

CITATION: *Anderton v Paspaley Pearling Co Ltd* [2009] NTMC 017

PARTIES: ALAN ANDERTON
v
PASPALEY PEARLING CO LTD

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health

FILE NO(s): 20812066

DELIVERED ON: 19th May 2009

DELIVERED AT: Darwin

HEARING DATE(s): 11th May 2009

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Interim determination of benefits – undue hardship – full and frank disclosure.

Tanya Maree Baker v National Jet Systems (unreported 4 April 2006)

Wormald International Australia v Barry Leslie Aherne [1994] NTSC 54

REPRESENTATION:

Counsel:

Plaintiff: Ms Dunn
Defendant: Mr Sweet

Solicitors:

Plaintiff: Priestleys
Defendant: Cridlands

Judgment category classification: C
Judgment ID number: [2009] NTMC 017
Number of paragraphs: 34

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

No. 20812066

[2009] NTMC 017

BETWEEN:

ALAN ANDERTON
Plaintiff

AND:

**PASPALEY PEARLING COMPANY
PTY LTD**
Defendant

REASONS FOR JUDGMENT

(Delivered 19th May 2009)

Ms FONG LIM RSM:

1. The Worker has a long standing claim with the employer he originally had a work injury on the 7th of March 2003 for which he was denied benefits and later that dispute was resolved by memorandum of agreement approval by the court pursuant to section 108 of the Work Health Act. In more recent times the Worker has had his weekly benefits reduced and eventually cancelled on the basis that he has an earning capacity to earn more than his indexed Normal weekly earnings as declared by this court previously.
2. The Worker has previously been successful in his application for an interim determination on the 4th February 2009 Judicial Registrar Ganley and the application before this Court is for a further interim determination in his favour. In relation to a second or subsequent application for interim determination the Worker has a threshold to overcome before the Court can exercise its discretion in the worker's favour. Section 107 mandates that :

(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

3. The Worker seeks to rely on the first arm and prove to the court that he would suffer “undue hardship” should he not be granted an interim determination. He relied on two affidavits of himself on the 21st of April 2009 and the 16th of May 2009 and submits that his financial situation is such that without a further interim determination he and his partner would suffer the “undue hardship” of being unable to meet the normal living expenses. The Worker puts forward without a further interim determination he and his partner would have a shortfall of \$649.27 per week of income to cover all necessary expenses.
4. In her ruling to grant interim determination to the Worker, Judicial Registrar Ganley indicated any further application for an interim determination should be supported with medical evidence of continuing incapacity and evidence relating to the earning capacity of the worker’s water cart business.
5. The Employer argues that the Worker suffers no undue hardship should he not receive an interim determination in his favour because he has very recently received a payment of \$95000.00 for a permanent impairment assessment which will enable him to pay off some of his smaller debts, some of his mortgage and continue to be able to afford his living expenses (which are not accepted by the Employer) as set out in his affidavit.
6. It is agreed between the parties that when the proceedings comes back before the court for a pre hearing conference for listing in June it will be ready to be listed for hearing. I note that given the state of the list of court the likely hearing dates for this matter will be in early 2010 some 8 months away.

7. The Worker's affidavit of 16th of May 2009 seeks to convince the court that it would be "unfair" if he should be required to use his permanent impairment payment for living expenses because it was intended to be used to pay off debts in relation to a car, credit line, possible child support and pay off some of the mortgage.
8. If the Worker were to use those funds for that purpose it would not affect the Worker's partner's Centrelink benefit but any interest earned on the \$95000, if invested, would be considered income and may affect that benefit. While I accept any extra income may affect a Centrelink benefit the Worker did not produce any information on how much extra income had to be earned before that benefit is affected.
9. It should also be noted that \$95000.00 invested at the present Reserve Bank cash rate of 3% pa would only net \$2850.00 for 12 months. This amount of income is unlikely going to affect the payment of a benefit to Mr Anderton's partner however the cash asset may, if her benefit is also dependant on Mr Anderton's cash assets. It is clear from this limited discussion of the effect on Ms Farrar's benefit of the use of the \$95000.00 is not able to be determined unless a direct enquiry is made with Centrelink with the different options. The Workers' solicitor led from the bar table that she had a telephone conversation with Centrelink and any income from investments would affect Ms Farrar's benefit however that was as far as that conversation went there was no in depth analysis on how it would be affected.
10. It is accepted that the Worker was only advised of the payment of \$95000.00 the Friday before this hearing of this application on the Monday morning therefore he cannot be criticized heavily for failing to investigate this issue more fully.

11. The Worker has said that it is his intention to use the bulk of that payment to pay off a substantial part of his mortgage and to expect him to use it to pay for his living expenses instead would be an undue hardship.
12. It is important to note at this point that “undue hardship” can include more than financial hardship, it can include emotional and psychological distress, relationship difficulties and other matters. The Worker states in his second affidavit that the thought of having to use his permanent impairment payment for living expenses instead of paying a substantial amount off his mortgage has caused him emotional distress.
13. The Worker clearly has continuing medical issues as is evidenced by Dr Tonga’s certification that he is unable to return to work until at least the 3rd of June 2009. Dr Millions agrees that the Defendant still has medical issues and is unlikely to ever return to his pre injury employment however has some limited capacity to work on light semi sedentary duties for approximately 3 hours a day 5 days a week. There is no argument from the Employer that the Defendant’s present issues are not linked back to his work injury. The issue is whether the Defendant has a capacity to earn equal to and more than his indexed normal weekly earnings.
14. The Worker has not produced any evidence of any efforts he has made to find employment and has relied on Dr Tonga’s certification that he is totally incapacitated for work.
15. In her decision Judicial Registrar Ganley expressed some concern in relation to the income earning capacity of the Worker’s investment in the water truck and indicated that she would expect to see some evidence of income earned from that truck.
16. The Worker has produced an affidavit with substantial attachments seeking to justify the claim for certain expenses and to demonstrate the income and expenses of the business the Worker has in hiring out his water cart.

17. The Worker has produced a huge volume of primary documentation to support his claim that the businesses Red Ant Jams and Red Ant Water Carts run by he and his partner produce little if any net income taking into account the business expenses. Annexed to his affidavit is a summary of the expenses of the business and the accompanying primary documentation.
18. The financial situation in regards to the water cart business is not completely clear. The bookkeeper who prepared the income tax returns for Mr Anderton and his partner advised them to move the water cart business into Mr Anderton's partner's name to maximise the tax liability. Therefore any income for both of those businesses are in her tax return. It was also the bookkeeper who claimed certain expenses against the business again to maximise tax advantage. Mr Anderton states in his affidavit that he "relied on her (the bookkeeper) to complete the tax returns".
19. The solicitor for the Employer submitted that the Worker was being less than frank in his evidence to the court. He highlighted the Worker's changing position about his relationship with Ms Farrar as an example of the Worker's unreliability. The Worker told the court that there were some issues with Centrelink because he was claiming that Ms Farrar is not his de facto partner for Centrelink purposes yet for the purposes of this application claiming she is his "partner". The solicitor for the employer submitted that the Worker's willingness to not be full and frank with the Commissioner of Taxation and Centrelink should cause the court to have concern about his frankness with the court. I agree with the Employer's submission that given the Worker's willingness to be less than truthful with his dealings with the Commissioner of Taxes and Centrelink this court should be careful to scrutinise his affidavit evidence.
20. It is clear from the receipts etc produced to justify the expenses of the business(s) that some of the expenses claimed as expenses of the business(s) could not have been business expenses eg dog food, bonjela , groceries and

pharmaceuticals. I have not trawled through all of receipts but I have looked at enough of them to be satisfied that all of the expenses claimed are not all business expenses and therefore the Worker and his partner have, with the assistance of their bookkeeper, not been totally honest regarding the net income earned through their businesses. Ms Farrar's tax return shows a net income from the business "Red Ant Jams" in the financial year 2007/2008 as \$656.00. In paragraph 9 of his affidavit of the 21st of April 2009 the Worker confirms Ms Farrar's tax return includes income from both businesses. The Worker has not attempted to inform the court of the income relating to the Water Cart business only nor has he attempted to separate the costs of running that business from other expenses. The Worker has not disclosed to the Court the true financial position of that business particularly the profitability of that business for last financial year. While it is not clear what expenses should be attributable to what income the court is unable to assess the profitability of the water cart business and therefore to some extent the Worker's earning capacity.

21. In paragraph 10 of his affidavit the Worker states there has been no income from the hire of the water cart since October 2008 and the income earned before that date was \$6755.00 over four months. The Worker also states in his later affidavit that the truck was not working presently and required the attention of a mechanic.
22. The Worker's solicitor submits even if there is some discrepancy in the way the Worker has claimed his business expenses the fact is that those expenses still exist and are still part of the Worker's overall financial picture.
23. Given Judicial Registrar Ganley's legitimate concern about the income earning capacity of the water cart business and given that the interim determinations for benefits have long been treated by this court as a maintenance system to ensure the Worker is able to pay for his reasonable living expenses while his claim is resolved through the courts (see Tanya

Maree Baker v National Jet Systems (unreported 4 April 2006) it was incumbent upon the Worker to be more precise as to his income and expenses.

24. It is the Worker's submission that "it would not be fair" to expect him to use the lump sum payment received for his permanent impairment for living expenses as it is a payment recognising his permanent disability. In *Wormald International Australia v Barry Leslie Aherne [1994] NTSC 54* His honour Justice Mildren reasoned even if a worker was a millionaire he could still suffer hardship if his income stream is ceased, it is trite to say that a whittling down of a worker's savings is a hardship suffered by workers who have not benefits paid to them and the same reasoning must apply to the use of a lump sum payment under section 71. It is clearly an imposition upon the Worker to use those funds for living expenses when he could have the benefit of reducing his mortgage to some degree.
25. In paragraph 18(a) of his affidavit the Worker states that unless he is granted further interim determination then he will suffer the hardship of having to eventually sell his house when his funds run out and he is unable to make the repayments.
26. Clearly if the Worker is required to sell his house that would be "undue hardship", what is not clear is how much his minimum repayments would be reduced by a lump sum reduction of mortgage. If there is a reduction of minimal payments then the likelihood of having to sell his house is less given the hearing dates will be about 8 months away. Although he states in his more recent affidavit that a lump sum payment off the house loan would not effect the repayments he does not provide anything from the bank to confirm that statement. There is no disclosure of the terms of his loan and in particular if there is an ability to have the minimum repayment adjusted given the decrease in principal outstanding.
27. Further if the minimum repayments are decreased then the Worker will clearly need less income in relation to that part of his living expenses. If he

uses some of the \$95000.00 to pay off his credit line with the Commonwealth Bank he will no longer have the expense referred to in paragraph 18(k) of his affidavit.

28. There is also an issue in relation to the weekly expenses claimed for fuel, pharmaceuticals, groceries and other car expenses. The Worker has claimed some of those expenses as expenses of the business and thereby decreasing the “income” from the water cart business and is also claiming an amount for those things as part of his living expenses. There is no way of telling if the expenses of the business are also the living expenses of the Worker as set out in paragraph 18 and if they are what effect that may have on the calculation of any interim determination of benefits.
29. Nonetheless it is clear that without using the \$95000.00 for his living expenses the lack of weekly benefits will have an effect on the Worker’s ability to cover those expenses.
30. Given all of the above I find the following:
31. The Worker has not proved on the balance of probabilities that he will suffer undue hardship should he not be granted a further interim determination.
32. Even taking into account the beneficial nature of the legislation the exercise of court’s discretion under section 107 (2) should only be exercised in favour of the Worker if the Court is satisfied the worker has been full and frank in his evidence to the Court. The Worker has not been full and frank in his disclosure to the court about his financial circumstances and the information contained in his affidavit does not assist the Court in deciding his true financial need.
33. The application for interim determination is dismissed.
34. I will hear the parties as to costs.

19th day of May 2009.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE