CITATION: *Paul Kiely v Department of Education, Employment and Training* [2004] NTMC 081

PARTIES:	PAUL KIELY
	v
	DEPARTMENT OF EDUCATION EMPLOYMENT AND TRAINING
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20422082
DELIVERED ON:	20th October 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	18th October 2004
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Interim benefits – onus of proof –likelihood of success – failure to attend medical appointment

Wormald v Aherne [1994] NTSC
Groundwater v Conservation Commission of the Northern Territory (unreported decision of Trigg SM)
Betapave v Shell Co and another [2004] NTSC 55

REPRESENTATION:

Counsel:

Worker:	Self
Employer:	Mr Morris

Solicitors:

Worker:	Self
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2004] NTMC 081
Number of paragraphs:	17

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20422082

BETWEEN:

Paul Keily
Worker

AND:

Department of Education, Employment and Training
Employer

REASONS FOR JUDGMENT

(Delivered 20th October 2004)

Judicial Registrar Fong Lim:

1. The Worker has made application for interim benefits prior to the mediation of his claim for work health benefits as he is entitled to do pursuant to section 103J(3) of the Work Health Act. The actual mediation took place on the morning of this application and apparently resulted in no change in the Employer's decision to deny benefits to the Worker. The form 5 served on the worker apparently set out the grounds of denial of benefits as there being no evidence that the Worker had suffered an injury out of and in the course of his employment or in the alternative that the injury arose out of reasonable administrative action. The Form 5 did not deny liability on the basis of the Worker's failure to attend a medical appointment.

2. The worker first supported his application with an affidavit which did not provide the court with any evidence upon which it could make its interim determination. The Worker was then referred to Justice Mildren's decision in *Wormald v Aherne* [1994] NTSC and given the opportunity to file and

serve a more detailed affidavit. The Worker then filed the affidavit sworn on the 4th of October 2004. The Employer relied upon an affidavit of Isidoros Boubaris of the 15th of October 2004.

3. The Worker has the burden of proof to establish that there is a serious issue to be tried and that the balance of convenience lies with Worker. The Worker's claim is that he is incapacitated for work by a mental injury he has incurred from the unreasonable actions of the department in his placement as a teacher. The Worker claims that as a result of the unreasonable treatment he suffered at the hands of the department he was afflicted with anxiety and depression and continues to suffer those conditions. The Worker ceased work on the 26th July 2004 when the situation at work all became too much and he was unable to cope any more having used up his sick leave entitlements.

4. The only medical evidence supporting the worker's claim are the medical certificates he has provided to the Territory Insurance office of general practitioners he has consulted with over the past few months. The medical certificates were not originally provided by the Worker to the Court but were produced by the Employer's representative. The Worker argues that these medical certificates should be enough to prove that he was likely to succeed and he relied on my decision in Yorston v Normandy Mining in which I comment that I have to accept the medical report provided by the worker as there was nothing to the contrary from the employer. However in this matter there is no medical report supporting the Worker. The medical certificates (which were provided to the court by the Employer) are a diagnosis of a general practitioner and an acceptance that the Worker's condition is caused by conditions at work. There is no explanation of how the doctor came to that conclusion, whether he explored the possibility of other factors causing the Worker's ill health nor what work conditions were the cause of the Worker's condition.

5. The Employer submitted that they do not have any contrary medical evidence because the Worker failed to attend an appointment made for him by the Employer (see the affidavit of Boubaris of 15th of October 2004). In answer to that argument the Worker submitted that the Employer had made the appointment at an inconvenient time and place and that he had conveyed that to the officer at the TIO expressing his willingness to attend at another time and place. Mr Morris for the employer argued that given the decision of Mr Trigg SM in Groundwater v Conservation Commission of the Northern Territory it would be against the intention of the Act to allow interim benefits to a worker who would not be allowed benefits that is if he has refused to attend a medical appointment.

6. Mr Keily was required to file an affidavit verifying the evidence he gave in relation to that issue. The Employer confirmed that they have made a further appointment for Mr Keily to be examined by a Psychiatrist in Melbourne on the 28th of October 2004. I find that it is more likely that there was a miscommunication between the worker and the TIO regarding the first medical appointment rather than an unreasonable refusal to attend by the Worker. Given those facts it is my view that this matter can be distinguished from the facts of the Groundwater case and that the Worker should not be refused benefits on the strength of that authority.

7. **Serious issue to be tried. -** it is normally the case that the worker provides the court with at least one medical report confirming the incapacity to work and the link between the incapacity to work. The Medical certificates produced state that the worker is incapacitated by stress, anxiety and depression which "the worker states was caused by: relates to an ongoing , unresolved grievance at work and the menial nature of his current position(unskilled work)at NTOEC the condition is consistent with the stated cause." (see certificate of Arnold –Nott of the 29th July 2004) or something similar. The final certificate from Dr Brownfield states the Worker has "stress related to work".

8. If I accept the medical certificates establish a link between the worker's present condition and work then I have to find that there is a serious issue to be tried. The issue between the parties is that the worker suffers a mental injury which has been caused by events at his workplace which may or may not have been reasonable administrative action.

9. For this dispute to amount to a serious issue to be tried the Worker must produce enough evidence to convince the court that the worker has a strong case or at least that there is strong enough evidence on both sides to support a genuine dispute between the parties. Mildren J in Betapave v Shell Co & another [2004] NTSC 55 states

> There is a great deal of discussion in the authorities as to what is meant by "a serious question to be tried" or "a prima facie case". I do not intend to add to that discussion, but merely point out the views of Meagher, Gummow and Lehane, Equity, Doctrines and Remedies 4th ed, para 21-340 to para 21-390. There seems to be support for the opinion that what is meant by these expressions is that the plaintiff must show a strong possibility of ultimate success - "something more than an outside chance, but not necessarily as strong as an odds on prospect": see Meagher, Gummow and Lehane *supra*, at para 21-370.

10. In this matter the evidence establishing the link between the injury and the work is very weak it takes the form of medical certificates from General Practitioners who do not have the qualifications to diagnose psychiatric injury and have not justified their opinion confirming what history was given to them by the worker and how they came to their opinion. The weakness of the medical evidence makes it very difficult for this Court to find that there is a strong possibility of ultimate success for the worker. Even though there is no medical evidence produced by the Employer the Worker still has the onus to convince the court of strength of his case and in this matter I cannot find that the medical certificates are enough to convince me that the worker has a strong possibility of ultimate success proving that his present medical condition is due to unreasonable administrative action by the Employer.

11. Having found that there is not enough evidence to support finding of a serious issue to be tried I do not need to consider the balance of convenience however, given that the worker could reapply for interim benefits (once he has more substantial medical evidence) I have decided to give the worker an indication of what else was lacking in his application.

12. On my request the Worker filed a further affidavit answering the affidavit of Mr Boubaris of the 15th of October 2004. The Worker address the affidavit of Mr Boubaris and made further submissions in that affidavit regarding his financial circumstances and why the court should find in his favour. I confirm that even with that further affidavit the Worker has not produced enough evidence for the court to find in his favour on this application for interim benefits.

13. **Financial hardship** - the worker stressed the fact that he was in obvious financial hardship because he has no income without work health benefits being granted to him. It is accepted that a person without income suffers financial hardship however the level of hardship can only be judged in reference to the whole of the worker's financial circumstances. The worker should establish to the court by way of reference to primary documents, his level of weekly spending, any savings he has, any debts he is paying off eg credit cards etc. The worker should attach to his affidavit primary documents supporting any claim for payment of rent or mortgage, electricity bills and other essential items. If a worker is on regular medication what the cost of that medication is and if that cost is expected to continue. It is not good enough for the worker to estimate his weekly expenses.

14. **Full and frank disclosure** – the worker should also ensure that he provides full disclosure in his affidavit eg in this matter the worker did not disclose that he lived with his mother and his arrangements with her regarding the payment of bills. He did not disclose in his affidavit any attempts he had

made to seek employment until he was questioned at the time of the application.

15. **Ability to repay benefits should the worker be unsuccessful** - This is one of the other factors often considered in the balance of convenience. If the Worker had fully disclosed the whole of his financial circumstances then the court would be able to assess his ability to repay the benefits should he be unsuccessful.

16. There are other factors the court will consider in the balance of convenience and it will depend on the facts of each case what those factors are. In the past the court has looked at the diligence of the worker in pursuing his claim for benefits, whether the worker has attempted to rehabilitate and other matters.

17. I understand that it is difficult for the worker to be aware of what a court requires in the way of evidence (what is acceptable and what is not) however if the worker intends to continue to represent himself in his application for benefits he would be well advised to get some legal advice on his court documents once he has drafted them to ensure his application for benefits is not delayed because his documents are not acceptable to the court.

18. Therefore I hereby order:

    18.1 The Worker's application for interim benefits is refused.

    18.2 Costs of this application be costs in the cause.

Dated this 20th day of October 2004

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Tanya Fong Lim
JUDICIAL REGISTRAR