

CITATION: *Baker v National Jet Systems* [2006] NTMC 028

PARTIES: TANYA MAREE BAKER
v
NATIONAL JET SYSTEMS

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20600767

DELIVERED ON: 4th April 2006

DELIVERED AT: Darwin

HEARING DATE(s): 15th, 29th & 31st March 2006

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Interim determination – application for further interim determination – undue hardship – consideration of whole of household income – Full and Frank disclosure – section 107(5) & (6) Work Health Act

McGuinness v Chubb Security Holding Australia Pty Ltd 24th March 2006 unreported decision Dr Lowndes NT Work Health Court

Wormald International (Aust) Ltd v Barry Leslie Aherne [1994] NTSC 54

REPRESENTATION:

Counsel:

Worker: Mr Buckland
Respondent: Mr Wilton

Solicitors:

Worker: Anthony Buckland
Respondent: Cridlands

Judgment category classification: C
Judgment ID number: [2006] NTMC 028
Number of paragraphs: 45

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

No. 20600767

BETWEEN:

TANYA MAREE BAKER
Worker

AND:

NATIONAL JET SYSTEMS
Respondent

REASONS FOR JUDGMENT

(Delivered 4th April 2006)

Judicial Registrar Fong Lim:

1. The Worker has made application pursuant to section 107 (5) of the *Work Health Act* for a further interim determination of benefits. The Worker was successful in her earlier application for an interim determination and was granted interim payments of \$571.30 gross per week. The amount granted was equivalent to the benefits the worker was receiving prior to the cancellation of her benefits by the Employer.
2. The Worker suffered a mental injury arising from a bullying incident at work. The Worker has been certified fit for pre injury employment on the proviso she has no contact with the other employee who was involved in the bullying incident. The Employer has attempted to get the Worker back to work by rearranging its staffing organisation so that the Worker is not rostered on with the other employee and all necessary precautions have been put in place to ensure that they do not cross paths at the workplace. The Worker is not satisfied with the arrangements and has refused to go back to work which refusal she says is based on the advice of her doctors. The

Employer has decided that the Worker's refusal was unreasonable and has cancelled the Worker's benefits.

3. Section 107(5) and (6) provide:

5) The Court may make more than one interim determination of a party's entitlement to compensation.

(6) The Court may only make a further determination under subsection (5) if satisfied that –

(a) the party would suffer undue hardship if the further determination were not made; or

(b) the circumstances are otherwise exceptional.

4. The onus is upon the Worker to prove to the Court's reasonable satisfaction the she would suffer undue hardship or that exceptional circumstances applied to her.

5. The Worker relied on her affidavits of 27th January 2006 and the 8th of March 2006. The Worker filed further affidavits of three other people and herself dated the 28th of March 2006 however did not seek to rely on those affidavits save the medical certificates annexed to her most recent affidavit.

6. The Employer relied upon the affidavit of John Wilton of the 15th of March 2006 annexing a report of Dr Brown. Dr Brown certifies the worker fit to return to work in her pre injury employment provided she has no contact with the other staff member.

7. The Employer's objection to a further determination of interim benefits in favour of the worker is simply that the Worker has not provided the court with enough evidence to show continuing hardship or indeed undue hardship. In particular the Employer argues that the Worker has not been full and frank in her disclosure of her husband's income and his contribution to the expenses she states she has and continues to have. The Employer argued on the basis of the most recent authority of a decision of this court in

the matter of McGuinness v Chubb Security Holding Australia an unreported decision of Dr Lowndes SM handed down on the 24th of March 2006, the worker must fail in her application because she has not provided the court with evidence of all of her financial circumstances.

8. This application was adjourned on two separate occasions for the Applicant to get her documentation in order and for her solicitor to consider the affidavit evidence of Mr Wilton and to produce an affidavit of Mr Baker of the 31st March 2006.
9. The accepted authority of *Wormald International (Aust) Limited v Barry Leslie Aherne* [1994] NTSC 54 requires the worker to prove that there is a serious issue to be tried and that the balance of convenience lies with the worker before an interim determination can be made in her favour. The worker has been successful in her previous application for an interim determination and unless the Employer can prove that circumstances have changed since the last application it is not necessary for the court to reassess the balance of convenience. What the court must decide is whether the worker overcomes either of the thresholds set by section 107(6).
10. **Undue hardship**-When the court considers hardship to the Worker in the analysis of the balance of convenience it often concentrates on the financial hardship of the Worker however as his honour Mildren J states in *Aherne's case* (supra) at page 9:

“..where a worker has had his payments stopped altogether by the employer exercising a right to discontinue payments under s69, there must inevitably be some hardship to the worker in the usual run of cases, even if the worker is fortunate enough to have other independent means. If the savings of a thrifty worker are to be whittled away pending the hearing of his appeal that is a hardship..... Even if a worker is a millionaire this does not necessarily mean that the balance of convenience must be decided against him.”

11. His honour indicated that hardship is a subjective thing and it depends on the worker's particular circumstances and expectations. What must be

remembered is that in the present case the Worker must prove “undue hardship” before the court can make a further interim determination in her favour.

12. The word “undue” suggests that the hardship must be of a more substantial nature than just mere hardship or misfortune. The Concise Oxford dictionary defines undue as:

“excessive, disproportionate, not suitable”

13. Stroud’s Judicial dictionary of Words and Phrases 6th edition has two entries of assistance:

“Undue Hardship is caused when that hardship is not warranted by the circumstances (*Tote Bookmakers v Development and Property Holding co*[1985] Ch 261)

The word “undue” adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant (*Jones v Trollope Colls Cementation Overseas*, the Times January 26 1990)”

14. It is my view that the obvious purpose of section 107(6) is to require the Worker to prove to the Court that the hardship she suffers without an interim determination of benefits would be more than just hardship caused by having less income but something in excess of that taking into account all of the circumstances of her case. In previous cases before this court the Worker has been found to suffer undue hardship when the worker would not be able to pay for the necessities of life without benefits.
15. On the financial side of things it is clear from the evidence of the worker that even prior to the work injury she was living well beyond her means spending approximately \$2400.00 per week (see paragraph 79 of the Worker’s affidavit of the 8th of March 2006) with her income at approximately \$1600 per fortnight nett (see the payslips and the schedule attached to the Worker’s affidavit).

16. The Worker also states that she has no savings and that has been caused by the lack of income however there is no evidence to support that reduction of savings eg bank account statements showing her level of savings from prior to her injury to now.
17. The Employer complained that the Worker has not been full and frank in her disclosure about her husband's income and that there was no evidence in relation to his contribution to the household expenses. In fact there is evidence of the husband's income and that is contained in the bank records annexure "V" to the Worker's affidavit of the 8th of March 2006. That bank statement shows Mr Baker's salary payment from National Jet Systems as about \$6500.00 nett per month. Mr Baker's recent affidavit also sets out his level of income and expenditure including maintenance payments to his former wife and confirms that he shares in the household expenses with the Worker.
18. Mr Baker's affidavit makes it clear that he and the Worker had an agreement prior to getting married that they would share equally in the household costs and refers to the Worker's affidavit regarding those costs. Mr Baker states that the Worker was responsible for her other expenses but that he did give her "gifts and payments" but did not realise until recently how much that was (see paragraph 15 of Mr Baker's affidavit).
19. The Worker has suggested that she has had to borrow from her husband to cover her living expenses since her work health benefits were ceased however given her level of expenditure and her income prior to her injury it is clear he was helping her with those expenses well before the cancellation of her benefits, Mr Baker confirms this in paragraph 15 of his affidavit. It is also clear that the worker has previously had another source of funds and that is her parents but since her father passed away last year that source of funds has ceased. The Worker was receiving approximately \$10000.00 per year from her parents to help her maintain the lifestyle she wanted.

20. The Worker also claimed in her affidavit supporting her original claim for interim benefits that she had household and health insurance that cost her \$131.00 per week without primary documentation to support that claim. I questioned that amount as it equated to approximately \$6800 per year in insurance. Mr Buckland advised me after taking further instructions from his client that the figure was incorrect and that the Worker in fact pays \$43.93 per week in insurance. However yet again there is no primary documentation to support these figures or any explanation of why the Worker had attested to the inflated amount in the first affidavit.
21. The documentation provided to the court shows that at least half of the worker's weekly expenses are spent on a beauty regime and clothing which she states are necessary for her "social standing". The worker produces manuals from her employer which set out the expectations regarding the grooming of cabin staff. I have no doubt that the worker is expected to be well presented at work but the manual does not require the Worker to spend large amounts of money for clothes to be worn outside of work nor does it require the worker to buy the more expensive cosmetics.
22. In McGuinness v Chubb Security Holding Australia Ltd (supra) his honour Dr Lowndes was persuaded to not grant the Worker interim benefits because the Worker had not convinced him of any hardship caused by the non payments of benefits which warranted an order in the Worker's favour. Dr Lowndes also found that the worker had not been full and frank in his disclosure of the household financial circumstances and therefore it was difficult for the court to accept the situation as described by the worker and that the Worker's credibility was affected by the his failure to disclose certain things. Dr Lowndes also found that the Worker's failure to disclose his wife's carer's allowance and his later failure to explain that inconsistency in his evidence could lead the court to put less weight on the worker's evidence.

23. In the present case there is a similar situation to the McGuinness' case (supra) the worker has exaggerated some expenditure eg cost of insurance and not explained why she has made that exaggeration, nor has she provided primary documentation to establish her expenses, and she did not disclose the whole of household income prior to the late production of an affidavit of Mr Baker's affidavit.
24. Despite the similarities McGuinness' case can be distinguished from the present case in one important aspect because in that case Dr Lowndes was considering an initial application for interim benefits whereas the present case is a subsequent application. In a subsequent application the court does not have to reconsider the balance of convenience unless there is new evidence which supports a change of view.
25. In the present case the Worker has stated on several occasions that she does not like to be dependant upon her husband and for her that is a hardship. The Worker claims that she likes to be self sufficient however is it clear from what financial information she has provided to the Court she was never self sufficient as she relied on "gifts" from her husband and funds from her parents to maintain her level of expenditure.
26. The Worker's treating psychologist is of the view that the Worker should continue to maintain her appearance because if she could not that would further dent her self esteem and hinder her chances of getting better. Given the worker's claim is based on mental injury the effect upon her mental wellness is a factor to be taken into account whether she would suffer undue hardship. The Worker also attests that she is now unable to undertake her leisure activities such as diving and clay target shooting because of her lack of income.
27. Financially the Worker has attested to her weekly expenses and some lump sum expenses which she says are necessary for her to maintain the lifestyle

she is used to. The Worker's husband has confirmed the household expenses are shared jointly but claims everything else is kept separately.

28. The Worker's beauty regime and expenditure on clothes and entertainment is to say the least extravagant and it is my view that expenditure could be drastically reduced with the Worker continuing to maintain her personal appearance with less expensive products. In any event the Worker has not provided the court with any primary documentation of those expenses.
29. The Worker is clearly used to living beyond her means and the question must be should the Employer be required to pay further interim benefits to the Worker if any undue hardship is in fact due to the Worker's inability to be realistic about her spending (even before the injury). The Worker's solicitor suggested I liken the Worker to the hypothetical millionaire in Mildren J's judgment in *Aherne's case* as person who had a lifestyle which she has lost because of the reduction of her income and therefore is suffering a hardship because of that loss. The difficulty with that analogy is that the Worker's lifestyle could not have been sustainable in any event on her income prior to the injury without assistance from her husband or her parents. It could be argued that and "hardship" caused by the Worker's loss of lifestyle is caused not by the reduction of benefits but by unrealistic expectations and spending patterns established well before the Worker's injury.
30. There are other financial issues which are not fully explained by the affidavit evidence of the Worker. The Worker apparently has a personal loan which she states in her affidavit of the 27th January 2006 as having a balance of \$6299.35. The documentation in relation to that loan show that it was taken out in both the Worker's and her husband's names for \$17125.00 on the 9th of June 2005, that is while the Worker was on work health benefits. There is no explanation of the purpose of that loan and more interestingly it seems on the affidavit evidence provided that Worker and her husband have

managed to pay off more than half of that loan during the time that the Worker was on benefits and for part of the time had no income at all. There is no explanation of how this has been achieved.

31. The Worker also claims that she has no savings at present implying that is caused by her lack of income however there is no evidence as to the Worker's level of savings prior to the cancellation of benefits therefore it is difficult for the Court to conclude that the Worker ever had a level of savings given her lifestyle.
32. The Worker also claims credit card debt of approximately \$6900.00 but again there is no primary documentation to indicate at what level that credit card debt was prior to the injury. It may have been kept at the same level by the Worker every month and in fact has not got any worse since her injury. Given that the Worker lived well beyond her means a credible explanation of the credit card debt is her overspending. The Worker's husband has even taken the credit card away from the Worker and destroyed it to prevent her from incurring further debt.
33. The Worker also attests to her level of legal costs as part of her weekly expenses. It has long been this court's view that these costs should not be taken into account when setting a level of interim benefit because that would be a back door way of awarding the Worker costs before the adjudication of the Worker's claim. It is certainly not an element of hardship that can be considered as excessive or undue given the Worker is a party to litigation in short this type of hardship is not out of the ordinary given there is a dispute between the parties.
34. The Respondent argues that the Worker has not provided enough evidence to convince the court of a continuing hardship applying the reasoning of Dr Lowndes in Mcguiness' case. I accept that prior to the production of the affidavit of Mr Baker there had not been full and frank disclosure by the Worker of the whole of her financial circumstances, not in the least the

substantial contribution her parents made to her lifestyle. Nevertheless the information was eventually provided to the court and it is clear that the Worker is a person who did not realise that she was living beyond her means until her benefits were ceased and she had to assess her expenditure. It is not my view that the worker has failed to be frank with the court by guile but more likely she did not understand or was not advised of what was expected of her.

35. It is my view that even taking into account the Worker's obviously extravagant lifestyle and her agreement with her husband regarding shared expenses she would suffer undue hardship should she not granted a further interim determination of benefits. The Worker would not be able to maintain the basic necessities of life (given her husbands' other commitments) and if she couldn't maintain her personal appearance with a reasonable beauty regime she is most likely to suffer further psychological distress. The combination of those two elements would make the hardship suffered by the worker more than is reasonable given all of the circumstances. Therefore I intend to make a further order for interim benefits.
36. **Quantum of benefits** – In her more recent affidavit the Worker submitted that the Employer has paid her benefits without taking into account non-cash benefits which make up part of her normal weekly earnings. It may be the case that the Worker has been underpaid however the only purpose of those figures for this application is to establish the maximum benefit that could be awarded to the Worker on the interim determination.
37. The Worker has not provided primary documentation to support her expenditure on her beauty regime however it is clear that there should be some sort of allowance for those expenses because the Worker's psychologist has opined that is it necessary for the Worker's mental health for her to be able to maintain "her appearance". It is not accepted the cost of that maintenance should be allowed at a level as claimed by the Worker.

38. Even though neither the Worker nor her husband has provided any primary documentation to support the levels of expenditure on household expenses the figures claimed seem reasonable (with the correction regarding insurance). They do agree that these expenses are shared equally.

39. The weekly household expenses are as follows:

Health and Household insurance	\$43.93
Electricity and telephone and food	\$235.40
Car running costs	\$152.00
Total	\$431.33

40. The Worker's share is therefore approximately \$215.00 per week.

41. With visa card payments of approximately \$7:00 per week, personal loan payments of \$86.75 per week and union fees of \$10:00 and shared rent of \$100.00 per week the worker's expenditure of necessities is \$418.75 per week.

42. I also accept that the Worker should be allowed some amount for beauty treatments and products to maintain her appearance and mental health. I note that the Commissioner of taxation allows the Worker tax deduction of \$71.35 per week for such expenses which in my view, in the absence of any documentation to establish the worker's expenditure, can be taken as a reasonable amount to spend on such items for work purposes.

43. Therefore a further interim determination of benefits of \$570.31 gross per week is in this case appropriate in these circumstances.

44. I note that the Respondent has indicated that they will be intending to make an application regarding any interim benefits continuing past the 104 weeks provided for in section 65(2)(b)(ii) however that is a matter for them and note something I have not taken into account in my deliberations.

45. I order :

(a) The Employer pay the Worker benefits on an interim determination at \$570.31 gross per week for 12 weeks from the expiry of the last order for interim determination.

(b) Costs reserved

Dated this 4th day of April 2006

Tanya Fong Lim
JUDICIAL REGISTRAR