IN THE COURT OF APPEAL OF NEW ZEALAND

CA484/06
[2008] NZCA 162

PROGRESSIVE MEATS LIMITED
Appellant

v

MINISTRY OF HEALTH
Respondent

Hearing: 22 April 2008

Court: O'Regan, Arnold and Ellen France JJ

Counsel: R M Lithgow QC for Appellant
A M Powell and C M Lloyd for Respondent

Judgment: 10 June 2008 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The answer to the question in the case stated (set out at [3] below) is "Yes".

C There is no award of costs.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] This case concerns the offence provisions in the Smoke-free Environments Act 1990. Progressive Meats Limited ("Progressive") was charged with an offence in that it breached s 5(1) of the Act in relation to a smoking room which it had set up at its meat processing plant in Hastings. Section 5(1) requires employers to take all reasonably practicable steps to ensure that there is no smoking in a workplace.

[2] In a decision delivered on 24 February 2006, Judge Watson found the charge proved. Prior to entering a conviction, the Judge stated a case for the High Court: DC HAS CRN 05020500298. The question posed for the opinion of the High Court was whether the smoking room came within the definition of a workplace in the Act and therefore infringed s 5.

[3] Baragwanath J answered that question in the affirmative in a judgment now reported at [2006] 1 ERNZ 892. After Baragwanath J refused leave to appeal to this Court on 7 December 2006 (HC NAP CRI-2005-020-1974), this Court on 27 June 2007 ([2007] NZCA 261) granted special leave to appeal on the following question:

> Does the smoking room, as described in the case stated to the High Court at [2] – [12], fall within the definition of a workplace under s 2 of the Smoke-free Environments Act 1990 and therefore infringe s 5 of that Act?

Facts

[4] As Judge Watson noted at [2] in the case stated, the facts are not in dispute. The facts are described in more detail in the excerpt from [3] to [12] of the case stated, which we set out below, but the key facts can be summarised in this way:

(a) Hygiene requirements for Progressive's employers changed in 2002. The practical effect of those changes was that it became problematic for Progressive employees who wanted to smoke to do so by going to an outside area during their break.

(b) To avoid this problem, Progressive, in conjunction with the union and its employees, provided a separate smoking room within the plant.

(c) The smoking room is situated directly off the cafeteria at the plant. Entry to the smoking room is gained via a vestibule off the cafeteria which leads to a sealed self-closing door.

(d) The smoking room has its own ventilation system and has been set up so as to prevent cigarette smoke from finding its way back into the cafeteria.

[5] Judge Watson's description of the facts from the case stated is as follows:

> 3. Progressive … operates a meat processing plant in Kelfield Place, Hastings. Progressive employs some 300 staff of which 276 are involved in meat processing. A significant number of employees are serious smokers. That is, they are addicted to nicotine.
>
> 4. Progressive has always had a proactive policy in regards to smoking in the workplace. Smoking has never been allowed in the processing plant. Prior to 2002 workers were able to smoke during their breaks either outside in the car park area or the cafeteria.
>
> 5. In 2002 there were changes to the hygiene requirements that Progressive and its workers were required to meet either under New

Zealand law or under the Overseas Market Access Requirements (OMAR). Such requirements now include:

(a) At the beginning of each shift each worker is supplied with freshly laundered clean white overalls, aprons, rubber boots, head covering, hair covering, knives, knife holders, steels and chain mesh gloves.

(b) Once they are "kitted" out in their "whites" no worker can leave a protective clothing area unless in transit to another designated work area.

(c) All protective clothing areas have self closing doors so those areas remain free of vermin, mice, rats and birds.

6. The hygiene requirements brought about by OMAR and changes to the New Zealand law effectively meant that it was no longer possible for Progressive employees who needed to smoke to use the time honoured method of simply going to an outside area during their break.

7. This is because to do this would mean that they would be required to leave the protective clothing area. That would require them to remove all their whites, check in their knives, change into civilian clothing and then reverse that process on their return to the work area. In effect all of their break would have been taken up changing clothing and there would have been no time for them to "light up".

8. To get around this particular problem Progressive in conjunction with the union and its employees has provided a separate smoking room which forms part of the protective clothing area. This room ("the smoking room") meets with, in particular, the OMAR hygiene requirements.

9. The smoking room is situated directly off from the cafeteria, and has been in use since 2002. It is constructed of hard surfaces. Workers are not permitted to consume food in that room. It has a number of tables but they are there only to enable staff to play cards. No one is employed to clean the room.

10. The entrance to the cafeteria is by way of a sealed self-closing door. The entrance to the smoking room is through a small vestibule, then also through a sealed self closing door. The cafeteria has what is known as "positive air pressure". Air is pumped into the smoking room from the cafeteria via ceiling vents and ducts.

11. The smoking room has what is known as "negative air pressure". This means that the smoke in that room cannot find its way back into the cafeteria either through the entrance door or via the air ducts. An extractor fan and two exhaust ducts take the smoke contaminated air directly out of the smoking room.

12. The separate dedicated smoking room for smokers was constructed in such a way as to ensure that none of the smoke generated would in any way affect the health of any other worker.

The statutory scheme

[6] The Act has four stated purposes in the long title. The first of these is to reduce the exposure for non-smokers to the detrimental health effects of smoking by others. The second purpose relates to regulating the marketing of tobacco products. The third purpose is to "monitor and regulate the presence of harmful constituents" in tobacco products and smoke. Finally, the long title also refers to the establishment of a Health Sponsorship Council.

[7] Smoke-free workplaces and public areas are dealt with in Part 1 of the Act which has its own specific purpose section. Section 4(a) relevantly provides that the purposes of Part 1 are:

> [T]o prevent the detrimental effect of other people's smoking on the health of people in workplaces, or in certain public enclosed areas, who do not smoke or do not wish to smoke there; …

[8] Section 5 is headed "Smoking in workplaces prohibited". In terms of s 5(1), employers "must take all reasonably practicable steps to ensure that no person smokes at any time in a workplace" that is not:

(a) a vehicle in which smoking is permitted under s 5A; or

(b) a dedicated smoking room in which smoking is permitted under s 6 (dedicated smoking rooms in hospitals etc).

[9] A "workplace" is defined in relation to an employer as meaning certain internal areas "usually frequented by employees" and then "includes" a number of other specified places such as a cafeteria, lobby or other "common" internal area linked in the way described in s 2(1) to the workplace. The definition in s 2(1) is as follows:

> **workplace,** in relation to an employer –
>
> (a) means an area that is –
>
> (i) an internal area, within or on a building or structure occupied by the employer, usually frequented by employees or volunteers during the course of their employment; or

(ii) an internal area, within or on a ship (being a ship to which section 10 applies), an aircraft, or a train, owned, leased, or otherwise operated by the employer, usually frequented by employees or volunteers during the course of their employment; and

(b) includes a cafeteria, corridor, lift, lobby, stairwell, toilet, washroom, or other common internal area attached to, forming part of, or used in conjunction with a workplace within the meaning of paragraph (a); and

(c) includes an internal area within or on a vehicle that –

(i) is not an aircraft, a ship, or a train; but

(ii) is provided by the employer and normally used by employees or volunteers; and

(d) includes an operating taxi; but …

[10] The definition then excludes certain facilities, namely:

(e) …

(i) a motel, or a bedroom or suite in a hotel; or

(ii) a cabin or suite, for the time being assigned to a passenger or passengers, on a ship; or

(iii) a sleeping compartment, for the time being assigned to a passenger or passengers, on a train; or

(iv) a cabin, for the time being assigned to only 1 employee or volunteer, or to the master or owner, on a ship; or

(v) a sleeping compartment, for the time being assigned to only 1 employee or volunteer, on a train; or

(vi) a prison cell; or

(vii) a dwellinghouse occupied by the employer.

[11] The phrase "internal area" is in turn defined in s 2(1) in the following terms:

internal area, in relation to any premises or vehicle, means an area within or on the premises or vehicle that, when all its doors, windows, and other closeable openings are closed, is completely or substantially enclosed by–

(a) a ceiling, roof, or similar overhead surface; and

(b) walls, sides, screens, or other similar surfaces; and

(c) those openings

[12] The exceptions to the regime established by s 5 are dealt with in more detail in ss 5A and 6.

[13] Section 5A makes it plain that an employer may permit smoking in a vehicle provided by the employer and "normally used" by employees or volunteers in specified circumstances. Those circumstances are, first, that the public does not normally have access to the vehicle, and second, that all the employees who use the vehicle have given written notice asking for smoking to be permitted or saying they do not object, and that notice is still current.

[14] Section 6(1) permits an employer to allow smoking by patients or residents of a workplace that is, or is part of, a hospital care institution, a residential disability care institution, or a rest home if certain conditions are met. The first condition is that the smoking must take place only in dedicated smoking rooms.

[15] A "dedicated smoking room" is given a limited meaning in s 2(1), namely:

> [A]n internal area in a hospital care institution, a residential disability care institution, or a rest home that is used solely to enable patients or residents who smoke to smoke, or to socialise with each other in a place where smoking is permitted.

[16] The second condition is that the smoking room must be equipped with a mechanical ventilation system which ensures that smoke does not enter into other parts of the workplace. Third, the employer must have taken "all reasonably practicable steps to minimise the escape of smoke" to other parts of the workplace. Finally, for each dedicated smoking room there must be an equivalent smoke-free room available for residents or patients who want to socialise in a smoke-free atmosphere.

[17] Section 6(3) makes it plain that s 6(1) does not authorise an employer to allow a non-resident or patient to smoke in the smoking room and nor does it authorise a person who is not a patient or resident to smoke in the smoking room.

[18] There are also provisions dealing with smoking in prison cells (s 6A), schools and early childhood centres (s 7A), aircraft (s 8), passenger service vehicles (s 9),

travel and licensed premises (ss 11 and 12), restaurants (s 13), casinos (s 13A) and gaming machine venues (s 13B).

[19] Finally, s 17(1) makes it an offence for an employer not to comply with s 5(1). Progressive is liable to a fine of up to $4,000 for the offence (s 17A(2)).

The decision of the District Court

[20] Judge Watson considered that by using the language "means" and "includes", the legislation extended the core workplace definition under s 2(1)(a) to include areas that may not be used frequently or by all workers all the time even though they may have been regarded as "only ancillary to or incidental to the core or actual work place area" (at [40]). It followed that the Judge accepted that while the smoking room was not an actual core part of the workplace it fell within the extended definition in (b) as another common internal area forming part of a workplace. While the smoking room was ancillary, it was "just as important" for the undertaking of the core business as other facilities such as toilets and access ways such as lifts and stairwells (at [46]).

The High Court decision

[21] Baragwanath J rejected the construction advanced by Progressive because it would allow smoking "to a greater extent" than the wording of the Act allowed (at [29]). His Honour concluded that there was no basis for reading down the language of the Act "and assume that smoking rooms are not prohibited by the Act where the smoking rooms are exclusively for the use of employees who smoke" (at [30]).

The issues

[22] It is accepted that neither exception in s 5(1)(a) or (b) applies in this case and that, having set up a room in which smoking is allowed, the appellant cannot argue that it has taken "all reasonably practicable steps" to prohibit smoking. That means

that the definition of "workplace" is critical. The appellant's submissions on the meaning of "workplace" raise the following issues:

(a) What is the relevance of the fact that the smoking room is attached to the cafeteria?

(b) Is the smoking room a "common" internal area given that its only use is for smoking?

(c) How is the approach to construction of the definition affected by the Interpretation Act 1999?

[23] We take each in turn.

Relevance of the fact the room is off the cafeteria

[24] The appellant submits that the definition of workplace incorporates two areas, that is, core workplaces where work is performed (part (a) of the definition) and ancillary areas (part (b)) being those used in conjunction with the workplace. The submission is that the smoking room is not a workplace because it is a room off an ancillary room (the cafeteria) and so it is two steps removed from the workplace.

[25] We agree with the approach taken by Judge Watson that the use of the "means" and "includes" technique in this case gives rise to an extended definition (at [41]). The extension is designed to bring into the definition areas such as common, that is shared, means of access in a workplace located in an office or factory building. For example, the lobby area of an office building may not come within the definition in (a) of a workplace for a business that occupies only a floor of that building. However, the employees must pass through that lobby to get to their workplace. These are common internal areas, shared with other workplaces in the same building and are for these purposes within the definition of workplace.

[26] On this approach, the cafeteria is within the definition of "workplace". The smoking room is attached to that workplace and so would come within the definition

in (b) as long as it is a "common" internal area. The width of the definition and the focus on capturing internal areas both adjacent to and used in conjunction with the "core" workplace is reflected also in the need for the exceptions in ss 5A and 6.

[27] Further, to the extent that the appellant's submissions are based on the premise that whether an area is part of a workplace depends on whether it is "attached to" and accessed off a part (a) internal area or a part (b) common area, we disagree. The definition in paragraph (b) says that workplace includes a common area "attached to, forming part of, or used in conjunction with a workplace within the meaning of paragraph (a)". It is possible for an area to be used in conjunction with a part (a) area, even though the area is only accessible via a part (b) area.

[28] In any event, we agree with the respondent that the smoking room does fit within the first part of the definition of workplace in (a)(i), that is, an internal area within a building occupied by the employer, usually frequented by employees during the course of their employment.

[29] The smoking room is clearly an internal area within a building occupied by Progressive.

[30] As to whether it is "usually frequented" by its employees, there was no suggestion in the evidence that persons other than employees of Progressive use the smoking room. They visit it, according to the appellant's evidence, on paid meal and tea breaks. The room is visited frequently (often) by the employees who go there to smoke.

[31] The only possible issue is whether the employees in going to the room to smoke on their breaks do so "in the course of their employment". That phrase has some flexibility. A narrower interpretation could confine it to the actual discharge of duties that the employee undertakes in accordance with their contract of employment. Judge Watson noted at [38] that it was not suggested in the argument before him that such a construction could be adopted here.

[32] We agree with the respondent that the most sensible interpretation is that the phrase "in the course of their employment" in this context incorporates not only the discharge of employment functions but also an employee's activities during paid meal and tea breaks that occur within the internal areas. The District Court Judge at [31] cited the interpretation suggested in Anderson and others (eds) *Mazengarb's Employment Law* (looseleaf ed) at [6502.10]:

> For present purposes and by broad analogy with the cases in those areas, it is suggested that frequenting an internal area will be "in the course of employment" if it would be normal for an employee or volunteer to use that area during the actual performance of work or acts reasonably incidental to the work.

[33] An employee on a paid morning tea break in a cafeteria provided for that purpose accordingly visits the cafeteria in the course of his or her employment. Similarly, an employee who takes his or her meal break in the smoking room immediately adjacent to the cafeteria at Progressive goes there in the course of their employment. As the respondent submits, the fact that Progressive's employees go to the smoking room dressed in the special clothing that they wear only for the purpose of carrying out their work makes the point.

Is the smoking room a "common" area?

[34] This issue relates to the reference in the definition (in (a)) to common internal areas.

[35] The appellant says the smoking room is not such an area because if it is not used for smoking then it has no current use. The appellant suggests there is a contrast between a recreation room in which smoking is allowed which also has a pool table and a television and (so is in common use) and the smoking room in this case.

[36] In the context of a definition that captures areas such as the lobby or liftwell, "common" must mean an internal area that is shared by employees. The smoking room is in this category.

Effect of s 5 of the Interpretation Act 1999

[37] The appellant says that the purpose of s 5 of the Smoke-free legislation is a narrow one, that is, to ensure that non-smokers are not affected by secondhand smoke. The appellant says that the smoking room is consistent with that purpose and there is an anomaly then in penalising Progressive for something which is in fact consistent with the statutory purpose. Relying on a passage in *Commerce Commission v Fonterra Co-operative Group Limited* [2007] 3 NZLR 767 (SC), the appellant points to the need based on s 5 of the Interpretation Act 1999 to give emphasis to both the text and the purpose in interpreting legislation.

[38] Tipping J, delivering the judgment of the Court in *Fonterra* at [22], observed that s 5 makes text and purpose "the key drivers" of statutory interpretation. Tipping J continued at [22] that:

> The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should also be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[39] There is an argument, which was adopted by Baragwanath J, that the purpose of the Act is the broader one of reducing smoking. It is not necessary for us to decide the matter on that basis. That is because we consider that the language is plain and *Fonterra* does not require the Court to ignore that.

[40] Tipping J in *Fonterra*, in a footnote to [22], also referred with approval to *Auckland City Council v Glucina* [1997] 2 NZLR 1 at 4 (CA) and Burrows *Statute Law in New Zealand* (3ed 2003) at 146 and following. Blanchard J in *Auckland City Council* observed at 4 that the starting point must be the "actual language" chosen by the legislature.

[41] In any event, the interpretation adopted by the courts below is consistent with the narrower purpose of ensuring non-smokers are not affected by smoking. It is quite possible to envisage fairly slight variations on the factual position which

illustrate that. For example, while non-smokers do not use the smoking room, it is possible that they may do so. This is not a situation where the literal meaning gives rise to a strained interpretation. Further, on the appellant's argument, that the smoking room is "one removed" and so outside of the definition, Progressive would be acquitted whether or not the smoking room had any effective ventilation. In other words, the appellant's interpretation is not dependent on the existence of appropriate ventilation but rather on the fact that the relevant room is off an ancillary area. That interpretation does not serve the purpose of the Act.

[42] The purpose also has to be considered in light of how it was Parliament decided to achieve it. In that respect, the legislative history suggests that Parliament rejected the concept of mechanically ventilated rooms as providing, generally, a means of compliance with the Act. Further, prior to the 2003 amendments that brought the current regime for workplaces into force, s 5 required employees to have a written policy on smoking in the workplace. Section 7 provided for employers to ensure there were notices in a workplace identifying any permitted smoking areas. That section was repealed in 2003. The shift was therefore from a permissive regime which envisaged the establishment of smoking rooms to a more restrictive regime.

[43] The Select Committee, in its commentary on the report back version of the Bill at 3, recommended making all indoor work places "completely smokefree with some limited exceptions". The Committee referred at 3 to a supplementary order paper which proposed restricting the areas where smoking could be allowed but still allowing some exceptions, "such as in separately-ventilated refreshment areas or in a designated" smoking area.

[44] The Committee said they were not recommending that the exceptions proposed in the supplementary order paper be adopted. The Committee said at 3 – 4 that it preferred to take a consistent approach and make all indoor workplaces smoke-free. As to the definition of workplace, the Committee recommended at 4 a definition based on internal areas that are usually frequented by employees or volunteers "and includes places such as lifts, toilets, ships, trains, and operating taxis." The Committee said at 4 that the "new definition will ensure that volunteer workers are afforded the same protections as paid employees".

[45] The Committee then addressed the question of separately ventilated smoking rooms. The Committee said it had heard conflicting evidence about the effectiveness of these ventilation systems. Another issue was the cost of running such a system. The commentary records as follows at 7:

> Some of us considered separately ventilated smoking areas would provide sufficient safeguards for employees. However, others of us consider separately-ventilated areas are impractical. We consider such systems would not provide sufficient protection for employees, and would impose substantial running costs on premises.

That approach is reflected in the limited definition of "dedicated smoking rooms" in the Act.

[46] We conclude that the meaning of the relevant provisions is plain. A cross-check of that meaning to confirm that the meaning accords with the purpose does not lead us to doubt that the plain meaning is what Parliament intended.

[47] For all these reasons, we consider the answer to the case stated is yes.

Costs

[48] Costs were not sought on the appeal and we make no order as to costs.

Solicitors:
Napier Law – Donkin Lloyd, Napier for Appellant
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