IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
APPELLATE JURISDICTION

ERCA No. 20 of 2019

BETWEEN : **GLASS HOUSE LTD**

APPELLANT

AND : **LABOUR OFFICER**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. S. Chandra for the Appellant

: Ms. P. Singh with Mr. S. Kant for the Respondent

Date of Hearing : 5 May 2020

Date of Judgment : 06 December 2023

JUDGMENT

WORKMEN"S COMPENSATION Appeal – Whether employee or independent contractor – Preliminary issue raised for the first time in appeal – Workmen's Compensation Act 1964

The following case is referred to in this judgment:

a. Lancashire and Yorkshire Railway Co v Highley [1917] AC 352; [1917] UKHL 509

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1. This is an appeal against the decision of the Employment Relations Tribunal of 24 July 2019, by which compensation of $18,200.00 was awarded to the workman, Mohammed Aslam, for an injury sustained while cutting grass at the residence of the appellant's director. The resident magistrate was satisfied that the requirements of section 5 (1) of the Workmen's Compensation Act 1964 were met, and that the labour officer had made out the case on behalf of the workman.

2. The appellant's grounds of appeal are reproduced below:

(1) "That the Learned Tribunal erred in fact and/ or misdirected itself as to the facts and the law when it held that there was a employer – employee relationship when the evidence produced at the trial clearly showed that the respondent was an independent contractor and the task the respondent performed was to cut grass outside working hours at a particular premises where he was employed as a contractor.

(2) The Learned Tribunal erred in law and in fact in finding so when there was no evidence before the Tribunal that the appellant in any manner was responsible for the task taken to have the matter mitigated and eventually heard and which appeared to have influenced the Tribunal in fixing the loss of compensation of the respondent's alleged employment.

(3) The Tribunal erred in fact and in law in analyzing the evidence of employee's and his witnesses regarding his duty or task allocated did not arise on the course of employment when the evidence produced at trial did not support such a finding.

(4) That the Learned Tribunal erred in fact and or misdirected itself as to the facts in that it failed to consider the evidence produced at trial in totality when the evidence was produced clearly showed that the respondent was in fact negligent when he took risk of cutting the grass at his own risk and failed to protect himself.

(5) The Learned Tribunal erred in fact in finding so when there was no evidence before the Tribunal to support or justify that the respondent was a worker of the employer at the time of the alleged employment.

(6) The Learned Tribunal erred in fact and in law in holding that the respondent was not provided and or advised on an opportunity to mitigate when such a finding is not fully supported in law.

(7) Alternatively, the Learned Tribunal erred in law and in fact heard the evidence of the respondent's case and made a decision on the case whereby it had no jurisdiction to hear the same in terms of the sections (2, 3, 5, 8) and other provisions of the Workmen's Compensation Act and failed to give opportunity to the appellant to seek independent legal advice on the issues".

3. At the hearing of this appeal, the appellant raised a preliminary issue on the basis that the workman's claim is statute barred. The appellant submitted that the accident purportedly occurred in April 2013, and the labour department filed its notice on 9 January 2019, five years and nine months after the incident. The appellant submits that the claim should have been filed within 12 months of the incident in accordance with statutory requirements.

4. There is no evidence that the appellant raised the issue of a time bar before the tribunal so that the resident magistrate could have considered the matter and made a finding whether the proceeding could have been continued in terms of section 13 of the Workmen's Compensation Act. Although the transcript of the evidence before the tribunal was said to have been available it was not tendered to court.

5. The tribunal makes no reference to the question of time bar operating against the claim. It can be assumed, therefore, that the issue was not raised before the tribunal. A consideration of the evidence before the tribunal would have been necessary to make a finding on the matter. The question of whether the claim is statute barred was also not raised as a ground of appeal by its notice of appeal filed on 8 August 2019.

6. Counsel for the appellant submitted that a preliminary issue on time bar could be raised at any time. The limitation appears at section 13 of the Act. The section enables recovery proceedings to be filed within six years, provided the requirements set out in it are met. Proviso (b) to section 13 states that the failure to make a claim for compensation within the period specified in the section would not be a bar to the maintenance of proceedings if it is proved that (i) the failure was occasioned by mistake or other good cause; or (ii) the employer failed to comply with the provisions of subsection (1) or (2) of section 14. However, no proceedings for the recovery of compensation can be maintained unless the claim is made within six years from the date of the accident.

7. Whether proceedings for workmen's compensation can be maintained under section 13 of the Act must be decided in light of the evidence. If the time bar objection had been raised, the tribunal would have had the opportunity to reach the necessary findings in regard to the maintainability of the proceeding. The stage for that has passed. There is no evidence that on the face of it, the claim is statute barred. That would be the case if the claim for compensation is not made within a period of six years from the date of the accident.

8. The workman was employed by the appellant from 12 January 2008. While cutting grass at the residence of the appellant's director, the workman injured his right eye in April 2013. The employer did not report the incident to the Ministry of Employment, Productivity and Industrial Relations. The workman did so by his statement of 9 March 2016. On 24 July 2018, he informed the ministry that he wished to pursue his claim against the employer. Following correspondence with the employer, the labour officer filed a claim in the tribunal on behalf of the workman for $18,200.00.

9. The appellant says that the time and place where the workman got injured was outside the hours of employment and at different premises. According to the appellant, the workman performed additional work for the directors for a separate payment and that this work was done as an independent contractor.

10. Evidence was led on behalf of the employer and the employee. After evaluating the evidence, the resident magistrate concluded that the workman was injured while performing work for the appellant. The tribunal made this finding:

> "The work undertaken by Mr. Aslam was of a wide ranging nature, including car washing, cleaning the compound and guarding the premises. On the day of the incident, Mr. Aslam had been driven in a company vehicle to the director's premises and utilized company equipment to cut grass in the compound".

In another paragraph, the resident magistrate states:

> "The worker was a caretaker involved in general duties. The work of grass cutting in the context of his role, that included washing cars, cleaning the compound and acting as security, can be seen as incidental or peripheral to the main task of caretaking. The Tribunal is satisfied that this limb is satisfied"

11. The tribunal referred to the House of Lords decision in *Lancashire and Yorkshire Railway Co v Highley*[1]. Lord Sumner stated:

> "Whether in any given case an accident arises on the one hand out of the injured person's employment, although he has conducted himself in it carelessly or improperly, or on the other hand arises not out of his employment but out of the fact that he has gone outside the scope of it or has added to it some extraneous peril of his own making, or has temporarily suspended it while he pursues some *excursus* of his own, or has quitted it altogether, are all questions which, often as they arise, are susceptible of different answers by different minds and are always questions of some nicety. So it is here. I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to, but in the last analysis each case is decided on its own facts. There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute and it is generally of some real assistance. It is this – Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask, if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or conversely, was an added peril and outside the sphere of the employment, are all different ways of

[1] [1917] AC 352 at 372; [1917 UKHL 509

asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury".

12. The eye injury resulted in blindness to the workman's right eye, and he was medically assessed at 40% impairment. The tribunal has considered whether the work performed by the workman was incidental to the work he usually performed for the employer. It rejected the employer's contention that in performing work for the director, the workman was in the position of an independent contractor.

13. In reaching a conclusion, the resident magistrate has preferred to believe the evidence of the workman. His findings are on the basis of the evidence before court. Those findings say that Mr. Aslam was a workman as defined by section 2 and the appellant, the employer in terms of section 3 of the Act. He concluded that the requirements of section 5 (1) of the Act were made out.

14. The appellant has not satisfied court that any of the material findings are contrary to the evidence. In these circumstances, the court sees no reason to interfere with the findings of the resident magistrate.

ORDER

A. The appeal is dismissed.

B. The appellant is to pay the respondent costs summarily assessed in the sum of $1,000.00 within 21 days of this judgment.

Delivered at Suva this **6th** day of **December, 2023**

HIGH COURT OF FIJI SUVA

M. Javed Mansoor
Judge