

RECENT DECISIONS

Labour hire recovery - failure to establish negligence against host employer

Coles Supermarkets Australia Pty Ltd v Ready Workforce (A Division of Chandler MacLeod) Pty Ltd (28 June 2018)

[Link to decision](#)

Summary

This decision recently handed down by the NSW Court of Appeal highlights a number of practical aspects of litigating section 151Z recovery claims that can be critical to the final outcome.

Background

Ready Workforce, described as being a Division of the Chandler Macleod Group, claimed indemnity from Coles Supermarkets in respect of workers compensation paid to one of their employees who was injured while working at a Coles warehouse.

The worker was performing her duties as a picker and packer at the Coles warehouse at Smeaton Grange when she suffered an injury while working the morning shift on 17 November 2011.

The worker was filling an order and had driven a machine (a DCP Personal) to an aisle to collect some plastic bags of dry dog kibble that were required to be manually loaded onto the machine.

The worker was injured at approximately 7am when upon turning to retrieve a second bag from the shelves, she slipped and fell landing hard on the ground and striking the pallet machine. The worker had slipped on a fine layer of crushed dry kibble that was like dust that was on the floor.

Compensation was paid by CGU as the workers compensation insurer of Ready Workforce to and on behalf of the worker.

Notably, the worker did not pursue a civil claim for damages in respect of her injury against any of the parties.

Labour hire arrangement

Ready Workforce claimed that the worker was their employee and that she was 'lent on hire' to Coles pursuant to a labour hire contract entered into between Coles and Chandler Macleod Group Limited, the parent company of Ready Workforce.

Ready Workforce alleged that Coles had breached the duty of care that it owed to the worker by failing to provide a safe system of work which had caused the worker's injury.

Coles denied that the worker was employed by Ready Workforce and contended that she was employed by Chandler Macleod. Coles also denied breaching its duty of care and claimed that the injury was sustained partly or wholly by the negligence of Ready Workforce so that any indemnity should be reduced accordingly.

Decision at first instance

The primary judge found that Coles had breached the duty of care and that if it had been sued (by the worker), it would have been liable to pay damages totalling \$438,024.92. Responsibility for the injury was apportioned 60% to Coles and 40% to Ready Workforce.

The damages payable by Ready Workforce were assessed at \$259,118.52 on which 40% was \$103,647.41. The recoverable amount represented the difference between the employer's contribution (\$103,647.41) and the compensation paid (\$135,142.41) being \$31,495 to which pre-judgment interest was added.

A cross-claim brought by Coles against Chandler Macleod claiming indemnity based on a contractual agreement was rejected.

Coles then appealed from the decision and Ready Workforce cross-appealed contending that judgment should have been entered for the whole of the workers' compensation paid plus interest.

On appeal

Mr Justice Wright gave the Court's reasons for decision through which some judicial guidance can be drawn on the practical considerations that must be addressed when pursuing section 151Z recovery actions.

Identity of the employer

The primary judge had made inconsistent findings as to whether the worker was employed by Chandler Macleod or Ready Workforce.

This appears to have been partly due to the wording of a casual labour hiring agreement signed by the worker which referred to employment with Chandler Macleod Group Limited and *any of its related entities* ('Chandler Macleod').

The fact that the worker's wages were also paid by Chandler Macleod was not considered to be determinative of the question, a task that was made more difficult by the lack of any evidence of intra-group accounting or as to who had the right to control the worker in how she performed her duties.

The fact that payments were made by CGU as the workers' compensation insurer of Ready Workforce was taken to be a strong indicator of Ready Workforce being the worker's employer. To that extent, it was considered that Ready Workforce had discharged the onus to establish that it was the worker's employer.

Standing to sue

On considering the legal standing of Ready Workforce to pursue a claim for indemnity, his Honour noted the position in terms of the liability of an insurer being directly liable to pay compensation under the policy, section 159(2)(a) of the *Workers Compensation Act 1987*.

If the insurer paid compensation to discharge its own liability then the insurer would be the proper plaintiff to

seek indemnity. However, if the insurer purported to act on behalf of the employer to discharge the employer's liability then the employer could seek the indemnity.

In terms of section 151Z(1)(d) the critical question was whether Ready Workforce was 'the person by whom the compensation was paid' that was found in the affirmative by virtue of the payments made by CGU on its behalf.

Employer as a tortfeasor

Justice Wright gave some consideration to the submission by Coles that section 151Z(1)(d) did not confer a right of indemnity in circumstances where the employer was itself a tortfeasor.

This submission was in part founded on the recent decision in *South West Helicopters Pty Ltd v Stephenson*, however, it was clear that the decision did not inhibit reliance upon the provision where the worker does not commence proceedings against the employer for damages. His Honour noted that in this case, the worker did not take proceedings against her employer so that section 151Z(2)(e) is engaged and the fact that Ready Workforce was itself negligent did not preclude it being entitled to claim indemnity, under section 151Z(1)(d).

Negligence of host employer

Critically, a party who is pursuing a section 151Z recovery claim must establish a liability in the third party to pay damages as a pre-condition to the right of indemnity.

The Court reviewed the finding of negligence against Coles and examined the reasons of the primary judge and the evidence, particularly focussing upon the cleaning system at the warehouse.

The evidence established that a sweeping machine went through the factory on a regular basis at least once a day although it was generally accepted that machine cleaning was done twice a day. There was a protocol within the warehouse for workers to pick up any debris and to mark any spillages with appropriate safety signage or to erect a barricade until the spill was attended to.

The floor where the slip occurred had been cleaned at 9:15pm the previous evening, however, there was no evidence as to when the warehouse closed that night. The warehouse did not operate 24 hours a day. His Honour determined that there were two shifts each day so that it

was reasonable to infer that the second shift would finish at about 10pm or up to half an hour later. It could then be inferred that the cleaning was done within 45 minutes to one and a quarter hours before the conclusion of the second shift.

His Honour was particularly concerned that there was no evidence of what precautions a reasonable person in Coles' position would have taken to clean the aisles more frequently than once every 4 hours. He concluded that there was no evidence to support the finding made by the primary judge that a reasonable person would have cleaned the aisle more frequently than once every 4 hours. There was no evidence that the particular area in which the worker was injured was dustier or more prone to spillages than any of the other aisles in the warehouse.

Further, there was no evidence as to how long it would take to clean the whole of the warehouse premises and what number of machines would be required for that purpose. There was no evidence that slipping was a particular hazard of the job that the worker was doing.

Ready Workforce was required to establish the facts by which it could be determined whether Coles system of cleaning was inadequate or what additional cleaning a reasonable person in Coles position would undertake or what other steps it would undertake as a precaution against the risk of injury by slipping. His Honour determined that they had not done so, and that in his view, the finding that Coles was negligent should be set aside.

Permanent impairment threshold

The cross appeal by Ready Workforce contended that the primary judge's finding that the worker satisfied the 15% WPI threshold under section 151H so as to be entitled to recover damages against the employer should be set aside. Justice White observed that the primary judge's reasons for this finding were inadequate.

The primary judge did not say why or how he had reached his conclusion and none of the medical evidence directly addressed the degree of permanent impairment suffered by the worker in accordance with the WorkCover Guidelines. The primary judge merely stated that he had read the medical evidence tendered and was satisfied that the threshold was reached.

The finding on the threshold is significant as unless it is satisfied, the worker would not be able to claim damages against the employer and there would not be any basis for the third party (Coles) to claim contribution.

Outcome

It may seem ironic that his Honour indicated that he would not have given Coles leave to appeal were it not for the cross-appeal filed by Ready Workforce.

However, the amount raised in issue on the cross-appeal was more than \$100,000 so that the cross-appeal was brought as of right in circumstances where justice then required that leave to appeal be granted to Coles.

As a result, the decision to set aside the finding of negligence against Coles meant that the judgment in favour of Ready Workforce was also set aside with Ready Workforce ordered to pay the costs of the trial, the appeal and cross-appeal.

While the decision by Ready Workforce to pursue a cross-appeal was presumably aimed at achieving a better result by reducing the finding on apportionment (something less than 40% on the part of the employer), this then led to the review of the liability of Coles that was ultimately fatal to the recovery action.

The decision clearly highlights the need to have regard to a number of practical aspects of pursuing recovery actions and perhaps most notably, the uncertainty that often surrounds the determination of negligence by a third party and the evidence that must be led to satisfy the plaintiff's onus to establish a liability to pay damages.

For more information, please contact:



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