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IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
WELLINGTON REGISTRY

A.483/83

IN THE MATTER of Part I of the Judicature Amendment Act 1972

A N D

IN THE MATTER of the District Courts Act 1947

BETWEEN JOHN GARY OSBORNE of Lower Hutt, Superintendent
Applicant

A N D EWEN BROWNLIE ROBERTSON of Wellington, District Court Judge
First Respondent

A N D ROBERT WAYNE TAYLOR of 31 Moana Road, Plimmerton, Driver
Second Respondent

TERRENCE DAVIS KEATING of 39 Westminster Road, Wainuiomata, Driver
Third Respondent

KEN KAIWAI of 9 Kendall Grove, Wainuiomata, Driver
Fourth Respondent

GARY EDWARD COOPER of 8 Pencarrow Crescent, Wainuiomata, Driver
Fifth Respondent

BENJAMIN FORSTER COLE of 15 Akron Grove, Totara Park, Driver
Sixth Respondent

GARY ALBERT of 15 Reynolds Street, Taita, Driver
Seventh Respondent

DONALD STEPHEN McKAY of 23b Roband Crescent, Upper Hutt, Driver
Eighth Respondent

CHARLES MACKIE of 680 Main Road, Te Marua, Driver
Ninth Respondent

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Hearing 28 June 1984

Counsel T W H Kennedy-Grant and R J D Buddle for Applicant
C T Young for First Respondent
C H Arndt for Second to Ninth Respondents

Judgment 5 July 1984

JUDGMENT OF DAVISON C.J.

On 27 September 1983 the eight respondents were prosecuted by the applicant in the District Court on informations laid under s 125 of the Industrial Relations Act 1973 ("the Act") which so far as it is relevant to these proceedings provides:

> " Every person shall be liable to a penalty not exceeding $150 who, being a worker employed in any essential industry -
>
> (a) Strikes without that worker or his union on his behalf having given to the worker's employer, within one month before the date of commencement of the strike, not less than 14 days' notice in writing signed by him or on his behalf by his union of his intention to strike... "

At the end of the prosecution case the defence submitted that there was no case to answer as the Court had no jurisdiction, sitting in its criminal jurisdiction, to deal with alleged breaches of s 125 of the Act. Penalties for such breaches, it was submitted, could only be enforced by way of civil proceedings.

The District Court Judge held that the District Court, sitting in its criminal jurisdiction, has no jurisdiction to hear informations for alleged breaches of s 125 of the Act and he dismissed the informations.

In the course of his judgment the District Court Judge also held that even if the prosecutions had been commenced by way of complaint and not by information, the complaint procedure would not have given the Court jurisdiction to hear the claims for penalty for the alleged breaches of the Act.

The applicant has now brought these proceedings before this Court by way of application for judicial review.

The full grounds of the application are set out in the statement of claim but the issues to be considered are set out more simply in two questions posed to the Court on behalf of the applicant. They are:

1. Does the District Court have jurisdiction, sitting in its criminal jurisdiction, to deal with alleged breaches of s 125 of the Industrial Relations Act 1973?

2. If the District Court does have jurisdiction, sitting in its criminal jurisdiction, to deal with the alleged breaches of s 125 of the Act, should proceedings in respect of such breaches be commenced by information or complaint?

DECISION

I answer the first question"No, the District Court does not have jurisdiction in its criminal jurisdiction to deal with alleged breaches of s 125 of the Act." No answer is therefore specifically required to the second question. I now give my reasons for such decision.

JURISDICTION (a) The Legislation

It is helpful at the outset to trace the history of s 125 and other related provisions of the Act.

The Industrial Relations Act 1973 was first enacted in 1973. Section 125(1) provided:

> " No person employed in any of the industries to which this section applies shall strike without having given to his employer, within 1 month before so striking, not less than 14 days' notice in writing, signed by him, of his intention to strike. "

It will be noted that no penalty was provided for a breach of that provision except cancellation of registration of union, or cancellation of the membership of members of the union: s.130.

There were in the Act, however, provisions for the Industrial Court to deal with offences and to recover penalties created or imposed by other sections of the Act. For example, see:

<u>Offences</u>:

s 144(1) "The Industrial Court shall have full and exclusive jurisdiction to deal with all offences in respect of which it is provided in this Act that any person is liable on conviction by the Industrial Court.

(2) Proceedings to recover a fine in respect of any such offence shall be taken in the Court in a summary way under the provisions of the Summary Proceedings Act 1957; and those provisions shall, with the necessary modifications, apply in the same manner as if the Court were a Magistrate"s Court exercising summary jurisdiction under that Act. "

<u>Penalties</u>:

s 147 "The Industrial Court shall have full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act, whether for the breach of an award or collective agreement or otherwise.

s 151(1) Any action for the recovery of a penalty may be brought -

(a) In the case of a breach of an award or collective agreement, at the suit of any party to the award or agreement; or

(b) In any case, at the suit of an Inspector of Awards and Agreements.

(2) Any such action that is brought at the suit of an Inspector may be continued by the same or any other Inspector.

(3) A claim for 2 or more penalties against the same defendant may be joined in the same action.

(4) No Court fees shall be payable in respect of any such action.

(5) The decision of the Court in any such action shall be final.

(6) The procedure in any such action shall be as prescribed.

s 152(1) In any such action the Court may give judgment for the total amount claimed or any greater or less amount (not exceeding in respect of any one breach the maximum penalty prescribed by this Act in that behalf); or, if the Court is of opinion that the breach proved against the defendant is trivial or excusable, the action may be dismissed.

s 153(1) Subject to any order made under subsection (2) of this section, every penalty recovered in any such action shall be paid into Court and not to the plaintiff, and shall then be paid by the Registrar of the Court into the Consolidated Revenue Account.

(2) The Court may order that the whole or any part of any penalty recovered shall be paid to the plaintiff.

s 154 A certificate under the hand of the Registrar of the Court, specifying the amount payable under any judgment given or order for the payment of money made by the Court, and the persons by whom and to whom it is payable, may be filed in any Magistrate's Court, and shall then be enforceable in the same manner as a judgment given by the last-mentioned Court in an action for the recovery of a debt. "

The Act was amended in 1976 by the Industrial Relations Act 1976 (No 2) s 21. Section 125 as amended read:

" Every person commits an offence and shall be liable on conviction by the Industrial Court to a fine not exceeding $150 who, being a worker employed in any of the industries to which this section applies -

(a) Strikes without that worker or his union on his behalf having given to the worker's employer, within

one month before the date of commencement of the strike, not less than 14 days' notice in writing, signed by him or on his behalf by his union of his intention to strike; or

(b) Strikes before the expiry of notice of intention to strike given by him or on his behalf under paragraph (a) of this subsection. "

The other sections earlier referred to remained the same.

The Industrial Relations Amendment Act 1977 s 6 changed the name of the Court having jurisdiction from "Industrial Court" to "Arbitration Court" and amended s 125(1) to read:

" Every person commits an offence and shall be liable on [summary conviction] to a fine not exceeding $150 who, being a worker employed in any of the industries to which this section applies -
..... "

The Industrial Relations Amendment Act 1978 amended the following sections to read:

s 125(1) "Every person shall be liable to a penalty not exceeding $150 who, being a worker employed in any of the industries to which this section applies ... "

s 147(1) "Subject to subsection (2) of this section, the Arbitration Court shall have full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act, whether for the breach of an award or collective agreement or otherwise.

(2) Magistrates' Courts shall have (to the exclusion of the Arbitration Court) jurisdiction to hear and determine any action for the recovery of any penalty provided for in section 81 or section 125 or section 125A of this Act; and sections 151 to 157 of this Act (except subsections (1), (5), and (6) of section 151) shall apply accordingly with all necessary modifications. "

The Industrial Relations Act 1981 amended s 147 by substituting "District Court" for "Magistrates Court". The Industrial Relations Amendment Act 1983 increased the penalty provided for in s 125 to $300. The pattern of the legislation has been as follows:

1. From 1973 to 1976 there was no provision for offences under s 125.
2. From 1976 to 1978 s 125 provided for "offences" with fines of up to $150.
3. In 1978 s 125 was amended so as to delete all references to "offences and fines" and liability for a "penalty not exceeding $150" was substituted. Section 147 was also amended to give the District Court exclusive jurisdiction in proceedings for the recovery of the penalty provided for in s 125.
4. The penalty was increased in 1983 to $300.

Before the 1978 amendment which substituted liability for a "penalty" for previous references to committing an "offence" and "fine" there was already provision in the Act for recovery of penalties by action using the procedure prescribed in the Industrial Relations Regulations 1974/51 Regs 37, 38 and 39. Such procedure was by way of civil action. When the 1978 amendment to s 147 applied s 151 to the new penalty provided for in s 125 of the Act it excepted however subsecs (1), (5) and (6) of s 151. These were the subsections stating:

Subs (1) By whom an action for the recovery of a penalty may be brought.

Subs (5) That the decision of the Court in any action shall be final.

Subs (6) The procedure in any such action shall be as prescribed.

The effect of subs (6) is that the procedure prescribed in the Industrial Relations Regulations 1974/51 does not apply to actions for penalties under s 125. The remaining

subsections of s 151 and ss 152 to 157, however, still apply to penalties sought under s 125. The reason for not applying the procedures as prescribed in the Regulations to s 125 penalties was no doubt because that procedure was laid down for the Arbitration Court and once District Courts were given exclusive jurisdiction to hear actions for the recovery of penalties under s 125 they had their own civil procedure by which claims for penalties could be brought. The references in ss 152-157 relating to powers of the Court on hearing, application of penalties recovered, enforcement of judgment, recovery from members of union, unsatisfied judgments, limitation of actions are all appropriate to District Court civil procedures.

Before leaving the heading "Legislation" I should refer to the Summary Proceedings Act 1957. The applicant in the course of argument referred to two sections of the Act. They were:

> "s9(1) A court presided over by a [District Court Judge] shall have jurisdiction in respect of every summary offence.
>
> (2) A Court presided over by a [District Court Judge] shall have summary jurisdiction in respect of every offence which by any Act is punishable by a fine, penalty, or forfeiture if no other form of procedure is prescribed by that Act for the recovery of the same."

> "s74 Subject to the provisions of any other Act, the provisions of this Part of this Act, as far as they are applicable and with the necessary modifications, shall apply to proceedings brought by way of complaint as if they were proceedings brought on an information, and as if references in this Part to the informant were references to the complainant, as if references to a charge or to an offence were references to the ground of the complaint, and as if references to a conviction were references to an order."

Attention was drawn to the reference to offences punishable by way of "penalty, if no other form of procedure is prescribed by that Act" and counsel argued that the

offence procedure of the Summary Proceedings Act 1957 was appropriate to the recovery of a penalty under s 125 of the Industrial Relations Act 1973.

It was said that the word "penalty" as used in s 125 covers the second and third class of penalties referred to by Chapman J. in Amalgamated Society of Carpenters and Joiners (Gisborne Branch) Industrial Union v McConachie and McGillivray [1904] G.L.R. 527, 528:

> " Penalties may be divided into three classes, viz. -
>
> 1. Penalties given by some form of contract, such as a bond or a penalty clause in a building contract.
>
> 2. Penalties prescribed by statute or by-law in respect of some public offence to be recovered by information, usually summarily. These include in some cases an element of compensation in which case they are recoverable only by a person interested (re Lorie, 19 NZLR 402; 3 Gaz.L.R.99).
>
> 3. Penalties given by statute, either generally, or to some named person, to be recovered in a penal action. "

The penalty under s 125 was, it was said, one which could be recovered by information filed under the Summary Proceedings Act.

(b) Legal principles

Whether or not the penalty provided for in s 125 of the Act should be recovered in criminal or civil proceedings depends upon the proper interpretation of the Act. The difference between criminal and civil proceedings is referred to in 11 Halsbury (4th ed) para 2:

> " Civil proceedings have for their object the recovery of money or other property, or the enforcement of a right or advantage on behalf of the plaintiff: criminal proceedings have for their object the punishment of a person who has committed a crime. Criminal proceedings are not to be used as a means of enforcing a civil right. Whether conduct amounts to a

> crime may be determined by ascertaining whether the conduct in question is followed by criminal or civil proceedings. If the proceedings will result in the punishment of a party, the conduct in question will be a crime notwithstanding that it may be a matter of small consequence. Where an act is commanded or prohibited by statute, disobedience is prima facie criminal unless criminal proceedings manifestly appear to be excluded by the statute. An act may be prohibited or commanded by a statute in such a manner that the person contravening the provision is liable to a pecuniary penalty which is recoverable as a civil debt; in such an instance contravention is not a crime. "

The approach of the Courts to the interpretation of a statute with a view to determining whether a criminal or civil procedure is intended is illustrated by the decision in <u>In re County Council of Derbyshire and Mayor etc. of Derby</u> (1896) 2 QB 53, 57:

> " In <u>Reg. v Whitchurch</u> 7 Q.B.D. 534 it was held that the procedure created by the Public Health Act, 1875, for abating nuisances, under which procedure a penalty could be imposed in the first instance, was a criminal procedure. The Legislature saw that the remedy given by the Public Health Act, 1875, with respect to the pollution of water-courses was not a sufficient remedy, and passed this Act of 1876, which contains all necessary powers to obtain the abatement of the nuisance. Is there anything in it to shew that the proceedings are proceedings in a criminal matter? I think not. Every part of the statute shews that it was not intended to treat the matter as a criminal matter. The penalty provided for disobedience to the order of the county court is to be recovered as a judgment debt. The proceedings under the first part of s 10 are proceedings of a civil nature. The provisions are absolutely inconsistent with a criminal proceeding, and the respondents are now only applying for an order under that part of s 10. But it is argued that the appellants will be liable to a penalty under the second part of the section if they disobey

> the order which may be made. In my opinion, every part of the proceedings under the latter part of the section is intended to be of a civil nature. "

In interpreting a statute which provides for the recovery of a "penalty" a starting point is found in the judgment of Lord Goddard C.J. in Brown v Allweather Mechanical Grouting Co Ltd [1954] 2 Q.B. 443, 446:

> " Concisely stated, Mr Brown's point is that the sanction provided by the Act of 1949 for using a vehicle which has one class of licence attached to it for a purpose which requires a different class of licence, is a monetary penalty which can be recovered in various forms of proceedings, but is not an offence in the sense that it is punishable as a criminal offence, although a penalty may be recovered in what would generally be called penal proceedings. It is true that there is a general rule that if the word 'penalty' is used in a section as distinct from the word 'fine,' the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court, and always goes to the Crown. "

From that starting point one must then consider the whole of the statute and elicit from it the intention of the Legislature.

In interpreting the provisions of the Industrial Relations Act 1973 I am drawn to the conclusion that the penalty recoverable under s 125 must be recovered by civil action for the following reasons:

1. The section refers to liability for a "penalty" which as a general rule must be recovered as a debt in a civil court: Brown v Allweather etc (ante)

2. There was a deliberate change in the wording of s 125 in 1978 which changed the words "commits an offence" and "fine" which are indicative of a criminal matter to the words "liable to a penalty" which are indicative of a civil proceeding.

3. The exclusion of the Arbitration Court civil procedure prescribed by s 151(6) for the recovery of penalties from proceedings under s 125 indicates that with the District Court having been given exclusive jurisdiction to hear applications for such penalties it no longer needs the s 151(6) procedure as it already has its own civil procedure which can be followed.

4. The specific provision in s 147 which gives the District Courts exclusive jurisdiction for s 125 penalties applies ss 152-157 to such proceedings and those sections contain references which are applicable essentially to civil actions. Words are used such as "action", "judgment", "plaintiff", "defendant".

5. The argument that s 9(2) of the Summary Proceedings Act 1957 applies can not be sustained because that subsection only applies "if no other form of procedure is prescribed by that Act for the recovery of the same". Now s 147 which gives the District Courts exclusive jurisdiction does not need to specially spell out the procedure to be followed because the District Court already has a well-established civil procedure to be followed. The procedure is prescribed in the District Court by the District Courts Act 1947. By eliminating the civil procedure given to the Arbitration Court by s 151(6) and the Industrial Relations Regulations 1974/51 and giving the District Court exclusive jurisdiction to hear disputes relating to claims for penalties under s 125, the Act has in effect prescribed a form of procedure for the recovery of those penalties.

Before leaving this aspect of the case I should for completeness deal with several matters which were referred to in the course of argument.

1. I do not accept that the word "penalty" as used in s 125 covers the second and third classes of penalties referred to by Chapman J. in Amalgamated Society of Carpenters etc v McConachie and McGillivray (ante). Read in the context of its own Act the word "penalty" in s 125 must be interpreted in the civil sense.

2. In James Stewart or B.P. Ltd v Knuckey & Ors (District Court, Auckland, 27 January 1983, Judge N R Taylor) it was held that s 125 of the Act created an offence for which a person could be proceeded against by way of information under s 9 of the Summary Proceedings Act 1957.

   With that decision I respectfully disagree.

3. I was referred to the "Dunlop Report" which was no doubt the reason for the 1978 amendment to the Act. The first recommendation of that report was -

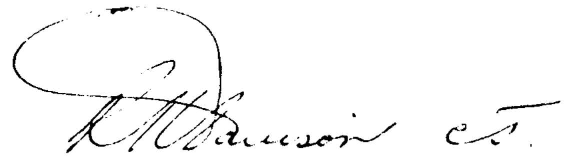
   "that the Government promote immediate legislation transforming the liability under sections 81, 125 and 125A of the Industrial Relations Act from one that is criminal in nature to one that is civil in nature".

   I have not, however, found any need to take that report into consideration for the purposes for which a Court may have regard to such a document for the reason that I was able to reach a decision on the intent of the legislation from considering the Act itself.

In the result, in my judgment the learned District Court Judge was correct in the conclusion that he reached and no grounds have been established which require this Court to review his decision.

It has not been necessary to answer the second question posed to the Court relating to proceedings by way of information or complaint and I have not dealt with it.

The application is refused. In accordance with the arrangements made by counsel, no order is required as to costs.



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