

CITATION: *Toohey v Ramangining Homelands Resource Centre Aboriginal Corporation* [2006] NTMC 056

PARTIES: VICKI TOOHEY

v

RAMANGINING HOMELANDS RESOURCE
CENTRE ABORIGINAL CORPORATION

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health Court

FILE NO(s): 20614521

DELIVERED ON: 21st June 2006

DELIVERED AT: Darwin

HEARING DATE(s): 19th June 2006

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Interim determination of benefits – section 107 Work Health Act – balance of convenience

Wormald Security (International) Pty Ltd v Barry Leslie Aherne_ [1994]NTSC 54
Mcguiness v Chubb Securities Pty Ltd [2006] unreported decision Dr Lowndes 24th March 2006.

REPRESENTATION:

Counsel:

Worker: Mr Priestley
Employer: Ms Lazaris

Solicitors:

Worker: Priestleys
Employer: Cridlands

Judgment category classification: C
Judgment ID number: [2006] NTMC 056
Number of paragraphs: 37

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

No. 20614521

BETWEEN:

Vicki Toohey
Worker

AND:

Ramangining Homelands Resouce Centre
Aboriginal Corporation
Employer

REASONS FOR JUDGMENT

(Delivered 21st June 2006)

Judicial Registrar Fong Lim:

1. The Worker has applied for an interim determination of her weekly benefits (“interim benefits”) pursuant to section 107 of the Work Health Act.
2. The factors to consider in determining an application for interim benefits are set out in the judgement of Justice Mildren in Wormald Security (International) Pty Ltd v Barry Leslie Aherne [1994]NTSC 54. The court must consider whether there is a serious issue to be tried and if so does the balance of convenience lie with the Worker.
3. The Employer argued that there was no serious issue to be tried and if the court found there was, the balance of convenience did not lie with the worker.

4. The Worker relied on her affidavit of the 23rd of May 2006 and a recent medical certificate of her GP. The Employer relies on the affidavit of Ms Lazaris of the 19th of June 2006.
5. There is no dispute that the Worker was involved in a motor vehicle accident when driving back from Gove to Ramangining on the 13th of June 2006. The main dispute is whether the Worker was in fact travelling “out of or in the course of employment”. The Worker attests that she had travelled to Gove for the purpose of delivering some urgent reports because the facilities at Ramangining were so unreliable that she had to either drive or fly the reports to Gove to ensure that they were received in time by the relevant authorities. The Worker gives evidence that she had attempted to get a flight however there were none available and she decided to drive.
6. The Employer submitted that the Worker had not travelled to Gove for work purposes. The Employer suggests that the court should not believe the Worker’s evidence that there was no other way to get the reports to Gove because there is no objective evidence to confirm there were no flights available, the Worker could have just sent the reports on the plane alleviating the need to personally deliver them, and the Worker has not provided any objective evidence that the reports were that urgent.
7. The Employer also implied that because the Worker travelled to Gove on the eve of a long weekend she would have been going there for reasons other than work. The Employer produces two letters from the present Executive Officer of the Employer which set out the Employer’s position in relation to the Worker’s attendance in Gove. The letters are inconsistent in what they say. The letter of the 10th March 2006 suggests that:

“Ms Toohey failed to attend a meeting in Nhulunbuy which appeared to be the purpose of her visit”
8. The letter of the 21st of March 2006 suggests that :

“...in this particular case I have spoken to the relevant Government and non Government Departments which this organisation deals with and none had a meeting scheduled with Ms Toohey for the period of time.

It should also be noted that the weekend of her vehicle accident was Queen’s birthday weekend, an even less likely time to be having meetings or carrying out this organisation’s business.”

9. In one letter the Employer suggests that the worker has failed to turn up to a meeting organised for that weekend and on the other hand the Employer suggests that the long weekend was an unlikely time to be having a meeting to carry out the organisations business. There is no full explanation as to what the meeting was that the Worker failed to turn up to and how that fits in with the claim that no meeting would have been arranged.
10. On the one hand the Employer makes complaint about the Worker making bald statements and then on the other hand the Employer is asking the court to doubt the worker’s evidence because of suppositions the Employer has made about the Worker’s attendance at Gove. The Employer has not produce positive evidence that shows the Worker was in Gove on personal business it has just assumed that to be the case because she had visited Gove for personal reasons in the past. The Employer does not positively deny the corporation may have done business through Gove.
11. The Employer also submits that there is a lack of medical evidence to causally link the Worker’s present difficulties with her motor vehicle accident. The only medical evidence that is produced to support the Worker’s claim that she is presently incapacitated for work is the medical certificate from her GP. The certificate lists a number of symptoms and classifies the worker as unfit for work for 28 days. The only way in which the certificate links this incapacity to the “work injury” is the fact that it is in the form of a worker’s compensation medical certificate and refers to the date of injury as the “13/06/05”.

12. The Employer has not produced any medical evidence to the contrary and the medical certificate of Dr Tonga read along with the Worker's affidavit evidence supports a prima facie case of a Worker's compensation claim.
13. It is also clear from the Worker's sworn evidence that she had physical difficulties when she went back to work (see paragraphs 14 & 15 of the Worker's affidavit) and that she continues to have those physical difficulties which affect her ability to work.
14. The Employer makes the further submission that there is no serious issue to be tried because the Worker is excluded from the Work Health Act because she is entitled to benefits under the Motor Accidents Compensation Act ("MACA"). The worker has been denied benefits through both schemes by the TIO in its role as work health insurer of the employer and its role as administrator of the MACA scheme. There is clearly a serious issue to be tried in relation to this issue.
15. The Court has to be reasonably satisfied on the balance of probabilities that there are serious issues to be resolved between the parties that the evidence supports the Worker's claim with enough weight to establish an arguable case. For the reasons set out above I am reasonably satisfied that there are several serious issues to be tried between the Worker and the Employer.
16. **The balance of convenience.** The balance of convenience has been discussed many times by this court. I do not intend to reiterate the guidelines produced by Justice Mildren in Wormald Security (International) Pty Ltd v Barry Leslie Aherne [1994]NTSC 54.
17. Factors put forward by this worker are that she has a strong case and that she is suffering financial hardship. The Employer argued that there is little likelihood of the worker being successful in her claim and therefore the balance of convenience does not lie with her.

18. Likelihood of success - the Employer submits that the Worker is unlikely to be successful in her claim for several reasons:
 - (a) The medical evidence does not give a causative link
 - (b) The Worker had clearly worked full time with the Charles Darwin University prior to her present job which earned equal to or more than her normal weekly earnings at the time of his application.
 - (c) The Worker has no claim under the Work Health Act and should be making a claim under the Motor Accidents Compensation Act.
19. I have already discussed the medical evidence and have found that there is enough evidence to establish an arguable case and that there is clearly an argument in relation to the division between Work Health claims and MACA claims.
20. The Worker's normal weekly earnings prior to the accident equated to \$1654 gross per week (see paragraph 30 of the Worker's affidavit).
21. The Employer argues that while the Worker was full time at Charles Darwin University she was earning an amount equal to her Normal Weekly Earnings therefore even if the worker proved that she was injured "out of or in the course of her employment" and that her present incapacity to work is caused by that injury, the worker would not be entitled to and weekly benefits.
22. The Worker states that she worked as a lecturer at the Charles Darwin University from September 2005 until 27th April 2006 however she doesn't say what hours she worked nor does she set out in her affidavit what her wage was at the time. The payslips annexed to the worker's affidavit show one payslip for that period (see the payslip produced by the worker for the period 6th of April 2006 to the 19th of April 2006) which shows the Worker receiving \$1693.22 gross for that fortnight. This indicates that the Worker in fact was earning about 50% less than her normal weekly earnings at the time of her injury.

23. The Worker says she then became a casual employee earning 50% less than her normal weekly earnings (see the payslip annexed to the Worker's affidavit for the 4th May -17th May 2006). There seems to be no difference in the Worker's earnings from the time she was on contract to the time that she became a casual employee. The amount that the Worker is earning and has earned since her termination from the Employer does not equate to the Worker's Normal Weekly Earnings therefore arguably the worker does have a loss of earning capacity.
24. On the evidence produced to the court in support of this application the worker is more likely to be successful than not.
25. Hardship and Full and Frank Disclosure – in the matter of McGuinness v Chubb Securities Pty Ltd [2006] unreported decision Dr Lowndes 24th March 2006 his honour found that the Worker had to ensure full and frank disclosure to the court. In that case the worker had not fully disclosed his partner's financial position and her contribution to the household nor had he provide the court with enough primary documentation to support his calculations of what he level of income he required to alleviate any financial hardship caused by the cancellation of benefits.
26. The worker submitted to the court that she had a total weekly expenditure of \$1170.00 per week. If these were her expenses prior to the accident she was clearly living beyond her means even if the rent is deducted from the total the worker was still living beyond her means. Dr Lowndes in Mcguinness's case found that the court could accept reasonable claims for rent, food, electricity etc without requiring the worker produce primary documentation to establish those costs but the worker should provide documentation to explain more unusual or lump sum expenditures.
27. In the present case the worker claims a weekly expense to pay some costs she owes to her lawyers arising out of a failed claim for unfair dismissal.

28. I do not accept that this expenditure should be taken into account when assessing the level of interim benefits because it could become a back door way of getting the Employer to pay for her legal costs in an action against it.
29. The explanation regarding the American Express card is inadequate, the worker has annexed a letter from that company cancelling her card and advising her of her debt to the company being \$10464.18. There are no statements to confirm that the debt has arisen since the injury or what that money was spent on since the injury. I do accept that is a debt the Worker has to pay off.
30. I also note that the worker has claimed a telephone expense of \$25.00 per week yet the only account she has annexed to her affidavit is one addressed to a "Wayne Toohey". The worker has not explained that discrepancy in her affidavit and although I accept that person could be related to her that does not mean that the worker is responsible to pay that account.
31. The Worker did produce bank statements which show for the month between 30.7.05 – 31.8.05 she maintained a balance of \$2867.69 but in the month 1 February 2006 – 28.2.2006 her balance has fallen to \$118.55. I am prepared to assume that the fall in savings is directly related to the decrease in the Worker's income. Therefore she has suffered the reduction of any savings she may have had in that particular account.
32. Even without considering the American Express debt and the Legal expenses the Worker could barely have covered her weekly expenses with her normal weekly earnings as they were prior to the accident. Some of the financial hardship suffered by the worker is caused by her inability to properly budget.
33. On balance the financial hardship the worker finds herself in has been to large extent caused by her lack of income.

34. I find on the scant evidence provided to me by both parties that the balance of convenience lies with the worker.
35. The worker has applied for a weekly interim benefit of \$636.75 gross per week however her counsel amended that application to \$520.00 gross per week being 75% of the worker's estimated loss of earning capacity. Therefore \$520.00 gross per week is the maximum the court should order on an application for interim determination.
36. I accept those calculations as an appropriate place to start in assessing the level of benefits. Without the American Express debt, the Legal expenses and telephone included in the calculations the Workers weekly expenses are \$945.00. The Worker is currently earning approximately \$505.00 gross per week (see paragraph 34 of the Worker's affidavit) and therefore an interim determination of \$520.00 gross per week would mean that she should be able meet her expenses.
37. I therefore order the following :
 - (a) The Employer pay the Worker interim benefits at a level of \$520.00 gross per week for a period of 12 weeks the first such payment to be made within 7 days of this order.
 - (b) The costs of this application be costs in the cause.

Dated this 21st day of June 2006.

Tanya Fong Lim
JUDICIAL REGISTRAR