, arising from the commission of the tort.

(3) Where a person commits serious and wilful, or gross, misconduct in the course of his employment and the misconduct constitutes a tort, subsection (1) shall not apply in relation to the tort.

18. I do not believe it necessary, for present purposes, to explore any difference in approach between a tort and a contract in the context of the current dispute; I think it may be fairly assumed that the defendant may counterclaim in tort or contract or both. Similarly, it is not in dispute that the defendant has exhausted its rights under its insurance policy to recoup its cost of repairs (Exhibit "D7").

19. So it is that I have reached the opinion in paragraph 16 above ie, that whether or not the defendant can succeed in its counterclaim depends upon whether the plaintiff has committed "…serious and wilful, or gross, misconduct in the course of his employment". The onus of proof with respect to the counterclaim is borne by the defendant.

20. The term "serious and wilful misconduct" has been the subject of much judicial interpretation and authority dating back, at least, to 1886 (*Pearce v Foster* 17 QBD 536) albeit in the context of an employer's power of summary dismissal, and without the added qualification of "gross" contained in the NT legislation. A useful review of that authority is canvassed in *Bunnings Group Ltd v Workcover Corporation of South Australia* [2008] SAWLRP 8.

21. It is, I think, unnecessary to embark upon such a detailed analysis for the purposes of the current dispute but I am minded, as a statement of general principle, to rely upon the remarks of the Master of the Rolls in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] All ER 285:

> To my mind the proper conclusion to be drawn from the passages which I have cited and the cases to which we were referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. …

> I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that disobedience must at least have the quality that it is "wilful"; it does (in other words) connote a deliberate flouting of the essential contractual conditions.

22. Upon a careful review of the evidence before me, and keeping in mind section 12 of the *Small Claims Act*, in my opinion the defendant has not satisfied the legal onus upon it sufficient to succeed in its counterclaim. I again note the use of the additional qualification "gross" used in section 22A(3) of the relevant NT legislation here under discussion and reiterate my view that the one act of misconduct, if that what it be, asserted by the defendant does not meet the threshold requirement of being "…serious and wilful, or gross, misconduct". If the Act required no more than "mere negligence" I may well have been persuaded otherwise. However, and as I have said above, the threshold is much higher than that.

23. If I am wrong about that then, in any event, I would not be prepared to find the plaintiff liable for the total cost of repairs to the defendant's vehicle. As I understood the evidence, the initial repair to the vehicle involved replacement of the damaged oil filter at a cost of $267.00 (Exhibit "D3"). The vehicle was then returned to service and it was not until a month later that the defendant incurred the remaining cost of repairs amounting to $4,692.26 (Exhibits "D5" and "D7") by deciding to replace the complete engine. The defendant asserts that by returning the vehicle to the defendant's workshop with an obvious and continuing loss of engine oil, the plaintiff had materially caused the need for the engine to ultimately be replaced. However, as I have said in paragraph 15 above, I prefer the plaintiff's evidence as to the circumstances in which he returned the vehicle to the workshop. I would therefore only have found the plaintiff liable for $267.00.

**Alleged overpayment**

24. Finally the defendant posited an argument that, in any event, the plaintiff had been overpaid in the course of his employment and that as a result he was only entitled to a final payment of wages of $88.08. This argument proceeded as I understood it upon the difference in the hourly rate for a "Casual Cleaner" as opposed to a "Cleaner Full Time".

25. In support of this assertion the defendant put into evidence a 6 page document exhibited as Exhibit "D6". This document comprised a 5 page "Payroll Advice" appearing to cover the period from 10 June 2009 to 29 July 2009 and a further page appearing to be a photocopy of two of the plaintiff's handwritten payslips; the first for the week ending 29 July 2009 and the second for the week ending 5 August 2009. Each page of this exhibit was penned with various dollar amounts labelled with the term "overpaid".

26. The defendant says that at some point in time the plaintiff had been employed as a "Cleaner Full Time" but had continued to be paid the hourly rate for a "Casual Cleaner". The difference in hourly rate between the two designations, so it was said, was the basis of the asserted overpayment. With some difficulty, and doing my best with the exhibited material, it appears that the base hourly rate for a Full Time Cleaner is $15.34 and the base hourly rate for a "Casual Cleaner" is $17.64 (ie, 1.15 x $15.34). Whilst it is difficult to be certain about that on the material before me, I take that to be the basis of the defendant's assertion as to overpayment.

27. As a first resort in his dispute with the defendant, the plaintiff sought the assistance of a Fair Work Inspector appointed pursuant to the *Fair Work Act* 2009 (Cth). This Inspector conducted an audit of the defendant's wage records and calculated the final wages payment due to the plaintiff pursuant to the Award. Her findings were contained in a Report dated 30 September 2009 (Exhibit "P1") which, *inter alia*, calculated the plaintiff's final wages entitlement which, when adjusted for an error in addition by the Inspector,

was in the amount of $913.65. However, it was said in evidence by the defendant, the Inspector took no further action in the matter because she agreed that the plaintiff had, in fact, been overpaid. The defendant complains that the Inspector promised it a letter to that effect but such letter was never forthcoming.

28. I find it difficult to give such assertions much weight. The Ombudsman's Report, whilst accepting that the plaintiff "...was employed on a casual basis from April 2009 to June 2009 and on a full time basis from June 2009 to August 2009", nonetheless goes on to state:

> From the period June 2009 until August 2009 [the plaintiff] would have been entitled to accrue 23.38 hours of annual leave at the accrual rate of 11.69 hour (sic) per month of continuous service.
>
> From the period June 2009 until August 2009 [the plaintiff] would have been entitled to accrue 11.69 hours of personal leave at the accrual rate of 5.84 hours per month of continuous service.
>
> For the week ending 5 August 2009, Cyclone City Cleaners Pty Ltd withheld the following final payment to pay for alleged damage to a company vehicle:

| | |
|---|---|
| 23.75 hours ordinary @ $15.34 | $364.32 |
| 11.69 hours sick leave @ $15.34 | $179.41 |
| 23.38 hours holiday pay @ $23.38 | $358.64 |
| District Allowance | $ 11.28 |
| **Total Withheld** | **$944.33** (sic) |

29. I pause to again note the error in addition; the actual total being $913.65.

30. The Inspector's Report goes on to find four contraventions of the *Workplace Relations Act* and a single contravention of the District Allowance provisions of the Award by the defendant, but proposed no further action on the basis of "voluntary rectification".

31. With all that in mind, and given the instigator and purpose of the Report, I find it difficult to accept that a competent Inspector appointed pursuant to the *Fair Work Act* would neglect to point out any overpayments against the plaintiff's Award entitlements, particularly in circumstances where she makes findings about the specific periods during which the plaintiff was employed "on a casual basis" and a "on a full time basis". In my opinion, I am bound to give the Report, and in particular its findings as to the amount "withheld" from the plaintiff, appropriate weight.

32. Whilst I am mindful of the difficulties faced by unrepresented litigants in this jurisdiction, in circumstances where a defendant seeks to retrospectively dilute the quantum of award wages owing to a plaintiff there is, in my opinion, a considerable onus to be discharged. That onus is to adduce probative evidence to prove on the balance of probabilities that the plaintiff had been overpaid and to do so with sufficient particularity to allow the Court to make appropriate findings of fact. In my opinion, the defendant has fallen short in that task. I should also add that, in circumstances where the alleged overpayment was never pleaded, no blame can be attached on that account to the plaintiff.

33. As a consequence, I am not satisfied that the defendant has met the required standard of civil persuasion sufficient to succeed in its claim of overpayment of the plaintiff's award wages.

**Summary**

34. In summary, I find that the defendant, for the reasons outlined in paragraph 11 above, was not, and is not, authorised to deduct from the plaintiff's award wages the cost of repairs to the defendant's vehicle. I also find that the defendant's Counterclaim must fail because I was not persuaded that the plaintiff's actions on the evening of 29 July 2009 ought properly be characterised as being "serious and wilful, or gross, misconduct" (section 22A(3), *Law Reform (Miscellaneous Provisions) Act*). Finally, I find that

there is insufficient probative evidence before me to enable me to make appropriate findings of fact that prove the alleged overpayment of award wages to the plaintiff, and that claim must also fail on the balance of probabilities.

35. As the plaintiff has succeeded in his claim, he is properly entitled to the Small Claims Court filing fee of $72:00.

**Orders:**

1. The defendant is to pay to the plaintiff the sum of $985.65, comprised $913.65 in award wages and $72.00 in Court costs, within 30 days.

Dated this 2nd day of July 2010

_____

**Julian Johnson**
Judicial Registrar

Dated this day of 2010

_____

STIPENDIARY MAGISTRATE