**[1980–87 Gib LR 528]**

## VALMAR PHARMACY LIMITED v. DEPARTMENT OF LABOUR AND SOCIAL SECURITY, ex parte RODRIGUEZ

COURT OF APPEAL (Spry, P., Fieldsend and Law, JJ.A.), November 13th, 1987

*Employment—foreign workers—permit to employ—non-resident worker not "employed" for purposes of Employment Ordinance, s.20(1)(b) and "employer" does not require permit to "employ" non-resident, if no contract with "employer," and receives no remuneration*

The appellant was charged in the magistrates' court with employing two non-residents without a permit to do so, contrary to the Employment Ordinance, s.20(1)(b).

The appellant pharmacy was inspected by two labour inspectors who found two non-resident Spanish nationals working there. The appellant had no permit to employ them, but they were free to come and go as they pleased, had no contractual obligations and received no remuneration for their work. Accordingly, the magistrate found that no offence, contrary to the Employment Ordinance, s.20(1)(b), had been committed. He was then requested to state a case and the following questions were submitted for the opinion of the Supreme Court:

> "(1) Whether, for the purpose of s.20(1)(b) of the Ordinance, the definition of "worker" in s.18(1) of the Ordinance was properly determined by the magistrate.
>
> . . .
>
> (3) Did the magistrate, on the facts he found, come to a correct determination in law?"

The Supreme Court answered "No" to these questions and came to the conclusion that, even if an individual owed no contractual obligations to his employer and received no remuneration for his work, he could still be employed as a worker under the Employment Ordinance, s.20(1)(b). Accordingly, the appellant was convicted of employing two Spanish nationals without a permit to do so.

On appeal, the appellant submitted that it had committed no offence contrary to s.20(1)(b) as (a) in the absence of mutual contractual obligations it had not employed the non-residents as employment was based on the bilateral relationship of master and servant (as demonstrated by the use of the word "servant" in the definition of "worker" in s.18(1) of the Ordinance), and such a relationship did not exist here; and (b) as it had not

employed them, they could not be described as "workers" within the meaning of s.18(1).

The respondent submitted that anyone who worked for another, even in the absence of contractual obligations, was employed as a "worker" for the purposes of s.20(1)(b).

**Held,** allowing the appeal:

The appellant had committed no offence contrary to the Employment Ordinance, s.20(1)(b) as the phrase "to employ any worker" in that paragraph meant to enter into a contract of employment with a worker. The Supreme Court had therefore erred in reaching the decision that s.20(1)(b) encompassed those who owed no contractual obligations to their employer and who received no remuneration for their work. Accordingly, the appellant did not need a permit as it had not entered into a contract of employment with the non-residents. Moreover, it was to be presumed that legislative references to "employment" meant contractual employment, as "employee" or "employed person" was defined three times in the Laws of Gibraltar and each definition expressly referred to a contract of employment (para. 10; paras. 12–15).

**Legislation construed:**

Employment Ordinance, s.18(1): The relevant terms of this section are set out at para. 5.

s.20(1)(b): The relevant terms of this section are set out at para. 5.

*J.E. Triay* for the appellant;
*J.M.P. Nuñez* for the respondent.

1 **SPRY, P.,** delivering the judgment of the court: The appellant is a limited company, the proprietor of a pharmacy which is managed by Mr. Caruana, its director. In November 1985, two labour inspectors visited the pharmacy and found two people working there ("the visitors"). One was a young lady engaged to be married to Mr. Caruana's son. The other was a young man, a friend of Mr. Caruana's son, who is studying pharmacy in Spain. Both were Spanish nationals and no permit had been issued for the employment of either under the provisions of the Employment Ordinance. It is common ground that neither of the visitors received any form of remuneration and they were free to come and go as they pleased. They owed no contractual duty to the appellant and the appellant had no contractual obligations towards either of them.

2 The appellant was charged with offences against s.20(1)(b) of the Employment Ordinance but the Stipendiary Magistrate found that no offence had been committed. He was then requested to state a case for the opinion of the Supreme Court. He did so, and after hearing both parties, the Chief Justice held that the decision had been incorrect and ordered that the information be relayed to the Stipendiary Magistrate, that convictions

be entered on each and that, after the parties had been given the opportunity to address the court, the appropriate sentences be passed. The appellant now appeals to this court against that decision.

3 We think it unnecessary to set out the arguments in the lower courts. As often happens in these cases, there has been some shift in the argument. The questions on which the Supreme Court was asked to express an opinion were as follows:

> "(1) Whether, for the purpose of s.20(1)(b) of the Ordinance, the definition of 'worker' in s.18(1) of the Ordinance was properly determined by the magistrate.
>
> (2) Whether the definition of 'employee' in s.2 of the Ordinance is relevant to the provisions of s.20(1)(b) of the Ordinance.
>
> (3) Did the magistrate, on the facts he found, come to a correct determination in law?"

Briefly, the answer of the Chief Justice to all those questions was "No."

4 We find it difficult to deal with the first question because it is not clear, from either the case stated, or the decision of the learned Chief Justice, exactly what the question means or what the Stipendiary Magistrate had determined. We shall, however, consider both provisions in the course of this judgment.

5 We propose now to go to the third question and we begin by setting out the relevant provisions of the Employment Ordinance. As we have said, the appellant was charged with an offence against s.20(1)(b) which, so far as is relevant, reads:

> "It is an offence—
>
> . . .
>
> (b) to employ any worker who is not resident in Gibraltar without a permit so to do . . ."

Section 18(1) contains a definition of worker, which reads as follows:

> "'worker' means any person to whom this Ordinance applies employed whether by the Crown or any other person, as a servant or apprentice by way of manual labour, clerical work or otherwise and whether or not in receipt of any salary, wages or remuneration in respect of such employment . . ."

6 The words "person to whom this Ordinance applies" may be ignored for present purposes as, under s.19 of the Ordinance, it applies to everyone with certain exceptions, which are also irrelevant for the purposes of this appeal. Section 18(2) provides:

"(a) a person to whom this Ordinance applies is a worker if he undertakes any work of a clerical or manual nature, or of any similar nature; and

(b) a person to whom this Ordinance applies, who undertakes any work specified in paragraph (a) of this subsection as a servant or as an apprentice for the Crown or for any other person, is employed as a worker, and, subject to subsection (5), it is immaterial—

(i) that he does or does not receive any salary, wages or other remuneration in respect of that work . . ."

(ii) and (iii) are not relevant to this appeal. It is difficult to see how the parts of sub-s. (2) which have been quoted add anything to sub-s. (1).

7 Section 18(4) reads:

"In any proceedings for an offence against this Ordinance, where the prosecution proves that a person is a worker, as defined in paragraph (a) of subsection (1), that person shall be presumed to be employed as a worker unless the defendant proves that the person was not at any material time employed as a worker."

8 This sub-section appears to be inconsistent with the definition of a "worker" contained in sub-s. (1), under which a person must be employed to come within the definition. It is clear that sub-s. (4) was intended to shift the burden of proof. Its precise meaning is open to argument but that need not concern us as there was no issue of fact in these proceedings and the onus of proof was therefore irrelevant.

9 What Mr. Triay, who appeared for the appellant, argued was that the visitors were not in employment and that if they were not employed by the appellant, they were not workers as defined in sub-s. (1). Sub-section (4), therefore, could not apply to them because it applies only to persons who have been proved to be workers.

10 The basis of Mr. Triay's argument is that employment must be based on a bilateral relationship, the relationship of master and servant, with its mutual obligations and he stressed the use of the word "servant" in the definition of "worker" in s.18(1) and also in s.18(2)(b). Mr. Nuñez, for the respondent, conceded that there had to be a relationship as a basis for employment but he argued that it fell short of a contractual relationship. He submitted that anyone who does work for another with the knowledge of that other, is employed, even if there is no obligation on either side. With respect, we cannot agree.

11 The learned Chief Justice appreciated that the matter turned on the meaning of the word "employ." He considered various authorities but

found them of little help. Basing his decision on the *Shorter Oxford English Dictionary*, 1973 ed., he said:

> "My view is that 'employ,' in s.20(1)(b), means 'to find work or occupation for' or 'to have or keep in one's service.' With or without a contract or payment. This fits in with the words and purpose of that section and that Part of the Ordinance."

12 He did not refer to the use, in ss. 18(1) and 18(2)(b), of the words "as a servant or apprentice." With great respect to the learned Chief Justice, we do not think the broad dictionary definition of "employ" is appropriate in a penal statute. We feel no doubt that "to employ any worker" in s.20(1)(b), means to enter into a contract of employment as a worker.

13 That brings us to the second question posed in the case stated, which is whether the definition of "employee" in s.2 of the Ordinance has any relevance or bearing. As was pointed out at the hearing before the Chief Justice, the Employment Ordinance is a consolidation of two Ordinances: the Control of Employment Ordinance (*cap*. 33) and the Regulation of Wages and Conditions of Employment Ordinance (*cap*. 139). The definition of "employee" was contained in the latter Ordinance but might, from its position at the beginning of the consolidated Ordinance, appear to apply to the whole of the Employment Ordinance. That is a difficulty which is more apparent than real because the word "worker" (originally "workmen") was used throughout the Control of Employment Ordinance (*cap*. 33) and so now appears throughout the comparable part of the consolidated Ordinance (in which the word "employee" is not used).

14 On the other hand, "employee" was used throughout the Regulation of Wages and Conditions of Employment Ordinance (*cap*. 139) and so appears throughout the relevant part of the consolidated Ordinance. Clearly, in our view, the definition of employee in s.2 cannot govern ss. 18 and 20. That is not to say, however, that it is wholly irrelevant. We are aware of three definitions of "employee" or "employed person" in the Laws of Gibraltar: in s.2 of the Employment Ordinance; in s.2 of the Social Security (Employment Injuries Insurance) Ordinance; and in s.2 of the Social Security (Insurance) Ordinance. All of these expressly refer to contracts.

15 We have also looked at other statutes which refer to employment without defining it and we think that a contractual relationship is implicit in all of them. We have not found any use of the word "employ" or any of its derivatives which appears to convey the wider dictionary sense, nor was Mr. Nuñez able to refer us to any. We think that this at least suggests that, when the legislature refers to employment, there is a *prima facie* presumption that the reference is to contractual employment. This confirms the opinion we had formed from an examination of ss. 18 and 20 of the Employment Ordinance.

16 If this interpretation of the Ordinance is correct, it is clear, in our opinion, that the appellant was not guilty of any offence. On the agreed facts, the visitors were under no obligation to work and the appellant had no contractual obligations towards them. In our opinion, they were not employed by the appellant. The appeal is allowed, the decision of the learned Chief Justice is set aside and the order of the resident magistrate is restored.

*Appeal allowed.*

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**[1980–87 Gib LR 533]**

## INTERNATIONAL PROPERTIES (GIB) LIMITED v. GIBREALTY LIMITED and CUBIERTAS MZOV RAMAGGE LIMITED

SUPREME COURT (Kneller, C.J.), November 17th, 1987

*Injunctions—interlocutory injunction—trespass—no interlocutory injunction to prevent trespass of airspace if at such height and for such length of time that ordinary use or enjoyment of land or buildings unaffected—interlocutory injunction only to be granted if necessary to maintain status of parties or if damages not adequate remedy—court to be satisfied serious issue to be tried*

*Tort—torts affecting land—trespass—use of tower crane—no trespass of airspace if crane crosses airspace at such height and for such length of time that ordinary use or enjoyment of land or buildings unaffected*

*Tort—torts affecting land—trespass—landlord not entitled to bring action for trespass unless land unoccupied or trespass would permanently damage land (to which landlord entitled in reversion)*

The applicant sought both interlocutory and permanent injunctions to prevent the defendants from causing or permitting the arm of a crane to pass over its land.

G employed R to erect an eight-storey building on land situated opposite that of the applicant. When the building work commenced, R positioned a tower crane on G's land, the arm of which regularly swung over the applicant's land. Although all of the buildings over which the crane's arm passed had been insured against damage by R, the applicant