



## HIGH COURT OF AUSTRALIA

12 August 2015

### TOMLINSON v RAMSEY FOOD PROCESSING PTY LTD

[2015] HCA 28

Today the High Court unanimously allowed an appeal from the Court of Appeal of the Supreme Court of New South Wales. The High Court held that declarations and orders made by the Federal Court of Australia in proceedings commenced by the Fair Work Ombudsman ("the Ombudsman") against the respondent did not create an issue estoppel precluding the appellant from asserting that the respondent was not his employer in a subsequent proceeding.

The appellant was employed by the respondent to work in its abattoir. The appellant was later informed that his employment was at an end and that he would be employed by Tempus Holdings Pty Ltd, which would provide labour services to the respondent. The appellant was subsequently made redundant. He complained to the Ombudsman that certain statutory entitlements had not been paid to him and the Ombudsman commenced proceedings against the respondent in the Federal Court. The principal issue in those proceedings was whether the respondent or Tempus had been the appellant's employer. The Federal Court declared that the respondent had been the appellant's employer and ordered the respondent to pay the appellant's entitlements.

The appellant subsequently commenced proceedings against the respondent in the District Court of New South Wales claiming damages in negligence for a personal injury he sustained while working at the abattoir. He contended that Tempus had been his employer, but that the respondent, as the party in control of the workplace, owed him a duty of care akin to that owed by an employer. If the respondent had been the appellant's employer, the appellant would have been prevented from bringing the claim, or from recovering damages, by New South Wales legislation governing the management of, and limiting recovery for, workplace injuries. The respondent argued that the appellant was estopped by the declarations and orders made in the Federal Court proceedings from denying that the respondent was his employer or, alternatively, that the respondent was in fact the appellant's employer.

The District Court rejected the respondent's issue estoppel argument and found on the evidence that Tempus had been the appellant's employer. On appeal, the Court of Appeal determined that the declarations and orders of the Federal Court created an estoppel binding on the appellant by reason of the appellant having been "privity" in interest with the Ombudsman in the Federal Court proceedings according to the principle stated by this Court in *Ramsay v Pigram* (1968) 118 CLR 271.

The High Court held that the Court of Appeal erred in concluding that the Ombudsman was the appellant's privity in the Federal Court proceedings, as the Ombudsman was not enforcing payment of the appellant's entitlements "under or through", or "on behalf of", the appellant. In commencing proceedings against the respondent, the Ombudsman was acting pursuant to his statutory power to enforce the *Workplace Relations Act 1996* (Cth) and awards made under that Act. That power was not derived from the appellant or his entitlements, and, in exercising it, the Ombudsman was not representing the appellant's legal interests. By majority, the High Court remitted the matter to the Court of Appeal for determination of an outstanding issue.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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