

REV:MRH

IN THE COURT OF PETTY SESSIONS
HELD AT HOBART

Deputy Chief Magistrate M R Hill
8th June 2004

{	Construction, Forestry, Mining, Energy Union	Complainant
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{	- v -	
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{	Gunns Limited trading as Hinman Wright & Manser	Defendant
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{	Complaint No. 03/95055	

The Complainant alleges that the Defendant breached the terms of an Award and seeks among other things payment by the Defendant to Mr David Gladwell of \$29,670.81 and that penalties be imposed on the Defendant.

On behalf of the Defendant it is submitted that the court has no jurisdiction.

The complaint is brought under s178 of the *Workplace Relations Act 1996*. That section permits a court of competent jurisdiction to impose a penalty for a breach of a federal award and also enables the court to make orders in relation to payment of any outstanding monies found to be owing by an employer.

Section 177A of the *Workplace Relations Act* ("the Act") is in the following terms:

"In this Division:

court of competent jurisdiction means:

- (a) District, County or Local Court; or
- (b) a Magistrates Court; or
- (c) the Industrial Relations Court of South Australia; or
- (d) any other State or Territory court that is prescribed by the regulations."

No regulations have been made.

The Act defines Magistrates Court as follows:

"Magistrates Court" means:

- (a) a court constituted by a police, stipendiary or special magistrate; or
- (b) a court constituted by an industrial magistrate who is also a police, stipendiary or special magistrate."

Speaking generally it seems to me this is not a civil action, as one would understand the ordinary meaning of those words as the complaint seeks a penalty or some punishment on the complaint being found proved. In the circumstances therefore to say that the complaint can be laid in the Civil Division of the Tasmanian Magistrates Court, in my view, may be an error as it may ignore the true nature of the proceedings.

The Act does not seek to confine the definition of Magistrates Court to a civil court.

It is interesting to note that the Court of Requests, which formerly operated in Tasmania, was constituted by a Commissioner under S9 of the now repealed Local Courts Act and not by a Magistrate.

As the Defendant submits the predecessor to the Act namely the *Industrial Relations Act* contained the following definition of Magistrates Court:

"Magistrates Court" means:

- (a) a court constituted by police, stipendiary or special magistrate; or
- (b) a court constituted by an industrial magistrate who is also a police, stipendiary or special magistrate; or
- (c) in Tasmania - a Court of Requests."

The Defendant submits that it can be seen from the omission of the Tasmanian Court of Requests in the current Act that the clear intention of the Commonwealth Parliament was that Court was not a court which was constituted by a police, stipendiary or special magistrate. (Perhaps it never was). The Defendant says the definition of "Magistrates Court" in the Act covered the Civil Division of the Magistrates Court of Tasmania, which replaced the Court of Requests.

Also the need of course to make that amendment was presumably because the Court of Requests disappeared with the repeal of the Local Courts Act.

This complaint has been lodged in the Court of Petty Sessions. The *Justices Act 1959* S3 (1) defines Court of Petty Sessions as:

"Court of Petty Sessions" means a court held by two or more justices in petty session;

"Court of summary jurisdiction" means - (a) a court of petty sessions; and (b) a court held by one justice.

Section 20(1) provides:

"Every complaint shall be heard and determined by a magistrate or by one or by more justices, as is directed by the Act relating to the matter, or if there is no such direction, by any 2 or more justices".

Section 22(1) provides:

- “(1) A magistrate has power to do alone -
- (a) whatever may be done by a court of petty sessions; and
 - (b) any other act which may be done by 2 or more justices in petty session.

(2) The court held by a magistrate, whether in the exercise of the jurisdiction of 2 or more justices or of jurisdiction exercisable by him as a magistrate, shall be deemed to be a court of petty sessions.”

The Defendant submits “the Court of Petty Sessions is not a court constituted by a police, stipendiary or special magistrate”.

In *D -v- Cordwell* [2002] TASSC 90 Blow J had occasion to consider the question of jurisdiction and procedure generally of the Magistrates Court of Tasmania. I think some of His Honours comments are relevant here. In tracing developments in the Magistrates Court at paragraph 5 he said:

“The Magistrates Court was created by the *Magistrates Amendment Act 1989*. Before that Act commenced, Tasmania had courts of petty sessions that were constituted by magistrates and by justices. Those courts of petty sessions were sessional courts, as distinct from standing courts. That is to say, they were constituted by magistrates or justices on the days that they sat, but had no continuing existence when the magistrates or justices constituting them were not sitting. The Magistrates Court, created by statutory amendments effected by the 1989 Act, is a standing court, and continues in existence when no magistrates are sitting.” The 1989 Act changed the name of the *Magistrates Act 1987* to the *Magistrates Court Act 1987*. It also introduced the *Magistrates Court Act, S3B(2)* which provides as follows:

“For the purposes of the organization and conduct of the business of the Magistrates Court, the Court shall exercise its jurisdictions in divisions, which may be created by or under this Act or any other Act and every proceeding in the Court shall be instituted, heard, and determined in one of those divisions.

Since the creation of the Magistrates Court and the enactment of s3B in 1989, new Divisions of the Magistrates Court have been created by the *Magistrates Court (Small Claims) Division Act 1989*, *Magistrates Court (Civil Division) Act 1992*, *Youth Justice Act 1997*, *Magistrates*

Court (Children's Division) Act 1998, and the Magistrates Court (Administrative Appeals Division) Act 2001. However I have been unable to find any Act or Statutory Rule creating a Division of the Magistrates Court in which the ordinary business of the court, including motor vehicle stealing charges against adults, is dealt with."

One of the arguments before His Honour was that there was a jurisdictional difficulty because a charge against a youth had not been brought or dealt with in the Youth Justice Division of the Court. In discussing that proposition His Honour continued at paragraphs 8 and 9:

".... However no regulations have been made creating a division of the Magistrates Court for the exercise of its ordinary jurisdiction whereby magistrates hear and determine complaints against adults in respect of simple offences.

If I am right in thinking that no division has been created for the exercise of the ordinary jurisdiction of the Magistrates Court, I do not think that is an impediment to the exercise of such jurisdiction. It is clear from s3B(2) that Parliament intended the Magistrates Court to exercise all of its jurisdictions in divisions. If no division has been created for the exercise of the court's ordinary jurisdiction, there has been a breach of a provision regulating the exercise of statutory powers. Having regard to those matters, I do not think Parliament can possibly have intended at the time of the 1989 amendments that the ordinary work of magistrates was to cease if a division of the Magistrates Court was not created for such work upon the commencement of the amendments.

In my view it follows that, even if no division of the Magistrates Court exists for the exercise of the ordinary jurisdiction of magistrates, magistrates are entitled to exercise their ordinary jurisdiction when not sitting in any particular division."

Now His Honour's decision was not referred to in argument before me but I consider it has some relevance because at the end of the day the question here is "Is the Court of Petty Sessions a court constituted by a police, stipendiary or special magistrate?"

Section 19(7) of the *Magistrates Court Act 1987* provides:

"On and after the commencement of this Act, a reference to a police magistrate or to a stipendiary magistrate in an Act, or in a regulation, rule, by-law, proclamation, order-in-council, order, summons, warrant, notice, or other instrument or document made, issued, given, or filed under or for the purposes of an Act or for the purposes of any legal proceedings shall be read as a reference to a person who is appointed as a magistrate, or is deemed to have been so appointed, under this Act."

Counsel for the Complainant (Mr. McTaggart) submitted "A court held by a Magistrate, in the exercise of jurisdiction exercisable by him as a Magistrate is a "Magistrates Court" within the *Workplace Relations Act* because it is "a court constituted by a police, stipendiary or special magistrate, regardless of whether it "shall be deemed to be a Court of Petty Sessions"

He relied on *Taylor -v- The Gordon Frost Organization Pty Limited & Ors* 52 IR 401 and *CFMEU -v- Warren* 85 FCR 599 for the proposition that you look at who constitutes the State court, not what the court is called or deemed to be called.

He submitted further "that in the present case it is irrelevant that a Magistrate is deemed to constitute a Court of Petty Sessions. He or she still constitutes a Magistrates Court within the *Workplace Relations Act* definition because he or she constitutes a State court constituted by a police, stipendiary or special magistrate. As such the court is of competent jurisdiction as defined by s177A of the *Workplace Relations Act*".

Counsel for the Defendant (Mr Wood) submitted "At the time of making the complaint, the court is either vested with jurisdiction or not. As at 3rd September 2003 the Court of Petty Sessions is either a court which answers the description of a Magistrates Court as defined or it does not. It does not." He referred to *The Commonwealth v. Hospital Contribution Fund*

(1982) 150CLR 49 as authority for the proposition that "Court of a State" meant the court as an institution and not the persons who comprise it.

I turn to the authorities referred to by Mr. McTaggart.

In *Western Newspapers Pty .Ltd -v- Warren* (1994) 56IR 340 Moore J was considering whether the Chief Industrial Magistrate of New South Wales was a court of competent jurisdiction for the purposes of the Industrial Relations Act. His Honour considered the Hospital Contributions case (supra) and commenced by saying:

"The first issue concerns the character of the forum in which the proceedings under S178 were commenced". (P344)

That is an issue here I would think.

His Honour went on at 345:

"Plainly those provisions (establishing the court comprising the Chief Industrial Magistrate and the office thereof) are intended to operate on a court so established and it is presently immaterial that it is, for the purposes of the State Law, established as a court for specified purposes"

His Honour went on to find that the essential function of the office of Chief Industrial Magistrate was judicial in character and found that *"His Worship sat as a court of competent jurisdiction as defined in S177A when determining the matter the subject of this appeal"*(p346).

With respect His Honour seemed to direct his mind to the 'court" under consideration at the time it was sitting not at the time when the proceedings were commenced. He referred to the Hospital Contributions case in coming to his conclusions.

In *Taylor v The Gordon Frost Organisation Pty Limited* [1993] 52IR 401 Miller CIM considered whether the Chief Industrial Magistrate, or NSW Magistrates generally, constitute a "court" within the terms of S71 of the Constitution. He held that the word "court" refers to a person or body exercising judicial power and said at 408:

" All the indicia of a 'court' as opposed to a non-judicial tribunal are present in the case of the industrial magistrate. The trappings of the Industrial Magistrate are court like. .. The practice and procedure to

be observed, and the standard of proof required in proceedings before the Industrial magistrate is that observed in civil and criminal proceedings before courts”.

At 410 he says:

“ As stated earlier the Act does not define the word “court”. In my opinion, in the context of the Act the word “court” simply refers to a person or body exercising judicial power. In my opinion an industrial magistrate, and the chief Industrial Magistrate exercise such judicial power in New South Wales”.

He concludes on the same page:

“There is nothing inconsistent in the HCF case to my conclusion here that the Chief Industrial Magistrate is a “court” for the purpose of S178 of the Act”.

I do not think it could be argued that the essential function of the work “performed” by a Magistrate in Tasmania is anything but judicial in character and that such work could be described in the same terms as in Taylor’s case. The same could be said of the ‘trappings’ referred to. I think therefore in Tasmania when a Magistrate sits he or she is performing a judicial function in a “court” within the ordinary meaning of that word.

(See Taylor above)

Adopting with respect the reasoning of Blow J in Cordwell’s case (supra) I do not think that because this complaint is headed “In the Court of Petty Sessions” that the Magistrates Court is prevented from dealing with what would otherwise be a complaint to be dealt with in the ordinary course of business.

It seems to me that when a Magistrate sits in Tasmania in a Court of Petty Sessions he or she is sitting as a “Court constituted by a magistrate” and therefore such a court is a “Magistrates Court” within the meaning of the Act.

I find that the Court of Petty Sessions has jurisdiction to hear this complaint.