IN THE COURT OF APPEAL OF NEW ZEALAND

CA554/2011
[2013] NZCA 175

BETWEEN	MARGARET UTUMAPU Appellant
AND	ADRIAN BULL AND HAMISH SPEEDY Respondents

Hearing: 10 April 2013

Court: Harrison, Wild and French JJ

Counsel: A M Powell and P D Marshall for Appellant
J W Maassen and N Jessen for Respondents

Judgment: 23 May 2013 at 2 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The declaration made in the High Court is set aside.

C There is no order for costs.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] This appeal raises an issue about the nature and extent of the powers of an inspector employed by the Department of Labour when questioning a person in the course of an investigation conducted under the Health and Safety in Employment Act 1992 (the HSE Act).

Facts

[2] The late Henry Whale was a farm hand employed by Mangaohane Station Ltd (MSL) on Mangaohane Station near Taihape. Both respondents, Adrian Bull and Hamish Speedy, were directors of MSL; Mr Speedy was also station manager. On 8 March 2011 Mr Whale died when the tractor he was driving on the station tipped and crushed him.

[3] The police notified the Department of Labour of the accident. Two safety inspectors including the appellant, Margaret Utumapu, attended the station and started an investigation under the HSE Act.

[4] On 18 March 2011 Ms Utumapu telephoned Messrs Bull and Speedy to arrange an interview with them at the station on 23 March. However, on 22 March Cooper Rapley, a firm of solicitors in Palmerston North representing Messrs Bull and Speedy, wrote to the Department. The firm advised that while their clients were willing to provide information required as part of the investigation they were unwilling to assist "... in an uncontrolled manner without prior notice of the issues or questions they are required to answer"; that the meeting scheduled for the next day would not proceed; and that a written summary was requested of the questions which the Department intended to direct towards Messrs Bull and Speedy together with copies of a number of documents.

[5] On 1 April 2011 Ms Utumapu wrote in reply that the Department did not provide actual questions to be asked given that the investigation was of a criminal nature. However, she advised that the proposed questions would focus on relationships, roles and responsibilities of those interviewed and others in the workplace; management of health and safety in the workplace; and health and safety practices in the workplace including conditions, materials or equipment that affect employees working on the station. On 7 April Cooper Rapley responded to the effect that the Department's provision of topics was insufficient, and considerably more detail would be required.

[6] On 11 April Ms Utumapu gave Cooper Rapley formal notice that she required Messrs Bull and Speedy to attend an interview pursuant to s 31(1)(f) of the HSE Act, pointing out that both had a duty to assist an inspector under s 47 of the Act and that failure to comply may constitute an offence under ss 47, 48 and 50.

[7] Messrs Bull and Speedy did not comply with Ms Utumapu's notice to attend an interview and the Department did not attempt to enforce attendance. Instead, on 18 April 2011 Messrs Bull and Speedy filed an application in the High Court at Palmerston North for an order granting judicial review of Ms Utumapu's actions. The statement of claim alleged that Ms Utumapu was acting unlawfully in requiring Messrs Bull and Speedy to submit to an interview by exercising her powers under ss 31(1)(f) and 47. On 10 May Ms Utumapu filed a statement of defence.

[8] MacKenzie J delivered judgment for Messrs Bull and Speedy on 12 August 2011,[1] granting a declaration in the terms sought.

Judicial review inappropriate

[9] Before addressing the merits of Ms Utumapu's appeal, we express our reservations about the nature of the challenge made to the inspector's powers. Like this Court in *Gill v Attorney-General*,[2] we consider that an application for judicial review was inappropriate and premature given that a statutory investigation was then under way. Messrs Bull and Speedy should have either submitted to an interview and answered the inspector's questions or declined to do so with the attendant risk of criminal sanctions for failing to comply with the inspector's direction. If they had answered questions and charges were laid, Messrs Bull and Speedy would then have been entitled to challenge the admissibility of the evidence obtained at or before trial.

[10] However, the Department was apparently content to acquiesce in this course without taking any steps to exercise the statutory powers of enforcement available to it. The inquiry was significantly if not decisively prejudiced by the course which

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1 *Bull v Utumapu* [2011] NZAR 584 (HC).
2 *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433 at [19].

both parties were content to follow. The time limit for laying charges relating to Mr Whale's death expired on 8 September 2011 and the Department did not apply for an extension of time. Instead, Ms Utumapu appealed. For that reason the appeal is moot. But by consent we have agreed to hear it because of the issue's importance to future investigations which the Department may undertake.

Statutory provisions

[11] Section 31 of the HSE Act governs an inspector's powers of entry and inspection. Relevantly it provides for these purposes:

> **31 Powers of entry and inspection**
>
> (1) For the purpose of performing any function as an inspector, any inspector may at any reasonable time enter any place of work and—
>
> (a) *conduct examinations, tests, inquiries, and inspections*, or direct the employer or any other person who or that controls the place of work, to conduct examinations, tests, inquiries, or inspections:
>
> (b) be accompanied and assisted by any other people and bring into the place of work any equipment necessary to carry out the inspector's functions:
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> (c) take photographs and measurements and make sketches and recordings:
>
> (d) require the employer, or any other person who or that controls the place of work, to ensure that the place of work or any place or thing in the place of work specified by the inspector is not disturbed for a reasonable period pending any examination, test, inquiry, or inspection:
>
> (e) require the employer, or any other person who or that controls the place of work, to produce documents or information relating to the place of work or the employees who work there and permit the inspector to examine and make copies or extracts of the documents and information:
>
> (f) *require the employer*, or any other person who or that controls the place of work, *to make or provide statements*, in any form and manner the inspector specifies, about conditions, material, or equipment that affect the safety or health of employees who work there.
>
> (1A) An inspector may do any of the things referred to in subsection (1), whether or not—

(a) the inspector or the person whom the inspector is dealing with is in the place of work; or

(b) the place of work is still a place of work; or

(c) the employer's employees work in the place of work; or

(d) the person who was in control of the place of work is still in control of it; or

(e) the employer's employees are still employed by the employer; or

(f) in respect of a document or information, the document or information is—

(i) in the place of work; or

(ii) in the place where the inspector is; or

(iii) in another place.

...

(6) No person is required on examination or inquiry under this section to *give any answer or information tending to incriminate the person*.

(Our emphasis.)

[12] The HSE Act deals with the safety, health and welfare of workers in all types of employment. It repealed a number of statutes relating to separate sectors of employment, including the Construction Act 1959, the Mining Act 1971 and the Agricultural Workers Act 1977.[3] Its principal objective is to prevent harm to employees at work across all sectors.[4]

[13] The HSE Act is also the primary means by which New Zealand implements its obligations under the Occupational Safety and Health Convention.[5] Article 4 of the Convention requires the implementation of a national policy designed "to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment". New Zealand is also a signatory to the

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3 Health and Safety in Employment Act 1992, s 62(1) and sch 3.

4 Health and Safety in Employment Act, ss 30, 31 and 39. See also Labour Inspection Convention (opened for signature 11 July 1947, entered into force 5 April 1950 (ratified by New Zealand on 30 November 1959)).

5 Occupational Safety and Health Convention (opened for signature 22 June 1981, entered into force 11 August 1983).

Labour Inspection Convention. Article 12(1) of that Convention requires states to ensure that inspectors have the following powers:

> 1. Labour inspectors provided with proper credentials shall be empowered:
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> (a) to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection;
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> (b) to enter by day any premises which they may have reasonable cause to believe to be liable to inspection; and
>
> *(c) to carry out any examination, test or enquiry which they may consider necessary in order to satisfy themselves that the legal provisions are being strictly observed, and in particular—*
>
> *(i) to interrogate, alone or in the presence of witnesses, the employer or the staff of the undertaking on any matters concerning the application of the legal provisions;*
>
> (ii) to require the production of any books, registers, or other documents the keeping of which is prescribed by national laws or regulations relating to conditions of work, in order to see that they are in conformity with the legal provisions, and to copy such documents or make extracts from them;
>
> (iii) to enforce the posting of notices required by the legal provisions;
>
> (iv) to take or remove for purposes of analysis samples of materials and substances used or handled, subject to the employer or his representative being notified of any samples or substances taken or removed for such purpose.
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> (Our emphasis.)

[14] Neither Hansard nor the Select Committee's report on the Bill[6] contain commentary on the powers of inspection provided by s 31 of the HSE Act. However, the statutory powers of inspectors reflect those powers contained in

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6 Health and Safety in Employment Bill 1991 (126-2) (select committee report).

previous legislation, for example, s 6(1)(c) and 6(2) of the Agricultural Workers Act[7] and s 5 of the Factories and Commercial Premises Act 1981.[8]

High Court

[15] In upholding Messrs Bull and Speedy's application for judicial review, MacKenzie J found materially as follows:

> (a) The common law has long recognised a right of silence preceding those rights affirmed in ss 23(4) and 25(d) of the New Zealand Bill of Rights Act 1990 (the NZBORA). The specific immunity protecting a person suspected of criminal responsibility from being compelled on pain of punishment to answer questions of any kind is relevant where the interpretation of s 31 is at issue.[9] Thus, where an interview is sought as a means of investigating possible offences "... the s 31(1)(f)

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7 Section 6 relevantly provided:
6 Powers of Inspectors—
(1) Every Inspector may—
…
(c) Make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act have been or are being complied with:
…
(2) No person shall, on an examination or inquiry by an Inspector under this section, be required to answer any question tending to incriminate himself.

8 Section 5 provided:
5 Powers of Inspectors—
(1) Every Inspector, accompanied if he thinks fit by a member of the Police or any other officer of the Public Service qualified to assist him in the execution of his duty, may—
…
(b) Make such inspections, examinations, tests, and inquiries, and take such samples and photographs, as are necessary to ascertain whether the provisions of this Act have been or are being complied with as regards any undertaking or any persons working in it; and where any such sample is taken, the Inspector concerned shall, if so requested, deliver part of it to the occupier of the undertaking concerned:
…
(d) Subject to subsection (4) of this section, examine with respect to matters under this Act, either alone or in the presence of any other person, as he thinks fit, any person whom he finds in any undertaking, or whom he believes on reasonable grounds to have been employed in or about an undertaking within the preceding 6 months, and require that person to make and sign a statutory declaration as to the matters with respect to which he is examined:
(e) Have and exercise such other powers and authorities as are necessary to carry this Act into effect.
…
(4) No person shall, on examination or inquiry under this section, be required to give to any question any answer tending to incriminate him.

9 At [11], [12] and [15], applying *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 (HL).

powers must be exercised in a manner which is consistent with the right of silence" and the NZBORA.[10]

(b) It followed also that: "... an inspector must provide a broad indication as to the purpose of the interview and the type of allegations which the interviewee might face".[11]

(c) Where the employer is a company, not an actual person, an inspector cannot nominate or require the employer to nominate a person to be interviewed on the employer's behalf.[12]

(d) An interview must be about "conditions, material or equipment that affect the safety or health of employees who work there".[13] While a broader interpretation "would be consistent with the statutory purpose of enhancing workplace safety", in the context of an investigation into possible offences the power to compel statements should not impinge on the right of silence,[14] therefore conditions included all working conditions and practices relating to the physical environment of a workplace but excluded certain factors.

Decision

[16] MacKenzie J's judgment was directed towards the applicability of s 31(1)(f) because the notices issued by Ms Utumapu relied on that provision. On appeal, however, Mr Powell places more emphasis upon s 31(1)(a).

[17] Each provision is of an essentially coercive nature. Section 31(1)(a) authorises an inspector to "conduct ... enquiries" – that is to ask questions which would be meaningless unless there was a correlative obligation to answer; s 31(1)(f) authorises the inspector to "require" someone to make a statement. In our judgment, the meaning of the words used in both s 31(1)(a) and (f) is plain. When construed in

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10 At [21].
11 At [24], applying *Simpson v Ministry of Agriculture and Fisheries* (1996) 3 HRNZ 342 (HC).
12 At [27].
13 Health and Safety in Employment Act, s 31(1)(f).
14 At [31]–[32].

their statutory context they empowered Ms Utumapu to request Messrs Bull and Speedy to answer questions relating to the Department's enquiry and imposed corresponding obligations on them to answer.

[18] Section 31(6) confirms these coercive powers. By codifying a statutory right to silence, it expressly excuses an interviewee from giving an answer or information tending to incriminate that person. Logically this limitation on an inspector's powers must proceed on the premise that the interviewee is otherwise required to answer questions.

[19] When read together, these three provisions are unequivocal in empowering an inspector to ask questions and obliging a person to answer subject to the privilege against self-incrimination. Such a construction is entirely consistent with the purpose and principles of the HSE Act and New Zealand's international obligations. The statute was designed to reform and integrate into one statutory framework all legislation relating to the health and safety of employees and other people in the workplace. Its overriding purpose is to "promote the prevention of harm to all persons at work".[15] By providing a range of enforcement methods including prosecution, the HSE Act enables an appropriate response to a failure to comply with the relevant provisions depending on its nature and gravity. We can take notice of the fact that the HSE Act was introduced not only in conformity with New Zealand's international obligations but also to provide the Department with the means to take effective steps to investigate an unacceptably high rate of workplace accidents. The powers given to inspectors for enforcement purposes must be interpreted in that setting.

[20] It is apparent that in the High Court MacKenzie J was diverted by counsel's unproductive foray into common law principles relating to an interviewee's right to silence. Counsel were agreed before us, as the Judge held, that the circumstances of this case fell within the third of the six immunities identified by Lord Mustill in *R v Director of Serious Fraud Office, ex parte Smith.*[16] Mr Powell addressed detailed submissions on the relevant common law principles. However, that approach was

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15 Health and Safety in Employment Act, s 5.

16 *R v Director of Serious Fraud Office, ex parte Smith*, above n 9, at 30–31.

unproductive where s 31(6) provides an express and unambiguous codification of the right to silence.

[21] Before us Mr Maassen did not attempt to support MacKenzie J's conclusion that where the employer is a company an inspector cannot nominate (or require the employer to nominate) a person to be interviewed on its behalf. Mr Maassen said that his argument in the High Court was instead that the inspector could not require Mr Bull, as opposed to the station manager, to answer questions; he understood that Mr Powell agreed.

[22] We do not accept this distinction. Again on a plain reading of s 31, a corporate employer can be required to answer questions and make a statement. The inspector is entitled to stipulate, either by name or position or both, the person or persons who are to answer enquiries or make a statement. Any other construction of s 31 would enable a company to defeat its purpose, such as by nominating an officer or employee who knew nothing about the subject matter of the enquiry.

[23] Also, Mr Maassen did not attempt to uphold MacKenzie J's conclusion that an inspector must in advance provide a broad indication about the purpose of the interview and the type of allegations which the interviewee might face. Instead, Mr Maassen advises that he argued that it is reasonable for the interviewee to exercise the right to silence in circumstances where (a) an inspector has obtained technical information concerning defects in equipment following an investigation after the harm through unimpeded access to the place of work; (b) the inspector demands a further interview in order to obtain a statement from a responsible person on those matters; (c) the responsible person requests the information in the possession of the inspector and a statement of the scope of questioning before submitting to an interview; and (d) the inspector refuses to comply with the last request.

[24] In those circumstances, Mr Maassen submits, an inspector would by his or her own actions deprive the interviewee of (a) the reasonable means of exercising the statutory privilege conferred by s 31(6) – including a reasonable opportunity to evaluate the tendency of an answer or information to incriminate them; and (b) the necessary context in which to fully and fairly respond to the questions raised.

[25] It is unnecessary for us to answer this proposition in an evidential vacuum. Its very existence illustrates the futility of dealing with this dispute by way of an application for judicial review. That factual situation may or may not have arisen for consideration if in this case either Messrs Bull or Speedy had refused to answer a question or provide information on the ground of self-incrimination. As noted, the proper forum for dealing with the issue would have been by a challenge mounted to a criminal charge, if laid.

[26] We should record also our disagreement with MacKenzie J's conclusion that an inspector is bound to provide the interviewee with a broad indication of the purpose of the interview and the type of allegations which might be made. In the absence of a statutory provision to this effect, we cannot impose a gloss onto the inspector's powers. The purpose of Ms Utumapu's enquiry was plainly known to Messrs Bull and Speedy. Furthermore, her notice of 1 April 2011 identified the general areas upon which questions would focus during an interview. In our judgment this advice was sufficient in the interests of fairness and efficiency, and Ms Utumapu was not required to provide more specificity.

[27] Finally, Mr Maassen devoted a good deal of argument to the meaning of the word "conditions" where used in s 31(1)(f). His purpose was to suggest that it is restricted to a right to require an employer or designate to answer an inspector's questions about physical conditions, as MacKenzie J accepted. While determination of this argument is not directly relevant to the narrow scope of this appeal, we record our view that no such limitation can be read into the word. It would plainly cover hours of work and other conditions in the workplace such as harassment or intimidation.

[28] Accordingly, we are satisfied that Ms Utumapu's request to Messrs Bull and Speedy was lawful, and that they were required to participate in an interview and answer questions subject to the statutory privilege provided by s 31(6).

Result

[29] The appeal is allowed and the declaration made in the High Court is set aside.

[30] Costs would normally follow the event. However, in the circumstances of this appeal, where the issue is now moot and Messrs Bull and Speedy participated on that basis, there will be no order for costs.

Solicitors:
Crown Law Office, Wellington for Appellant
Cooper Rapley, Palmerston North for Respondents