1955

*Mar. 1, 2
*May 24

BRUCE N. KENNEDY ..... APPELLANT

AND

WORKMEN'S COMPENSATION BOARD ..... RESPONDENT

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Labour—Workmen's compensation—Whether injuries arose out of employment—Workmen's Compensation Act, R.S.N.B. 1952, c.255, s.6.

The appellant together with his truck and tractor was engaged by his two sons at a fixed rate per day to truck supplies and do hauling at their lumber camp, they to supply the gas and oil. The tractor was to be kept at the site of the work. One of the sons while using the tractor damaged it and told the appellant to take it to a garage for repairs or buy a new one. The appellant took the tractor home on his truck and to a garage the next day. There he decided to buy a new one and had the tracks of the old one transferred to it. While trying it out he was injured.

Held: (Rand and Cartwright JJ. dissenting) that the appellant elected in his own interest to make the purchase and there was no basis upon which it could be said that the accident arose out of his "employment" within the meaning of s. 6 of the *Workmen's Compensation Act*, R.S.N.B. 1952, c. 255. *Reed* v. *Great Western Ry. Co.* [1909] A.C. 31, applied.

Per Rand and Cartwright JJ. (dissenting) The significant fact was that the sons were to pay for the use of the tractor throughout the operation. It was to remain on the work and the father was not exclusively to operate it. The damage was done by the employer and the instruction to have it repaired or to get a new one was of primary importance in interpreting what followed. In obtaining the repairs or their

*PRESENT: Rand, Kellock, Cartwright, Fauteux and Abbott JJ.

substitute, a new tractor, the father was at some time acting within his employment. Treating his driving home and to the garage the next day as for his own purposes, when he reached the latter place, he had clearly re-entered upon what he was to do under instructions. In the broad perspective of the circumstances, the occurrence was caused by the work and in the course of it.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), disallowing the appellant's claim for compensation.

N. Carter for the appellant.

D. M. Gillis and R. E. Logan for the respondent.

The judgment of Rand and Cartwright JJ. (dissenting) was delivered by:

RAND J.:—The controlling facts here are not in dispute. The sons of the appellant were carrying on logging operations and they engaged with him for his own services and the use of a truck and tractor for trucking and hauling purposes generally. The tractor was kept at the site of the work but the father would return home at night with his truck. The sons were to pay at the rate of $8 a day and supply oil and gas. Nothing seems to have been said regarding repairs, although the father stated the understanding to be that the equipment was to be returned to him when the work was finished in the same condition as when begun.

On an occasion when he was cruising with one of the brothers, the other, while driving the tractor, stripped a cog in the steering column. Unable to get repairs done locally, the son told his father to take the machine to Gagetown to be repaired or to buy a new one. The tractor accordingly was that night placed on the truck, taken to the father's home, and the next morning to Gagetown. For reasons which do not appear, it was there decided by the father to make an exchange. The old tracks were placed on the new machine which, in the course of being tried out, overturned, pinning the father underneath and causing him serious injury.

The ownership of both machines was admittedly in the father. It is on that circumstance and the inferences from it that the Workmen's Compensation Board and the Appeal

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Rand J.

Division have held the injury not to have arisen "out of and in the course of the employment". Their view was that it was the father's responsibility to furnish the tractor at the scene of operations, and until that was done it could not be said that he was at his work.

But, with the greatest respect, that seems to me to overlook significant facts. It was not merely that the sons were to pay for the use of the tractor; they had bargained for its use throughout the operation. It remained at the work and was there to be used as required. That the father was not, exclusively, to operate it, or that to drive it was not his only duty, is seen by what was taking place at the time of stripping the gear. The damage done was by the employer himself and the liability as between the sons and the father arising out of that is not to be decided here; but the instruction to have the machine repaired or get a new one is of primary importance in interpreting what followed.

I cannot think it controvertible that in obtaining the repairs or their substitute, a new tractor, the father was at some time and place acting within his employment. Treating his driving home and the next morning to Gagetown as for his own purposes, when he reached the latter place, he had clearly re-entered upon what he was to do under instructions; and if the repairs had been made, and the accident had taken place on the way back to the work, the case would be free from doubt.

The exchange effected only a substitution of machine, the use of which was engaged. The son could not "instruct the father" in the sense of compelling him to buy the new tractor; but it was sufficient to effect, as it was intended, a continuity of use and relation to the work; the new machine became identified with the old as to the employers and for its return to the operations.

In that situation, testing the old tracks on the new machine was an ordinary precaution taken in the interest of the employment; a similar trial of the repaired machine would not be questioned. The old tracks were part of the substitution and to try them out at a place where, if not working satisfactorily, they could be adjusted, was exercising good judgment.

In the broad perspective of the circumstances, the occurrence was caused by the work and in the course of it. The responsibility for the damage led to the necessity for the repair or substitution, and that what the father did was considered an ordinary incident of the employment is seen in the regular allowance of remuneration made for the day on which it took place. That to be engaged in restoring such breakages of the employer by a course of action directed by him, is outside the employment, although recognized by him as being within it, seems to me to be, in the circumstances, an untenable conclusion in law.

I would, therefore, allow the appeal with costs in both courts.

The judgment of Kellock, Fauteux and Abbott JJ. was delivered by:

KELLOCK J.:—The question in this appeal is as to whether the accident causing the injury to the appellant was one "arising out of and in the course of his employment" within the meaning of s. 6(1) of the *Workmen's Compensation Act*, R.S.N.B. 1952, c. 255.

The appellant commenced work for his sons on November 14, 1951, which work consisted, at the relevant time, of "trucking supplies and hauling around the camp", with his own truck and tractor for which he was to be paid $8. per day, the sons, who were his employers, paying for gas and oil. In a statement made by one of the sons to an investigator of the respondent board, he said that "I imagine we will pay for the use of the tractor though no arrangement was made."

On the 4th of December, while one of the sons was driving the tractor, it was damaged and as it could not be repaired in the neighborhood, the appellant was instructed by the sons to take the tractor to a garage "and have it fixed or supply a new one".

The appellant was not living at the camp where the accident occurred but at his own home, to which he returned every night. He accordingly took the tractor home in his truck on the night of December 4th and the next day drove in to Gagetown to have it repaired. According to Ralph Kennedy, one of the employers, the appellant "while there decided to trade for a new one." This he did, the tracks from the old tractor being transferred to the new one,

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Kellock J.

whereupon the appellant proceeded to try out the new tractor. It was while demonstrating what these tracks would do that the tractor overturned, causing the injuries.

It is quite true that if the appellant wished to carry out his contract with his sons, he had to have a tractor, which could have been done either by the keeping of the old one in repair or by purchasing a new one. Had he chosen to have the old one repaired, it might have been that it could be said he was acting on behalf of the sons in so doing, although this could only follow, in my opinion, if it were part of the arrangement of hiring that the obligation to keep the tractor in repair lay upon the employers. In the circumstances, I agree with the statement of counsel for the appellant in his factum that this point is immaterial. The old tractor was not repaired. The appellant elected in his own interest to purchase a new machine, and I can see no basis upon which it can be said that in so doing he was acting in any sense in the course of his "employment" with the sons.

To say that the appellant was "instructed" to repair the old machine or to supply a new one means nothing more, in my view, than that it was immaterial to his employers which he did, but that if he were to maintain himself in a position to continue working for them, he would have to possess a tractor. The election to purchase a new machine was his own, and the purchase moneys were his own. He was in the course of performing no duty to his employers in purchasing the new one. I do not think it could be contended that, had the appellant sustained injury by reason of some defect in the premises of the vendors while he was engaged in making the purchase, such injury could have been said to have arisen in the course of his employment by his sons. The actual occurrence, in my opinion, cannot be put on any higher ground. In my opinion, the principle of the decision in *Reed* v. *Great Western Railway* (1), applies.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Inches* and *Hazen*.

Solicitors for the respondent: *Logan, Bell* and *Church*.

(1) [1939] A.C. 31.