

DEAL v KODAKKATHANATH (M252/2015)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2015] VSCA 191

Date of judgment: 24 July 2015

Date special leave granted: 11 December 2015

The appellant was employed by the respondent as a primary school teacher. On 19 September 2007, she had to remove a number of large sheets to which were attached papier mache displays, from a pin board on a wall of a classroom. The respondent had provided a two step ladder ('the steps') for use when performing this task. The steps, which were an 'A' frame configuration, had to be set at right angles to the pin-board. The appellant had to ascend the steps, unpin the displays, and whilst carrying one or more of them, descend the steps backwards. As she was descending, she held the displays by putting both hands underneath them. She thus had no hand free to steady herself. Because of their size, she also had an impaired view of the steps which she was descending. She missed her footing and fell, suffering injury to her right knee.

The appellant issued proceedings in the County Court of Victoria in which she claimed damages for injury by reason of negligence and breach of statutory duty on the part of the respondent. During the course of the trial the respondent submitted that the evidence adduced did not permit a conclusion that the appellant had suffered injury in breach of regs 3.1.1, 3.1.2 and 3.1.3 of the *Occupational Health and Safety Regulations 2007* (Vic), as pleaded by the appellant. Regulation 3.1.1 requires an employer to identify any task undertaken, or to be undertaken, by an employee 'involving hazardous manual handling'; reg 3.1.2 requires an employer to ensure that the risk of a musculoskeletal disorder associated with a hazardous manual handling task is eliminated or reduced so far as is reasonably practicable; and reg 3.1.3 requires review, and if necessary revision, of any measures which have been implemented to control risks in relation to musculoskeletal disorders. The trial judge (Judge McInerney) found there was no circumstance whereby the definition of hazardous manual handling could be met in this case, so the pleading could not be put to the jury.

The appellant appealed to the Court of Appeal (Warren CJ and Ashley JA, Digby AJA dissenting) on the ground, inter alia, that the trial judge wrongly removed the breach of statutory duty claim from the jury's consideration. The majority of the Court held that hazardous manual handling could be constituted by a single episode of manual handling of an unstable or unbalanced load or one that is difficult to grasp or hold; and it was not necessary that the activity carry with it the risk of associated musculoskeletal injury. Therefore, it could be said that Regulation 3.1.1 was potentially engaged. But the question which then arose was what was comprehended, in reg 3.1.2, by 'the risk of a musculoskeletal injury associated with a hazardous manual handling task'? The majority did not accept that it was enough to show that an appellant in fact suffered a musculoskeletal injury whilst performing a hazardous manual handling task. If such a connection was sufficient, the expression 'associated with' would not be given due regard.

The majority found that it should not be regarded as reasonably practicable for an employer considering the generic task of removing light displays from pin boards using steps of the kind used by the appellant to conclude that the task would, or even might, involve hazardous manual handling. The circumstances in which the appellant suffered injury illustrated the point. Assuming that the task nominally fell within paragraph (c) of the definition of 'hazardous manual handling', it did so because the appellant chose to handle multiple displays at the one time, which meant holding them horizontally. Although it could be said that the evidence permitted a conclusion that the carrying of the displays had a certain causative relationship with the appellant's fall - either because the displays obscured her vision of the steps; or because, using both hands to handle the displays, she could not steady herself - such a connection could not satisfy the relationship between risk and activity which was required by regulation 3.1.2.

Digby AJA (dissenting) considered that the appellant had a real prospect of ultimate success on the breach of statutory duty cause of action. Regulation 3.1.1 required the respondent to identify any task involving hazardous manual handling. It was open on the evidence for the jury to conclude that the respondent had failed to undertake and complete such identification. Regulation 3.1.2 required the respondent to reduce the risk of a musculoskeletal disorder associated with a hazardous manual handling task by, insofar as reasonably practicable, changing the relevant systems of work used to undertake that task. On the evidence, the respondent's systems of work should arguably have been altered to ensure that a person in the appellant's position was assisted by another person when demounting displays and before descending the ladder used for that task.

The grounds of appeal include:

- The Court of Appeal was wrong in holding that the risk of injury, or the musculoskeletal disorder, to the appellant was not a risk "associated with" the hazardous manual handling tasks in which she was engaged, within the meaning of reg 3.1.2 of the *Occupational Health and Safety Regulations 2007 (Vic)*.

The respondent has filed a Notice of Contention which submits that any contravention of reg 3.1.1, 3.1.2 or 3.1.3 of *Occupational Health and Safety Regulations 2007 (Vic)*, properly construed, did not confer upon the appellant a private right of action in damages for breach of statutory duty.