CITATION: *Day v Yuendemu Social Club Inc* [2010] NTMC 028

PARTIES:	SANDRA MARY DAY
	v
	YUENDEMU SOCIAL CLUB INC.
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	21003580
DELIVERED ON:	12 April 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	31 March 2010
JUDGMENT OF:	J Johnson A/Registrar, Work Health Court

CATCHWORDS:

WORK HEALTH – INTERPRETATION OF SECTIONS 107(4) AND 107(6) OF THE ACT. INTERIM DETERMINATION – APPROACH TO THE EXERCISE OF THE DISCRETION. SECTION 65(2)(b)(ii) OF THE ACT.

REPRESENTATION:

Counsel:

Worker:	Mr O'Loughlin
Employer:	Mr Crawley

Solicitors:

Worker:	Priestleys
Employer:	Cridlands MB

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 028
Number of paragraphs:	22

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

No. 21003580

BETWEEN:

SANDRA MARY DAY

Worker

AND:

YUENDUMU SOCIAL CLUB INC.

Employer

REASONS FOR JUDGMENT

(Delivered 12 April 2010)

Mr J JOHNSON A/JR

First Preliminary Issue

1. This is the second application by the Worker for interim benefits pursuant to section 107 of the *Workers Rehabilitation and Compensation Act* ("the Act"). The Worker's first application for an interim determination was heard and determined by me on 8 February 2010 and was dismissed, resulting in the Worker making application for Judicial Review of my decision. The first preliminary issue in this second application for an interim determination turns on the interpretation of section 107(4) of the Act which, for convenience, is reproduced below:

> **107. Interim determination**
>
> …….
>
> (4) The Court may only revoke an interim determination:

(a) on the making by the Court of a formal finding in respect of liability; or

(b) with the consent of the parties.

2. The Employer's submission is that, the Worker's first application having sought an interim determination for a period of 12 weeks post the hearing of the application, she is thereby precluded from making further application for an interim determination until 3 May 2010; that is, 12 weeks post the date of the hearing of that first application. This, it was said, was the effect of section 107(4) of the Act because the Court can only revoke an interim determination in the circumstances provided in sub-paragraphs (a) or (b), neither of which apply in this case. This argument can, of course, only be sustained if the *dismissal* of an application for an interim determination is consubstantial with the *making* of an interim determination. If that be the case, so the argument goes, any dismissal of an application for an interim determination remains in force for the period of time sought by the terms of the application (in this case 12 weeks from 8 February 2010) unless overtaken by the circumstances described in sub-paragraphs (a) or (b).

3. Whilst I accept that there is some logic in the Employer's submission, I cannot accept that to be the result intended by the legislature. As Counsel for the Worker points out, there is much sound authority for the proposition that the Act is beneficial and should not be interpreted in an overly technical or restrictive way so as to defeat the legitimate expectations of an injured Worker (see, for example, the discussion in *Paspaley Pearls Pty Ltd v Johnston* [1995] NTSC 63 at paragraphs 57 to 59). I do not think, for example, that if a Worker's application for an interim determination was dismissed on the basis that it was deficient in form or content that he or she should, thereby, be precluded from making further application for the prospective period of interim determination sought in his or her application. True it is that such an approach may result in multiple applications until the Worker "gets it right", but I think that is answered by the beneficial intention of the Act and, in any event, such an interpretation may well result

in the same multiplicity of applications if conservative Worker's only apply for an interim determination for short periods of time against the possibility that if there application is initially dismissed they will be precluded from further application for a significant period.

4. On balance I do not believe the Employer's argument on this first preliminary issue can be sustained and I reject it accordingly.

Second Preliminary Issue

5. The Employer's second preliminary argument turns on the interpretation of section 107(6) of the Act which, again for convenience, is reproduced below:

> **107. Interim determination**
>
> …….
>
> (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.

6. The Employer's argument is that this being the second application for an interim determination by the Worker, she needs to clear the additional hurdle prescribed by sub-paragraph (a) or sub-paragraph (b) of section 107(6). Again, this argument turns on whether the *dismissal* of an application for an interim determination is consubstantial with the *making* of an interim determination as discussed in paragraph 2 above. As I have said, I do not believe, on balance, that to be the intention of section 107(4) of the Act nor, for similar reasons, do I believe it to be the intention of section 107(6) of the Act. To find so would be to impose an additional hurdle upon a Worker who had failed in a previous application by virtue only of such failure. Objectively that does not appear to me to be the intention of section 107(6). Rather, I believe that the additional hurdle prescribed is to apply in

circumstances where a Worker has already had the benefit of an initial interim determination for a potentially allowable period of up to 22 weeks (section 107(3) of the Act).

Background to the Application Proper

7. Given the history of this matter and the decision on application for Judicial Review of His Honour the Chief Justice (*Day v Yuendumu Social Club Inc & Anor* [2010] NTSC 07, hereinafter "*Day*") I do not believe it necessary to traverse the background to the Worker's application herein in great detail. For present purposes it is suffice to say that the Worker was injured during the course of her employment with the Employer on 28 December 2007. In the intervening period she has attempted to return to work on at least two occasions in different settings but, for varying reasons, none of those attempts have succeeded in reintegrating her into long term employment. The Worker now finds herself unemployed not without, what appears from the papers at least, the requisite degree of rehabilitative assistance from the Employer pursuant to section 75A of the Act.

8. Acting upon certification by Consultant Orthopaedic Surgeon HJP Khursandi that the Worker had "ceased to be incapacitated for work as a result of the work injury", on 4 December 2009 the Employer issued a Notice of Decision cancelling payment of weekly benefits pursuant to sections 69(1) and 69(3) of the Act. Benefits ceased 14 days thereafter.

9. Initially unrepresented, the Worker quickly gained representation, sought a mediation of the dispute between the parties pursuant to section 103 of the Act, and applied for an interim determination without delay. As outlined in paragraph 1 of these reasons, that first application was dismissed and the Worker sought Judicial Review of the decision. She now makes the within second application for an interim determination and, the mediation of the dispute between the parties having been unsuccessful, has made application

to the Work Health Court pursuant to section 104 of the Act for the recovery of compensation.

10. Importantly, in the period between the Workers first application for an interim determination and this, her second such application, she has consulted with a Consultant Psychiatrist, Dr Chris Martin. In his report of 30 March 2010 (affidavit of Ms Mellissa Dunn sworn 30 March 2010) Dr Martin diagnoses the Worker with Axis 1 clinical disorders of post traumatic stress disorder and major depressive disorder both of which, in his opinion, "result directly from the accident which [the Worker] experienced during the course of her employment with [the Employer]". He goes on to certify that the Worker "continues to be incapacitated for employment as a result of these injuries, and at present is unable to work at all". Clearly in my view, such expert opinion must materially bear upon assessment of the Worker's loss of earning capacity. Whilst I accept the Employer's submission that such expert medical opinion has not been challenged, it nonetheless stands as the most contemporaneous expert opinion of the Worker's current loss of earning capacity for the purposes of her present application. Accordingly, I am bound to give it appropriate weight.

11. The Worker also submits that, during the same intervening period, her financial situation has worsened (see Affidavit of the Worker sworn 28 March 2010 where she avers that her total household income is comprised entirely of the Centrelink benefit accruing to her and her husband which, when combined, amounts to $413.00 gross per week) and that she has had to sell some paintings in an attempt to supplement her income. Similarly, the Worker avers to being "concerned that we are getting so far behind in our house payments that we will lose our home". The Worker is also now the subject of a costs order emanating from her application for Judicial Review.

Consideration of the Application Proper

12. It is "accepted practice" (*Day* at paragraph 10) in the Work Health Court "that the approach to the exercise of the discretion to award interim payments is the same as in an application for an interlocutory injunction – ie that the worker must establish that there is a serious question to be tried and that the balance of convenience favours the making of an interim award" (*Wormald International (Aust) Pty Ltd v Aherne* [1994] NTSC 59 at paragraph 10).

13. In the Worker's first application for an interim determination I decided that she had established that there was a serious question to be tried and I do not think it necessary to again traverse that ground. Adopting, with respect, the reasons of the Honourable Chief Justice going to the principles to be applied to an application for interim payments (*Day* at paragraph 10) I reiterate my view that the Worker has established "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial". Whilst I would not go so far as to say that Counsel for the Employer explicitly conceded this point at hearing, he did not argue that such a finding was not maintainable on the facts of this case.

14. The remaining issue is, thereby, whether or not "the balance of convenience favours the making of an interim award" in favour of the Worker. I have considered in detail the matters averred by the Worker in her affidavits sworn 2 February 2010 and 28 March 2010 and the Employer sworn 29 March 2010 against the "non-exhaustive" list of factors to be considered in determining the balance of convenience (Wormald International (Aust) Pty Ltd v Aherne [1994] NTSC 59 at paragraph 10), and against the particular circumstances of the Worker's case. There is now little doubt, in my opinion, upon review of the material before me that the Worker is suffering financial hardship as the result of her weekly benefits having ceased some 14 weeks ago and that she has attempted, as best she can, to reshape her

financial affairs to meet that hardship. There has been no delay in the Worker bringing her application and, save for one particular aspect to which I refer below, I do not criticise the extent of disclosure in her affidavit evidence. As to her particular circumstances, I again note the expert medical opinion of Consultant Psychiatrist Dr Chris Martin referred to at paragraph 10 above and the fact, as I understand it, that she is continuing to undertake treatment with Dr Martin at her own expense. The report of Dr Martin must also, in my view, bear upon the perception the Court has of the strength of the Worker's case.

15. From the Employer's perspective there is complaint, firstly, that the Worker has not attempted to explain the working capacity or prospects of her husband and that if knowledge of such capacity or prospect was available it may well have considerable impact upon the balance of convenience. The Worker was put on notice to that effect by correspondence from the Employer's solicitors on 22 March 2010 (affidavit of Ms Candice Maclean sworn 29 March 2010) but, nonetheless, has chosen not to address the issue with any particularity in her affidavit evidence. Secondly, the Employer points to the prospective prejudice accruing to it through the Worker residing outside the jurisdiction and having no apparent capacity to repay the interim benefits in the event that the substantive application for compensation fails.

16. As to the first issue, whilst the Worker's failure to disclose the working capacity or prospects of her husband is a matter of some reservation it does not, in my opinion, when viewed against the Worker's place of residence being relatively remote from available work, tip the balance of convenience or, indeed, the status quo that has had both residing at that location for the 2 year period that the Worker has been in receipt of weekly benefits of compensation.

17. As to the second, inevitably, in many cases where financial hardship prevails as a result of a Worker's weekly benefits of compensation being ceased, capacity to repay will be a live issue. It is further complicated here by the Worker residing outside the jurisdiction and title to her current home being in the name of her husband. Nonetheless the Worker must, in my view, have some equitable interest in her home, and the Employer's insurer some existent capacity to recover benefits in the event that the Court was ultimately to make such an order. I do not consider that this factor, of its own, tips the balance of convenience in favour of the Employer.

18. For completeness, I should make reference to the evidence by statutory declaration of the current Co-Managers of the Yuendemu Social Club Store, Mr Mark Vegera and Ms Kathryn Vegera, annexed to the affidavit of Ms Candice Maclean sworn 29 March 2010. I did not discern that what, on the face of it, appears to be an allegation of fraud, was firmly pressed by Counsel for the Employer for the purposes of the Worker's current application and I cannot, for obvious reasons, make any finding about it.

19. Finally, I should touch upon section 65(2)(b)(ii) of the Act which was central to my decision on the Worker's first application for an interim determination. Counsel for the Employer submits, and I respectfully agree, that the work of that sub-section lies in assessing the balance of convenience. I note also the comments of His Honour the Chief Justice in *Day* (at paragraph 25) that "…even if the plaintiff was fit to undertake 40 hours per week of the most profitable employment identified in the APM report, her loss of earning capacity for the purposes of assessing compensation payable under s65(2) was a minimum of approximately $600 per week."

Conclusion

20. On this, the Worker's second application for an interim determination, I have reached the conclusion that, on balance, the Worker has established that there is a serious question to be tried and that the balance of convenience favours the making of an interim award in her favour. Whilst I retain some reservation going to the two matters of potential prejudice to the Employer referred to in paragraph 15 above, neither, in my opinion, tip the balance of convenience or maintenance of the status quo against the Worker. Similarly, given the Employer's submissions relating to the section 65(2)(b)(ii) issue and the fact that it has, in any event, been largely overtaken by the expert opinion of Dr Martin, that aspect is not of the significance that I accorded it on the first occasion. I have also had the benefit of the decision of His Honour the Chief Justice in *Day* which, with respect, I am bound to follow.

Quantum

21. The parties agree the Worker's normal weekly earnings ("NWEs") pursuant to section 65(1) and indexed to 2010 pursuant to 65(3) of the Act at $1,120.68 gross per week. In the Worker's affidavit sworn 28 March 2010 she avers that her total household income is comprised entirely of the Centrelink benefit accruing to her and her husband which, when combined, amounts to $413.00 gross per week. In that same affidavit she avers to weekly household and living expenses of $1,070.88 net per week which on her evidence, uncontested by the Employer, amounts to $1,396.00 gross per week. Thus, accepting the level of her current weekly expenditure for household and living expenses, such expenditure exceeds her NWEs by $275.32 gross per week. She also avers to having been advised by Centrelink that if she were to receive interim benefits in the amount sought both her and her husband would cease to have any entitlement to Centrelink benefits.

22. I do not propose to intimately dissect the Worker's evidence of weekly household and living expenses; none of it on my inspection appears beyond the bounds of reasonableness and any items of minor adjustment to which I may be attracted are effectively nullified by the shortfall referred to in paragraph 21 above.

Orders:

1. Interim Determination to issue in favour of the Worker for the payment of interim benefits in the amount of $1,120.68 gross per week.

2. Interim Determination to apply for the period of 10 weeks prior to 31 March 2010 and 12 weeks post 31 March 2010.

3. Costs in the cause.

Dated this 12th day of April 2010

_____

Julian Johnson

Acting Registrar
Work Health Court