

CITATION: *Hendy v Northern Territory of Australia* [2010] NTMC 045

PARTIES: DAVID CRAIG HENDY

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20900578

DELIVERED ON: 13 July 2010

DELIVERED AT: Darwin

HEARING DATE(s): 10 May 2010

JUDGMENT OF: Relieving Magistrate Bradley

CATCHWORDS:

WORKERS COMPENSATION – DEFINITION OF WORKER – Persons Entitled to Compensation – Prisoner at work in custody – whether a “worker” as defined

Workers Rehabilitation and Compensation Act 1986 (NT) as amended s 3
Prisons (Correctional Services) Act 1980 (NT) as amended s 66

REPRESENTATION:

Counsel:

Worker: Mr Christrup
Employer: Mr Macdonald

Solicitors:

Worker: Ward Keller
Employer: Solicitor for the NT

Judgment category classification: B

Judgment ID number: [2010] NTMC 045

Number of paragraphs: 27

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

No. 20900578

BETWEEN:

DAVID CRAIG HENDY
Worker

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Employer

REASONS FOR JUDGMENT

(Delivered 13 July 2010)

Mr BRADLEY R/SM:

1. The applicant, David Hendy brings proceedings under the provisions of the *Worker's Rehabilitation & Compensation Act* ("the Act").
2. He claims to have sustained an injury on or about 5 September 2002 whilst working in the mechanical workshop at the Alice Springs Prison. He was at the time, a serving prisoner.
3. The parties have agreed to argue the preliminary point to determine whether the applicant, Mr Hendy is a worker within the meaning of the Act. Clearly, on the pleadings, there are a number of other issues facing the worker if he is successful at this preliminary stage.
4. The definition of worker, so far as is relevant, is contained in s 3 of the Act and reads as follows:-

“worker means:...

b) for the purposes of the provisions of this Act relating to compensation and rehabilitation – a natural person:

- (i) 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** 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; or
- (ii) who is a person, or a member of a class of persons, prescribed for the purposes of this definition;

but does not include a person:

- (iii) who is employed in the service of the Commonwealth;
- (iv) subject to subsection (2), who is a member of the immediate family of the employer;
- (v) subject to subsection (3), who is a director (by whatever name called) of a body corporate;
- (vi) subject to subparagraph (b)(ii) of this definition and to subsections (7), (8) and (9), who is employed in voluntary work and who receives in relation to that work, if anything, nothing more than reasonable travelling, accommodation or other out-of-pocket expenses;
- (vii) who is a person, or a member of a class of persons prescribed for the purposes of this definition;
- (viii) in relation to the work or service under consideration – who is an employer of another person engaged in the performance of the work or server;
- (ix) subject to subsection (5) – who is employed or engaged by a householder; or
- (x) who is **employed or engaged otherwise than for the purposes of the employer's trade, business or enterprise and in respect of whom the employer does not make any withholding payments under the PAYG provisions.**”

5. The parallel definition of “employer” is also contained in s 3 and reads as follows:

“*employer* means a person by or for whom a worker is engaged or works or, in relation to a member of the Legislative Assembly, a Judge, a magistrate or a member of the Police Force, means the Territory.”

6. The evidence provided in affidavits and tendered by the parties by consent would, and I so find, support the following findings:

- 6.1 Mr Hendy was a serving prisoner at the time that he asserts that he suffered an injury. He had been sentenced on 26 April 2002 to five months of imprisonment and was not due for release until later in September 2002.
- 6.2 There was a practice in place within the Northern Territory prison system that enabled prisoners to work. There were insufficient workplace positions to enable all prisoners to work and so prisoners were asked upon entry to the prison whether they wished to work. When positions became available they were assigned to an appropriate workplace.
- 6.3 Prisoners who elected not to work did not receive any or a lesser weekly payment. At relevant times those prisoners who had expressed an agreement to work received a weekly payment of \$17.50; those who were actually working received a greater payment of between \$21.00 and \$38.50 depending on skill levels.
- 6.4 On 1 April 2002 upon Mr Hendy’s first entry to the prison and later upon his return to prison from Court, he was asked if he would agree to work. On these and one other occasion the answer as completed by the Correctional Services Officer was “yes”. On the fourth but not the final occasion the question was asked there is no recorded answer on the form.
- 6.5 That Mr Hendy had asked separately for work to relieve his boredom of prison life.
- 6.6 That Mr Hendy was placed on a waiting list for the mechanical workshop and subsequently on a date uncertain, but probably prior to August 2002 commenced activities as a general hand in that workshop.

- 6.7. That on or around the date Mr Hendy alleges the injury he was engaged in the mechanical workshop.
 - 6.8. That during the period to early June Mr Hendy received the sum of \$17.50 per week which is the rate stipulated by both the Minister pursuant to s 69 of the *Prisons (Correctional Services) Act 1980* (the “Prisons Act”) and by the Director of Correctional Services (the Director) for a prisoner who has volunteered to work but is not assigned any designated work to perform.
 - 6.9. That from early June to the date of his discharge (with the exception of 3 payments) he received the sum of \$21.00 per week which is the appropriate amount stipulated by the Minister and Director for a person undertaking the type of duties undertaken by Mr Hendy in the latter months of his sentence.
7. The Northern Territory argues that for Mr Hendy to be a worker one need to look generally as to the circumstances of his incarceration; that the effect of his imprisonment together with the provisions enabling the Director to direct work and the directive as to pay scales means there was no intention to create legal relations. In effect the Territory says the agreement to pay must be legally enforceable in order to be a “contract or agreement” as envisaged by s 3 of the Act. Other states appear to have reached this conclusion but the definition of worker is significantly different there and/or the status of the prisoner being required to work is also different. I am of the view that the decisions in other jurisdictions are of little assistance in determining the intention of the Northern Territory Parliament.
 8. Section 66 of the Prisons Act provides: “the Director may direct prisoners to be employed in such work as he or she requires them to perform ...”.
 9. There is no evidence of any direction being given by the Director to Mr Hendy pursuant to s 66 of the Prisons Act and Mr Hendy alleges that he volunteered for the work and was, after a waiting period, provided with work in the mechanical workshop.

10. Section 69 of the Prisons Act provides: “subject to his or her good conduct in a prison or a police prison, a prisoner shall be paid by the Director, at rates determined by the Minister, for any work performed by that prisoner”.
11. On the 4th day of September 2000 the Minister for Correctional Services made a Determination (Exhibit E2) as follows:

I, Daryl William Manzie, the Minister for Correctional Services –

...

- (b) in pursuance of section 69 of the *Prisons (Correctional Services) Act*, determine that the rate set out in Column 2 of the Schedule is the rate per week to be paid on and from 4 September 2000 to a prisoner for work described opposite in Column 1.

Date 4th September 2000.

Minister for Correctional Services

SCHEDULE

Column 1	Column 2
Hygiene work	\$17.50
Unskilled work, including hygiene work	\$21.00
Semi-skilled work, including kitchen, laundry, community working parties	\$28.00
Skilled work	\$38.50

12. There is no limitation in s 69 of the Prisons Act to the effect that the rate of pay determined by the Minister is to be paid in respect of persons who are

required to carry out work under s 66; indeed s 69 is in a different Part of the Act dealing with payment to prisoners rather than employment of prisoners. In my view the section, together with the Determination, creates a legally enforceable right to payment as determined.

13. On 6 September 2000 the Director issued a directive (Doc 1 in Exhibit W1) setting wage rates for prisoners which broadly coincides with the Minister's determination. That document says prisoners are to receive payment for meaningful work. Its purpose was said to be to ensure a fair and consistent income is available to prisoners commensurate with the type of work undertaken. The directive asserted it was consistent with the Agency's strategic policy for "containment and supervision, resource management, offender rehabilitation ...". The document variously refers to the payments as "income", "weekly pay rates" and "wage earnings".
14. To my mind there is no doubt the scheme for employment during periods of custody was able to be mandated but in fact was conducted on the basis of a prisoner volunteering for work. When suitable work became available, the prisoner would be assigned to areas of work that met the requirements of the Director and the skills of the Prisoner. I have formed the view that the parties reached an agreement to work rather than the Director exercising his rights to direct the defendant to carry out employment pursuant to s 66.
15. In fact it could be suggested the method by which the arrangements were made did not differ greatly from what might have had happened in the normal labour market.
16. Whilst a prisoner is not entitled to receive weekly compensation payments under the Act whilst in detention (see s 65A), he is nevertheless entitled to other benefits under the Act. I therefore conclude that the parliament did not intend to exclude prisoners from obtaining benefits under the Act altogether.

17. The definition of “worker” in the original version of the Act in 1986 was of a more traditional nature. There followed some litigation as to who was a worker and who was a contractor. The definition was amended in 1991 to determine a “worker” as a person who is also a P.A.Y.E. taxpayer. This was, according to the Ministers 2nd reading speech, intended to “alleviate the existing, cumbersome administrative procedures it will be easy for workers and employers to understand”. The definition was later amended to the present system making reference to the ABN but there was specifically no change to government intent to have a “practical the workers definition ... with the advantage of being clear and concise, thereby avoiding litigation over the common law concept of a worker...” (2nd reading Speech 18/5 2000).
18. The definition cannot, as the Territory argues, be read so as to infer (by the ‘*ejusdem generis*’ rule) that “agreement of any kind” should be read to mean a legally enforceable agreement. Something broader must have been intended. I also note there is no longer any requirement in the definition for the payment of money or any requirement for the concept of service to be a necessary part of qualifying as a “worker”. When one looks at the plain words of the definition of worker and given the background intention of parliament to simplify the definition, I am drawn to the conclusion that unless there is an applicable exclusion, then Mr Hendy should be deemed to be a worker under the Act. I do not need to decide whether a person carrying out work by direction pursuant to s 66 is a worker, because I have found Mr Hendy entered into a voluntary arrangement to work. I find that this is the case, even though there is some evidence to suggest that Mr Hendy could be subject to disciplinary processes within the prison system if he mis-conducted himself during the course of that employment. Even if he worked pursuant to a direction it might be said he was working “under a law of the Territory”.

19. A submission was made on behalf of Mr Hendy that the Northern Territory Government had the onus of proving that any of the exceptions to the definition applied and that in the absence of any specific plea, I should not examine whether or not any such exception could apply. Proper pleading principles would require a respondent to specifically plea a statutory provision it intended to rely upon. I believe however that where a defendant has specifically denied the claimant is a worker “under the Act”, then the Court should satisfy itself that the claimant satisfies the whole of the definition which is contained in a rather longwinded singular sentence. I would therefore not prohibit an argument by the respondent that one of the exclusions applied.
20. In the event the Northern Territory Government did not press any specific argument, but did not concede that they could not apply.
21. Looking at the general exceptions (iii) to (x) contained within the definition, it seems to me that the only possible exceptions that might be argued to have application are (vi) and (x).
22. Since the work carried out was voluntary and the pay nominal, one might possibly argue that exception (vi) applied. I believe however that the extra payment received is not of a mere compensatory nature of the type envisaged in that exception. The general intent of parliament would, it seems to me, have been to cover the sort of situation where someone voluntary goes along to help another and put themselves out for them at some expense to themselves.
23. The subsection (x) contemplates that where no PAYE deduction for tax is made, then that person ought to be excluded. This, in a sense, is the other side of the main provision which says that any person who has not presented an ABN to his employer is in fact a worker within the meaning of the Act. On the surface therefore, this provision would appear to apply to the applicant. I note however that:

23.1 the pay received was so low as to be unlikely to require any deduction for tax to be made and;

23.2 the work undertaken was part of the regular activities conducted in the prison environment and could in my view be said to be part of the prison department's "trade, business or enterprise". In this regard, I have regard to the Commissioner's directive referred to above.

24. Therefore it seems to me that none of the exceptions apply.

25. I find therefore that Mr Hendy is a "worker" within the meaning of the Act and the Northern Territory Government is an "employer" as defined also in that Act being a person "by or for whom the worker is engaged or works".

26. Mr Hendy therefore is entitled to pursue his claim for compensation and may or may not be successful, depending on whether he is able to satisfy all of the other requirements necessary to establish his entitlement.

27. I will hear the parties as to costs and other orders.

Dated this 13th day of July 2010

Hugh Bradley
R/STIPENDIARY MAGISTRATE