CITATION:	*Simon Farndon v Metcash Trading Ltd* [2005] NTMC 030
PARTIES:	SIMON FARNDON
	v
	METCASH TRADING LIMITED
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20508588
DELIVERED ON:	2nd June 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	30th May 2005
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Interim Determination - return to work program – strength of worker's case – section 75B of the Work Health Act

REPRESENTATION:

Counsel:

Worker:	Ms Spurr
Employer:	Mr Maher

Solicitors:

Worker:	Halfpennys
Employer:	Phillips Fox

Judgment category classification:	C
Judgment ID number:	[2005] NTMC 030
Number of paragraphs:	26

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

No. 20508588

BETWEEN:

Simon Farndon
Worker

AND:

Metcash Trading Limited
Employer

REASONS FOR JUDGMENT

(Delivered 2nd June 2005)

Judicial Registrar Fong Lim:

1. The Worker has applied for an interim determination of benefits ("interim benefits") pursuant to section 107 of the *Work Health Act*.

2. It is trite law that the Worker must prove to the Court on the balance of probabilities that there is serious issue to be tried and that the balance of convenience lies with the Worker (see Barry Leslie Aherne v Wormald International Ltd [1998] NTSC).

3. There is clearly a serious issue to be tried the Worker claims he is unfit for work and cannot return to the any duties because he cannot find work which allows him to work for 20 hours a week. The Employer argues that the Worker is fit to return to work on a graduated return to work program as devised in consultation with the Worker's treating general practitioner and physiotherapist. The Employer says that return to work program would have meant that within 6-8 weeks the worker could have been back to full time

employment with some restrictions of not being able to do moderate – heavy manual labour. This is supported by the medical report of Dr Bowles.

4. There is a further issue between the parties as to whether the Worker failed to participate in a reasonable return to work program. The Employer argues that it provided the program but the worker failed to attend regularly. The Employer will be relying on the operation of section 75B in the substantive hearing to claim that the Worker ought to be deemed as capable of the most profitable employment equivalent to the return to work provided to him by the Employer. The worker argues that the program exacerbated his pain levels and that is why some times he did not attend there is no medical evidence to suggest that any of the duties undertaken by the Worker were the cause of the regular temporary increases in the Worker's pain.

5. The worker has produced medical certificates which certify him unfit for full time duties however the Employer has conflicting medical evidence which suggests that the Worker is physically able to undertake a graduated return to work with full time employment as the goal.

6. Should the Court find that the Worker has unreasonably failed to attend the return to work program then he will be deemed to have a capacity to work equal to what was required under the return to work program. Arguably the worker could be found to be deemed capable of full time clerical work and therefore will only be entitled to the difference between his normal weekly earnings and that which he could earn as a member of the clerical staff of a business. Section 75B states that

> (1) Where compensation is payable under Subdivision B of Division 3 to a worker, the worker shall undertake, at the expense of the worker's employer, reasonable medical, surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, or as required by his or her employer, present himself or herself at reasonable intervals to a person for assessment of his or her employment prospects.

7. It is clear from the evidence that there were several reasons why the worker says he didn't attend the return to work program. He states in his affidavit of the 10th of May 2005:

> "I was constantly harassed and victimised at work. I was told not to talk to other employees. I was refused permission to take a smoke break or a break to do my stretching exercises. While at work on light duties I was given computer work to do. I was not allowed to have a password, so has to repeatedly ask people to log me back onto the computer when it wen to standby mode. There was hardly any work to do and I spent a lot o time just sitting at the computer without anything to do.
>
> I stopped working for the Employer in October 2004. Matters came to a head when I was provided with a copy of a report from Konect which quoted my employer as saying I had been sent home from work drunk. This was untrue, I have never been drunk at work nor was I sent home."

8. The medical certificates provided to the Court as annexed to the affidavit of De Jong show the Worker as certified by Dr Mellor as partially incapacitated for work up to April of 2005. Then there is the report of Dr Bowles of the 3rd of February 2005 which certifies the Worker as fit for return to work program commencing part time and then working up to full time duties. Dr Bowles does restrict the types of work that can be undertaken by the worker by saying that he "has a capacity for employment generally with the exception of moderate to heavy manual work."

9. There was also a handwritten report from Dr Mellor, the worker's treating general practitioner, who certified the worker fit to return to work on a graduated return to work program eventually bringing the worker's hours to 38 hours per week on modified duties.

10. There are no current medical certificates before the court.

11. The Worker accepts that he has certification for a restricted duties for 20 hours per week however does not accept that is it reasonable to expect him

to return to the Employer to undertake those duties they have available to him.

12. Given the above I find that there is a serious issue to be tried between the parties as to the worker's refusal to participate in the return to work program.

13. **The Balance of Convenience**

It is clear that the Worker is in dire financial difficulties, he has a level of debt he cannot service and no income as he cannot get benefits from Centrelink. The Worker's financial circumstance is one of the main factors taken into account when making a decision under section 107 of the Act, however it is only one of the factors the court will take into account when considering the balance of convenience.

14. The likelihood of success of the worker's case is an important factor to consider in this matter. The medical evidence states that presently the Worker could work at least 20 hours restricted duties. The Worker himself feels confident that he could work those hours but says he has been unable to find a job for those hours. The Employer states the work is available to the Worker with the Employer. The Worker states that he could not work with the Employer because of the way that he was treated yet there is some evidence to suggest that the Worker was able to work 20 hours per week but he just didn't like the work.

15. After the Worker advised he could not continue to work with the Employer he found employment with REDCLAW and was physically able to the do the duties assigned to him without recurrence of pain however that employment ceased because of a disagreement between the Worker and REDCLAW. Subsequent to the cessation of employment with REDCLAW the Worker was offered further employment with Employer on restricted duties. The Worker attended for 2 hours on the first day, left and has not returned to the workplace stating that he was not happy to work there any more.

16. The question in the substantive hearing of this matter is whether the worker's refusal to return to work was reasonable. It seems that the worker accepts he can do 20 hours per week and was coping with those hours while at REDCLAW. If the worker's evidence of victimisation is to be believed then it is arguable that he had good reason not to participate in the return to work program.

17. If the real reason is that the worker just didn't like the duties assigned to him and if the notes taken by Konek reflect the true position of the worker he is unlikely to be successful in convincing the court that he acted reasonably.

18. Of course this issue will be decided on the facts as accepted by the court and the evidence before the court in this instance is fairly evenly balanced with the Worker swearing to one version of events and the Employer to another. The additional independent evidence are the notes of Konek's attendances upon the Worker and what he was reported to say.

19. Given the independent evidence it is my view that it is more likely that the Worker's refusal to continue with the return to work program will be found to be more to do with his dislike of the clerical duties than physical problems caused by those duties. The worker tried to clarify his comments as noted in the Konek notes in paragraph 2(v) of his second affidavit. In that affidavit the Worker accepts that he told Konek that he didn't like the clerical work but explains that he didn't like it because the prolonged sitting was aggravating his back. Interestingly there seems to be no complaint about this to Konek as there is no mention of it in their notes. There is mention of the office step to be a problem but no mention of the prolonged sitting. If the Worker had made the complaint at the time of his interviews with Konek I would expect that to be noted in their files.

20. It is my view that the worker is not likely to succeed in establishing that his refusal to return to work was reasonable.

21. Prior to the cancellation of his benefits the Worker had been certified fit for work in limited duties and for 20 hours per week. The level of benefits he was receiving prior to cancellation was $320.12 per week which was apparently the benefits based on a capacity to work 20 hours per week.

22. If the employer were successful in claiming that the worker should have returned to work on graduated return to work then the Court could deem the worker fit for work full time at his most profitable employment which would be deemed to be the clerical position. I am not provided with any information as to what level of pay the worker would have earned in that position so cannot make a comparison to the worker's indexed normal weekly earnings.

23. The issue of whether the worker is fully fit for work is a medical issue and there is evidence from doctors suggesting that the worker would be fit for full time employment after some work hardening over 6-8 weeks. Dr Bowles does say that the full time employment must not include moderate to heavy labour duties. I have no evidence of whether the duties of packing confectionery is considered moderate labour duties. However I think it is clear that both Dr Bowles and Dr Mellor are certifying the Worker for full time employment in his modified duties not in his normal duties.

24. The Employer has not shown the Court any prejudice it will suffer should an interim determination be made in the worker's favour.

25. Given the above it is my view that even though I am of the opinion that the Worker may not be successful in his argument about his refusal to participate in the return to work program the balance of convenience favours the worker being returned to his status quo of benefits of $320.12 per week. The Employer has not provided the Court with any evidence as to what the Worker's most profitable employment would be if section 75B operated against him and the only figure provided to me of his present capacity to

work is the benefits as reduced to include 20 hours per week on restricted duties.

26. My orders will be

26.1 The Employer pay the worker interim benefits of $320.12 per week for 12 weeks.

26.2 The costs of this application be costs in the cause.

Dated this 2nd day of June 2005

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Tanya Fong Lim
JUDICIAL REGISTRAR