

Kelly v Humanis Group Limited [2014] WADC 43

Key Points

- Discusses the law on the liability of employers for the negligence of their employees in the context of labour hire arrangements, in which the relationships and duties between labour hire company and the hirer business can become blurred.
- When liability is disputed by both a labour hire firm employer and hirer, the Court will look to the extent of control each party had over the worker.

Background

Stephen Kelly (**plaintiff**) was employed by Ngarda Mining & Civil Pty Ltd (**Ngarda**), a mining works contractor, to operate front-end loaders and dump trucks at a mine site located at Yarrie, in Western Australia's Kimberley region (**site**).

Humanis Group and TSS Recruitment (**defendants**) owned and operated a labour hire business that engaged workers to work at the site. Reggie Scanlan (**Scanlan**) was one of those workers. Scanlan commenced work on the site as an excavator operator.

On 16 November 2009, the plaintiff was operating a dump truck in an area of the site which was located directly underneath a fully loaded excavator bucket. Scanlan, who was operating the excavator and proceeded to drop the fully loaded bucket onto the plaintiff's truck causing the plaintiff injury to his neck and back (**accident**).

The plaintiff commenced proceedings in the District Court against the defendants seeking damages for the injuries he suffered as a result of the accident. The plaintiff alleged, among other things, that the defendants were liable for his injuries by failing to ensure that Scanlan was adequately trained, experienced or qualified to operate the excavator. It was alleged the defendants were vicariously liable for Scanlan's negligence.

The Law

The issue to be determined was whether a duty of care was owed by the defendants and whether the defendants were vicariously liable for Scanlan's negligence.

Conclusion

Whether a duty of care was owed by the defendants

When considering this question, His Honour Stavrianou DCJ opined that it is necessary to consider the salient features of the relationship (if any) to determine whether such features



amount to a sufficiently close relationship which would give rise to a duty of care.

His Honour noted that the defendant was a labour hire company. Employee resumes would be sent through the defendants and on to prospective employers. In this instance, Scanlan's resume was forwarded to Ngarda who made the sole determination as to whether Scanlan was suitable. Ngarda was also be responsible for the induction and training of Scanlan. Ultimately, Scanlan could not operate an excavator without Ngarda's permission. To that end, his Honour found that Ngarda was in control of safety and had assumed responsibility for preventing injury to the plaintiff.

The defendants on the other hand, were not in such a position. The plaintiff was not vulnerable to injury because of the conduct of the defendants and did not place reliance on the conduct of the defendants. In sum, his Honour found that the defendants did not owe a duty of care to the plaintiff.

Whether the defendants were vicariously liable for Scanlan's negligence

His Honour then turned his attention to whether the defendants were vicariously liable for the conduct of Scanlan. The general rule is that an employer will be vicariously liable for the negligence of its employee. However, where an employee has been hired to another entity, depending on the circumstances, it is possible that responsibility for an employee can transfer. It is a question of who exercised more control over the employee.

What emerged from His Honour's analysis was that the central focus of the enquiry rests on which of either the labour hire company or the entity hiring the employee, was entitled not only to direct the tasks which were to be carried out, but also *how* they were to be carried out.

Ultimately, his Honour held that Ngarda had full control over Scanlan's actions, and if he "was negligent, then vicarious liability for that negligence lay with Ngarda and not the defendants".

The plaintiff's claim was dismissed.

Lessons Learnt

Where liability is disputed by both a labour hire firm and an employer, the Court will look to the extent of control each party had over the worker. This presents an issue for workplaces across the country. According to the Australian Bureau of Statistics, there are over half a million workers employed through labour hire firms.

However, there are number of ways both labour hire companies and employers can minimise their exposure. For example, clearly defined roles and responsibilities, especially in relation to training and supervision, can go a long way to mitigating this risk.



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