

Don't you (forget about material evidence): Federal Court finds Tribunal not to disregard subjective statements *Rus v Comcare* [2017] FCA 239

Key Points

- The Federal Court was asked to consider whether the Tribunal had erred in determining that statements as to a witness' belief in his own employment with a Commonwealth authority had no probative value.
- This case reminds us that any evidence – even subjective evidence provided after the fact – should not be dismissed by the Tribunal as irrelevant, if that evidence is important to the determination of a critical fact in issue.

Background

In 2013, at the age of 63, Mr Rus died of mesothelioma caused by exposure to asbestos. His wife brought a claim for compensation under the *Safety, Rehabilitation and Compensation Act (SRC Act)*. The basis for the claim was that Mr Rus had contracted mesothelioma while employed by the Australian Wool Board (**AWB**) during 1965 and 1966.


Comcare denied liability for the claim, and Ms Rus sought further review at the Administrative Appeals Tribunal.

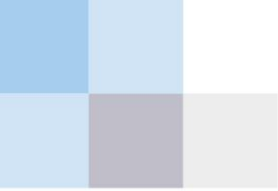
Tribunal decision

At first instance, the Tribunal heard that during the time Mr Rus had worked at AWB, he performed maintenance work. There was no evidence of any written contract in respect of work done.

The Tribunal looked at the definition of “employee” in s 5(1) of the SRC Act and determined that to meet the requirements of the definition, it needed to be satisfied that Mr Rus was employed by AWB either under a law of the Commonwealth, or a contract of service. Ultimately, the Tribunal considered that it was not able to determine whether Mr Rus was an employee of AWB, an employee of a contractor engaged by AWB, or an independent contractor engaged by AWB. The Tribunal therefore held it could not find Mr Rus had been employed by AWB, and found that there was no liability for the claim.

Mrs Rus appealed to the Federal Court, contending that the Tribunal erred by ignoring statements made by Mr Rus that he had been employed by AWB or that he had worked “for” AWB. These ‘statements’ were not the direct evidence of Mr Rus, but evidence of what he had told variously his son, daughter-in-law, solicitor and medical practitioners. There





was also evidence contained in answers to interrogatories sworn by Mr Rus as to the dates he commenced and ceased “working” for AWB. The Tribunal accepted the evidence as fact.

However, Ms Rus contended that the Tribunal erroneously regarded those statements as being of no assistance on the question of whether or not Mr Rus was employed by AEB.

The law

To be regarded as an ‘employee’ under the SRC Act, a person must perform work for a Commonwealth corporation under a law or a contract, and ordinarily be entitled to compensation in respect of injury, loss or damage suffered by them in connection with that work pursuant to that law or contract.


The distinction between an ‘employee’ and a contractor is “*rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own*”: *Hollis v Vabu Pty Ltd* [2001] HCA 44.

Factors taken into consideration by previous Courts as to whether a person is an ‘employee’ include the intention of the parties forming the relationship, any contract (or lack thereof), the degree of control exercisable by the employer, and the ‘label’ the parties place on their relationship: *ACE Insurance Ltd v Trifunovski* [2011] FCA 1204.

Drawing on a line of authority commencing with *Carmichael v National Power PLC* [1999] 1 WLR 2042 and most recently *Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd* [2015] VSCA 286, the Court held it was well-established that subjective evidence arising after a contract is alleged to have existed is both admissible and ought to be regarded by the decider of fact.

In rejecting the approach taken by the Tribunal, the Court pointed to the judgment of Finn J in *Re C & T Grinter Transport Services Pty Ltd (In Liquidation) & Grinter Transport Pty Ltd; Ex parte Fitzgerald* [2004] FCA 1148 and later settled in *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034. Finn J held that, relevantly, conversations and conduct at the time of alleged engagement of an employee are of considerable significance, and the personal beliefs of an employee as to the identity of his employer are admissible and entitled to weight.

Comcare contended that the Tribunal was correct to have found Mr Rus’ statements to be irrelevant. The Court, however, held that the Tribunal did not consider the statements irrelevant, it simply excluded the statements from its consideration of whether Mr Rus was employed by AWB during the relevant period. Relying on the decision of the High Court in *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [82], the Court held that “*ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law*”.





Conclusion

The Court held that the Tribunal regarded – incorrectly – that Mr Rus’ statements were no more than his own characterisation of his status and had no probative value in determining whether he had actually been employed by AWB.

Ultimately, the Court held the Tribunal’s task was to determine whether or not it was satisfied that Mr Rus was an “employee” pursuant to s 5 of the SRC Act, and this could not have been properly performed if material important to this question was ignored. Mr Rus’ statements were critical to the fact of employment. The Tribunal’s failure to take that material into account affected the exercise of its power and resulted in an error of law.

The Court allowed Ms Rus’ the appeal and remitted the matter for reconsideration by the Tribunal.

Lessons Learnt

This case is authority for the fact that subjective evidence provided after the fact must not be dismissed by the Tribunal as irrelevant if that evidence is important to the determination of a critical fact in issue.

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