

CITATION: JENKINSON v CMA RECYCLING PTY LTD [2009] NTMC 064

PARTIES: ANDREW JENKINSON

v

CMA RECYCLING PTY LTD (ACN 107 209 503)

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 20933028

DELIVERED ON: 2 DECEMBER 2009

DELIVERED AT: DARWIN

HEARING DATE(s): 16 NOVEMBER 2009

JUDGMENT OF: ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

WORK HEALTH – Application for interim benefits – considerations which apply-serious question to be tried – balance of convenience

Workers Rehabilitation and Compensation Act (NT), ss 107

Wormald (Australia) Pty Ltd v Aherne [1994] NTSC 54

American Cyanamid Co v Ethicon Ltd [1975] AC 396

McGuinness v Chubb Security Holdings Australia (Unreported, Work Health Court, Dr Lowndes SM, 23 March 2006)

Phillips v G & K Akers Contracting Pty Ltd [2009] NTMC 040

Australian Broadcasting Corp v O'Neill (2006) 227 CLR 57

REPRESENTATION:

Counsel:

Worker: Ms Spurr
Employer: Ms Venning

Solicitors:

Worker: Halfpennys
Employer: CridlandsMB

Judgment category classification:	B
Judgment ID number:	[2009] NTMC 064
Number of paragraphs:	26

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

No. 20933028

BETWEEN:

ANDREW JENKINSON
Applicant/Employer

AND:

CMA RECYCLING AUSTRALIA PTY
LTD (ACN 107 209 503)
Respondent/Worker

REASONS FOR JUDGMENT

(Delivered 2 December 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is the worker's application for an order of interim benefits pursuant to s 107 of the *Workers Rehabilitation and Compensation Act* ("the Act").
2. The worker relied on the affidavits Andrew Jenkinson sworn 21 October 2009, 12 November 2009 and 20 November 2009. The employer relied on the affidavits of Gerard Burgess sworn 6 November 2009 and Arlene Dianne Venning sworn 6 November 2009 and 26 November 2009.
3. The law in respect to an application for interim benefits under the Act is fairly well settled (see *Wormald (Australia) Pty Ltd v Aherne* [1994] NTSC 54 per Mildren J).

Serious Question to be Tried

4. As I have previously observed, in *Phillips v G & K Akers Contracting Pty Ltd* [2009] NTMC 040, the phrase "a serious question to be tried" has been

the subject of recent High Court authority (see *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57). In demonstrating a serious question to be tried an applicant should demonstrate a likelihood or probability of success. The degree of likelihood to be demonstrated, or the probability needed, will depend on the nature of the rights asserted and the practical consequences which flow from the order sought. In my opinion, in order for the Court to be satisfied that a serious question to be tried exists, there should be sufficient evidence provided, acknowledging that such proceedings are at an early stage and there has not been the benefit of fully testing the evidence, that the worker has an arguable case with a reasonable prospect of success.

Balance of Convenience

5. The non-exhaustive list of factors to be considered when determining the balance of convenience were set out in *Wormald* by Mildren J. Such factors have been subsequently adopted by this Court. In *McGuinness v Chubb Security Holdings Australia* (unreported decision of the Work Health Court, 23/3/06) the following factors were identified by Dr Lowndes SM:

- Hardship to the worker;
- The ability of the worker to repay the interim benefits in the event that the substantive application for compensation fails;
- Any perception the Court has of the strength of the worker's case;
- The amount of compensation at stake;
- Any delay in making the application or in bringing the application for substantive relief and where the fault lies for that delay;

- The period of time which might elapse before the substantive application can be heard;
- The degree of any prejudice to the employer if the order is made, particularly if the worker is outside the jurisdiction;
- Relief might also be refused on other discretionary grounds such as a failure on the part of the worker to make a full and frank disclosure of all the material circumstances.

The Worker's Evidence

6. The factual background to the worker's application, as deposed in his affidavits, can be summarised as follows:

- The worker was injured on 5 November 2008 whilst working as a truck driver with the employer. He stepped onto a piece of iron and fell over twisting his ankle. This caused an injury to his ligaments which required a ligament reconstruction.
- The worker applied for worker's compensation which was granted by the employer's insurer, QBE, and weekly payments of benefits and medical expenses were commenced.
- The worker took his medical certificates to his employer on 4 January 2009 and 6 February 2009 to be met with disparaging remarks from the office administrator. The administrator indicated that "she would get something sorted" to ensure that he returned to work.
- The worker received a return to work program on 2 March 2009 stating that he was due to commence work on 4 March 2009. At that time the worker had not yet been reviewed by his treating doctor, Dr Ngunt, and did not have medical clearance to return to work. On

contacting the insurer, the worker was told to attend his doctor's appointment as scheduled on 4 March 2009.

- On 4 March 2009 whilst waiting at the doctor's surgery the worker received a telephone from the office administrator telling him to return to work. The worker refused on the basis that he was seeing his doctor as instructed by the insurer.
- Dr Ngunt subsequently certified the worker unfit for duties until after 16 March 2009. Dr Ngunt had also spoken with the employer's doctor, Dr Dvash, who agreed with that course. The worker subsequently received a letter from the employer stating that Dr Dvash had certified him fit to return to full time duties. The worker subsequently confirmed with Dr Dvash that he was unable to return to full time duties.
- A further work program was due to commence on 16 March 2009, however the worker was subject to further harassment from the office administrator. He had no other choice than to resign from employment. He complained about the administrator to senior management.
- The worker resigned from the employer's employment and commenced work with Kosmos Foods, as a truck driver. He was employed with Kosmos Foods for approximately 5.5 months. His employment was terminated on 22 September 2009 because he could not fulfil all of the duties required. Kosmos Foods told the worker that due to his continuing restrictions, related to his injury, they were no longer able to offer him employment.
- The worker complains of a number of continuing symptoms including numbness in the toes, pain in his ankle and other difficulties with his foot.

- The worker's medical benefits continue to be paid. The worker's weekly benefits were ceased 14 days after the worker received the employer's notice of decision dated 10 September 2009.
 - The worker has recently gained casual employment with Toll Personnel.
 - The worker's proceeding in the Work Health Court is at an early stage. Pleadings have not yet been filed and served.
7. There is very little medical evidence, filed by the worker, in support of the worker's application. The only medical evidence comprises medical certificate dated 23 October 2009 which refers to a ATFL repair R ankle, fit to return to restricted duties 25/9/09 – 23/10/09 with no lifting above 20 kg and to avoid repetitive bending.
8. In relation evidence of the worker's household income, the worker deposed that he is married with two children (aged 10 and 16) who all live with him. In relation to household income:
- The worker's spouse earns \$1252.84 nett per fortnight.
 - The worker has recently been able to get limited casual work from Toll Personnel and earns between \$18 and 24 per hour. In the week prior to 20 November 2009 the worker earned \$280 nett from working at Toll Personnel. In the week of 20 November 2009 the worker expected to earn approximately \$373.32 from working at Toll Personnel.
9. Therefore the worker's deposed household income amounts to \$626.42 nett per week (on his spouse's salary alone) or \$999.74 nett per week (combining the worker's spouse's income and his income from Toll Personnel).
10. In relation to household expenditure, it was the worker's evidence that the current weekly expenditure is as follows:

- Food \$150
- Meat \$40
- Alcohol \$20
- Petrol \$80
- Power and Water \$37.50
- Childcare \$10
- Storage \$32.50
- Car registration and running costs \$10
- Rent \$235
- Medical Benefits Fund \$16
- Credit Card Payments \$27.50
- Life Insurance \$11
- MBF Health Insurance \$34.50
- Car, caravan and contents insurance \$43.50
- Entertainment \$50
- Any other expenses \$90 and \$80

11. The worker's deposited weekly expenses amount to \$967.50. He also deposits to assets of \$25,000 (two cars and a caravan), and debts of \$20,100 (credit cards and car loans).

12. In support of the claimed expenses the worker attaches a number of documents:

Annexed to his affidavit of 21 October 2009 is: a vehicle registration notice for \$618.75 for a 12 month period, a Lee Point Village Receipt for rent and power dated 1 October 2009 for \$608.55, one Coles grocery

receipt dated 19 September 2009 for \$124.64, and a number of bank statements which are repeated in a further affidavit.

Annexed to the worker's affidavit of 12 November 2009 is: a copy of a GO Mastercard statement dated 8 October 2009 for the period 2/10/09 to 5/8/09 in the worker's and spouse's name, a Commonwealth Bank ("CBA") visa account netbank printout for the period 1/10/09 to 6/8/09 in the worker's and spouse's name, a CBA statement for the period 20/6/09 to 28/9/09 in the worker's name, a CBA streamline netbank printout for the period 5/10/09 to 3/7/09 in the spouse's name, and a CBA Netbanksaver statement for the period 2 November 2009 to 3 April 2009 in the worker's name.

Annexed to the worker's affidavit of 20 November 2009 is: a CBA Netbanksaver statement for the period 6/11/09 to 1/7/09 in the spouse's name and a CBA Award Saver netbank printout for the period 17/11/09 to 22/9/09 in the spouse's name.

13. The worker and his spouse would appear to have eight separate bank accounts between which they transfer various amounts to pay bills and debts.

The Employer's Evidence

14. The employer relied on the affidavit of Ms Venning sworn 6 November 2009 and 26 November 2009. Annexed to the affidavit of 6 November 2009 were various worker's compensation medical certificates certifying the worker unfit from 18 December 2008 to 19 March 2009, and then fit with various degrees of reducing restrictions from 14 April 2009 to 23 October 2009. Further, the employer relied on the affidavit of Mr Burgess sworn 6 November 2009 which related to the implementation of the various return to work programs and included the worker's resignation letter.

Determination

15. As stated above, in order for the Court to be satisfied that a serious question to be tried exists, there should be sufficient evidence provided, acknowledging that such proceedings are at an early stage and there has not been the benefit of fully testing the evidence, that the worker has an arguable case with a reasonable prospect of success. Normally that would require provision of medical reports and the like going to the capability or injury of the worker.
16. It is the employer's position that the worker was offered suitable duties within his restrictions but resigned and refused to return to suitable duties. It was argued that had he partaken in the return to work program it would have enabled him to undertake more profitable employment. It was submitted that the worker had a capacity to work and obtain employment at or above the level of weekly earnings he was receiving at the time of the injury. The employer points to the worker's employment at Kosmos Foods for 6 months prior to 22 September 2009.
17. The worker submitted that he was subject to harassment and was unduly pressured to return to work. It was submitted that the worker had been proactive in getting employment with Kosmos Foods, but he had been terminated due to restrictions related to his injury.
18. On the evidence available, I accept the worker was dismissed from Kosmos Foods for reasons related to his restricted physical ability, which was in turn related to his workplace injury.
19. Although there is little substantial medical evidence I am satisfied there is a serious question to be tried.
20. In relation to the balance of convenience the worker's application focused mainly on the issue of hardship. In that respect, I note that the worker's deposed household expenditure is \$967.50. The household income presently stands at \$999.74, if one includes the worker's spouse's

employment income and the worker's income from Toll Personnel. Further, the bank statements annexed to the worker's affidavit of 20 November 2009 indicate that his spouse is in receipt of Centrelink payments on a fortnightly basis. It is presumed these are Family Tax Benefit payments. That must be presumed because no mention of such income was made by the worker in his affidavits. The payments are as follows:

- 13/11/09 \$154.56 + \$29.26
- 30/10/09 \$154.56 + \$29.26
- 21/10/09 \$127.07
- 16/10/09 \$154.56 + \$29.26
- 2/10/09 \$108.00 + \$4.18

21. Those payments, at least the last three similar amounts, amount to \$91.91 per week. If such amounts are included in the household income, the income amounts to \$1091.65, a surplus of \$124.15 over the declared household weekly expenditure.
22. The effect of the above is two fold. First, the worker has failed to expressly declare additional income received by his spouse, which leads to an inference that he has been less than full and frank in his disclosure to the Court. Even if it could be argued that a declaration of the Centrelink payments came through an annexure to the worker's affidavit, such affidavit was the third affidavit filed, it was filed to address anomalies in bank records identified by the employer and no mention of the payments is made in evidence given by the worker. Secondly, the household income, as it presently stands, exceeds the household expenditure. On that basis it is extremely difficult to make a finding as to hardship. As stated in *McGuinness*:

“Where a worker relies upon hardship as a factor favouring the making of an interim payments order, then he or she bears the onus of proving, on the balance of probabilities, that they will suffer hardship if an interim award is not made...Hardship needs to be sufficiently established. The Court must be provided with such evidence – documentary or otherwise – as is available which relates to the whole of the worker’s financial situation in terms of income and expenses. The Court is reliant on the worker to make full and frank disclosure of his or her financial situation so that the Court can be placed in a position to accurately and reliably assess the worker’s needs – both present and future. Unless those things occur the Court is unable to reach any decision regarding the worker’s level of hardship, as hardship may not, in fact, exist, or if it does it may vary in its intensity – it could be minimal, moderate or extreme.”

23. It could be argued that the Court should disregard the worker’s income from Toll Personnel because it is limited casual work and as such is not guaranteed. However, the fact remains that, as at the time of his application, the worker was employed, albeit in a limited capacity, and was earning an income. That cannot be ignored. Should the worker be dismissed from Toll Personnel in the future, and should the worker fail to secure other employment, such that the household income falls, then a further opportunity may arise for the worker to make another application on the basis of hardship. Similarly, it could be argued that the worker’s spouse’s Centrelink payments may change (ie. in light of the worker’s present employment). That may be the case but there was no evidence to that effect.
24. Additionally, I wish to make an observation in relation to the manner in which evidence was presented by the worker. The purpose of filing affidavit material is obviously to provide evidential support for the worker’s application, but it must be in a format which assists the Court. The manner in which such information is provided is crucial to the Court’s task. Where household expenditure is declared, the Court requires full supporting documentation of expenses where reasonably possible. That normally includes provision of sufficient receipts, bills, invoices and the

like, including historical receipts where necessary. Workers would normally have forewarning that an application for interim benefits is to be made, as complex and numerous affidavits are often prepared, and it should not be a hard task to save weekly receipts (for petrol, food and other frequent expenses). Where such receipts are unavailable bank records may be used, although they are less reliable than primary receipts (as often expenses are not itemised or described on bank statements). If bank records are relied upon a full explanation is required. It is not particularly helpful to attach reams of bank statements with hundreds of transactions without making specific references to which particular transactions support which expenses. If bank statements are used to support expenditure claims they should be specifically referred to. For example, if mortgage payments are made through bank transfers, the worker should depose to such transfers and specify which statement and what dates (or page numbers of the statement) the transactions occurred on. Alternatively, if grocery payments are made through EFTPOS then the worker should depose to such payments and specify the statement and dates upon which the transaction occurred¹. It is not the task of the Court to engage in a forensic accounting exercise to match up or justify the worker's claims. That is a matter for the worker in the prosecution of his application.

25. I find that the worker has failed to satisfy me that he would suffer hardship if an interim award is not made. However, a failure to show hardship is not determinative in all circumstances, the other factors weighing in the balance of convenience must be considered.
26. In relation to other aspects of the balance of convenience, neither party, either in evidence or submissions, significantly addressed other factors. However, for the sake of completeness I will briefly address them:

¹ For example: "My household spends \$150 per week on groceries. Payment for groceries is made by EFTPOS transaction and such transactions are recorded on my bank statement, which is attached and marked annexure A. The transactions listed in annexure A on dates A, B, C, D and E illustrate that payments averaging \$150 are made on a weekly basis for groceries at Coles Supermarket."

Delay – there has been no indication that the worker has been guilty of delay in respect to his claim or this application. This weighs in the worker’s favour.

Ability to repay – on the basis of the evidence and a comparison of the worker’s debts versus assets there would appear to be very little ability to repay any amounts awarded should the worker be unsuccessful in his substantive claim. This weighs in the employer’s favour.

Perception as to the strength of the worker’s case – there is very little information which has been presented to the Court to gauge the strength of the case. There are no pleadings or formal medical reports. It is therefore extremely difficult, at this stage, to make an assessment as to the strength of the worker’s case. This factor is neutral.

Amount of compensation at stake – the Court has little or no information as to the level of compensation at stake. This factor is neutral.

Period of time which may elapse before hearing – the proceeding is at an early stage. A conservative estimate would put a hearing at about 8 to 10 months away. This factor weighs in the worker’s favour.

Status quo – the worker was paid benefits between November 2008 and March 2009. He then worked for Kosmos Foods earning more than he had previously. Weekly benefits were formally ceased on about 22 September 2009. This factor is neutral.

27. I have considered the other factors in the balance of convenience. In my view such other factors do not swing the pendulum away from the view which I have formed. The worker has primarily failed to show he would suffer hardship if an award was not made. His application is therefore dismissed.

28. My orders therefore are:

1. The worker's application for interim benefits is dismissed.
2. The costs of and incidental to this application be costs in the cause.

Dated this 2nd day of December 2009

CRAIG SMYTH
ACTING JUDICIAL REGISTRAR