## case notes with mark hunter

### Hales V Hampton

### Supreme Court No. JA 154/2003

### Judgment of Martin (BR) CJ delivered 16 April 2004

**CRIMINAL LAW - DOMESTIC VIOLENCE ACT 1997 - CONSENT ORDERS**

**In November 2001, a restraining order ("the order") was made against the respondent, by consent, when he appeared before a magistrate. The respondent was subsequently charged with breaching the order in February 2002.**

In September 2003, the respondent pleaded guilty in the Court of Summary Jurisdiction. At an earlier mention, his counsel had informed the Court that there was *"no dispute about service or existence of the [restraining] order."*

The Magistrate hearing the case refused to act upon the guilty plea, and dismissed the charge. His Worship relied upon the fact that the precis did not establish that in November 2001 the Court had, pursuant to s 5(5) of the *Domestic Violence Act 1997* ("the Act"), explained to the respondent the effect of the order and the possible consequences if it was breached.

**HELD**

1. Appeal allowed; order dismissing complaint set aside.
2. The respondent having pleaded guilty, it was not incumbent upon the prosecution to prove compliance with s 5(5) of the Act.

His Honour observed that counsel for the respondent did not in the lower court seek to vacate the guilty plea entered by her client, but supported the dismissal of the charge on the erroneous basis propounded by the Magistrate.

The respondent contended on appeal that compliance with s 5(5) of the Act is a condition precedent to the existence of jurisdiction for the court making a restraining order by consent.

*Mark Hunter*

In his judgment, Martin CJ examined the structure of the Act and, as obiter dicta, expressed the view that failure to comply with s 5(5) does ***not*** affect the validity of a restraining order made by consent.

**APPEARANCES**

Appellant: R Carlin / DPP

Respondent: G Smith / NTLAC

# Mutual mitigation: sections 75A and 75B Work Health Act cont...

the worker, Mr Loadman SM observed that "...all the bases upon which the Employer sought to evade its obligations are based upon hearsay or other, very circumstantial evidence which of course is when disputed capable only of being resolved by being tried."

The Court decided to deal with the case summarily because the worker (for the purposes of the summary judgement application), conceded that the allegations against him could amount to a breach of the obligation of "mutuality" under the contract of employment between him and the employer.

The worker argued that even if he breached his obligations of mutuality, such a situation did not entitle the employer to avoid its obligations under Section 75A of the *Work Health Act*. The Court agreed.

Mr Skeen referred to s75A(2) and argued that section specifically catered for a situation where an employer is unable to provide a worker with suitable employment. He contended that if the employer felt a worker had breached mutuality in some way by the workers conduct, the employer could not cancel payments but would have to follow s75A(2). The Court also agreed with this proposition.

**Comment**

The interpretation of "suitable employment" and the analysis of sections 75A and 75B are heavily laden with complex policy issues.

The facts of individual cases, naturally, will be key. The approach to case preparation and planning, and the presentation of the case concept at the hearing, as well as overall strategic decisions, are of elevated importance to ensuring a fair and just outcome.

Although interpreting rehabilitation provisions is inherently complex and challenging, it behoves counsel to assist the Court by distilling the principles and delivering them in a cogent and compelling way; and avoid resorting "to a welter of authorities and referral to esoteric points of law".

It would appear the Supreme Court will have an opportunity to formally analyse and examine the meaning of "suitable employment" in the Act and the principles of mutuality and mitigation of loss. The Work Health Court's decision in *Power* has been appealed to the Supreme Court. The employer/insurer in the *Skeen* case has decided not to appeal.