CITATION: *Niehus v Cater Care Australia* Pty Ltd [2013] NTMC 028

PARTIES:	LINDA NIEHUS
	V
	CATER CARE AUSTRALIA PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Interlocutory
FILE NO(s):	21345737
DELIVERED ON:	5 December 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	11 November 2013
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

SECTION 107 OF THE *WORKERS REHABILITATION & COMPENSATION ACT* – Whether asserted invalidity of Notice of Decision is sufficient of itself to be determinative of the balance of convenience.

HELD - any inquiry into the relative strength of each party's case, and its use in tipping the balance of convenience, can only be determinative on its own if the evidence of one party is so overwhelmingly strong and indisputable as to prima facie defeat the claim or defence of the other.

REPRESENTATION:

Counsel:

Worker:	Mr Grove
Employer:	Mr McConnel

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2013] NTMC XXX
Number of paragraphs:	24

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

No. 21345737

BETWEEN:

LINDA NIEHUS
Worker

AND:

CATER CARE AUSTRALIA PTY LTD
Employer

REASONS FOR JUDGMENT

(Delivered 5 December 2013)

Mr J JOHNSON JR:

1. This is an application for an interim determination by the worker in the substantive proceeding. There is sufficient evidence before me that the necessary statutory pre-conditions for such application have been met, so for present purposes I shall not venture into that territory.

2. What is somewhat novel about this particular application is that upon its hearing before me today the worker's Counsel, Mr Grove, effectively rested the worker's case for an interim determination on assertion that the Notice of Decision productive of the dispute between the parties in the substantive litigation was so fundamentally flawed as to be a "nullity from the outset". This it was said, in circumstances where the employer had conceded that there was a serious issue to be tried between the parties, must inevitably and without further enquiry lead the court to the conclusion that the balance of convenience lies with the worker.

3. I do not agree with such assertion. Perhaps the best way for me to illustrate why that is so is to call in aid some of the oft cited dictum of Lord Diplock in *American Cyanamid v Ethicon Limited*[1]:

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[1] See http://www.bailii.org/cgi-bin/markup.cgi?doc=uk/cases/UKHL/1975/1.html ; albeit without page or paragraph numbers.

> The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

4. As I understand these words of Lord Diplock, any inquiry into the relative strength of each party's case, and its use in tipping the balance of convenience, may be permissible where the uncompensatable disadvantage or prejudice as between the parties does not differ widely. However, in the normal course of events such inquiry can only be determinative in tipping the balance of convenience on its own if the evidence of one party is so overwhelmingly strong and indisputable as to prima facie defeat the claim or defence of the other. The reasons for putting the bar so high are obvious enough: "... it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations"[2].

5. Lord Diplock's dictum appears to reflect the strategy of the worker upon the hearing of her application today, ie, a strategy to convince me that on the facts disclosed by the evidence there was no "credible dispute" as to the "disproportionate" strength of the worker's case on the invalidity of the employer's Notice of Decision, and that such a finding ought be determinative of the balance of convenience.

6. However, and without going into the detail, Counsel for the employer Mr McConnel was able in my view to paint a picture of a Notice of Decision which seemingly complied with the 'guidance'[3] provided by NT Worksafe and, contextually at least, appeared a genuine attempt by the employer to explain the reasons for its decision. Which argument prevails at trial is, of course, an entirely different matter but I remind myself that on an application for injunctive relief the "court is not justified in embarking upon anything resembling a trial of the action".

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[2] *American Cyanamid v Ethicon Ltd* (supra)

[3] Exhibit "E 1"

7. If I am wrong about that or, indeed, I have misunderstood the basis of the worker's arguments today, in my opinion the balance of convenience must by its nature be a broader enquiry than a simple focus upon one element and its asserted "disproportionate" strength as being conclusive to the exclusion of all other elements. It seems to me that before the circumstances postulated by Lord Diplock could prevail in an application for an interim determination in this jurisdiction there would need to be some form of concession on the part of the employer. In my opinion, at this very early stage of the substantive proceeding[4], and given the constraints upon the court in its interlocutory jurisdiction to which I have referred, "no credible dispute" is a high hurdle indeed.

8. I therefore reject the worker's contention.

9. With that argument aside, I indicate to the parties that I have undertaken a very careful assessment of the balance of convenience on the evidence and submissions before me today and come to the conclusion that the balance of convenience lies with the employer.

10. At the outset let it be clear that in considering the court's perception of the strength of the worker's case I would certainly not put it at the high water mark asserted by the worker's Counsel. In my opinion the worker's evidence falls well short of the 'high hurdle indeed' to which I have referred at paragraph 7.

11. Counsel for the employer urges that the balance of convenience should lie in its favour by virtue of the following three central grounds.

12. The first of these, and I observe, importantly from the court's perspective, is the fact that the Notice of Decision issued to the worker by the employer on 4 July 2013 founds upon assertion that the worker failed to attend an appointment with her rehabilitation provider on 26 June 2013. The worker has chosen not to respond to that assertion in her evidence other than by bald riposte that she "did not unreasonably fail to [attend such appointment]". In the circumstances I agree with the employer's contention that this goes to the worker's obligation of full and frank disclosure. The evidentiary onus is on the worker to persuade the court of the elements necessary to favour the award of an interim injunction and in my opinion that ought include some form of evidentiary explanation in response to that causative issue.

13. The second reason advanced by the employer was that the worker had failed to adduce full and frank evidence of her financial circumstances. By way of example I

[4] No pleadings have yet been filed

note that the single bank account transaction record disclosed by the worker covered only a one month period from 1 August to 1 September 2013, and for a Commonwealth Bank account at the Innisfail branch in Queensland. This record provided no accounting of the $3,100 which on the worker's evidence she received by way of tax return on 13 August 2013, and did not extend in time to cover any of the 10 weeks of benefits received by the worker following mediation on 13 August 2013.

14. In similar vein, the worker deposes in her affidavit evidence before the court that she is now and foreseeably hereafter the full-time carer of her 17 month old granddaughter, but provides no explanatory evidence as to how such responsibility might affect her financial circumstances or ability to comply with her section 75B obligations.

15. The third reason advanced by the employer was possible prejudice to it if the court ultimately finds against the worker in the substantive litigation and, given the financial circumstances to which the worker avers in her application, I accept that possibility.

16. I pause to note, and this was fairly conceded by the employer today, that the restoration of the status quo weighs in favour of the worker and that at the requisite mediation of the dispute between the parties on 13 August 2013 the employer extended payment of weekly benefits of compensation on a without prejudice basis for a further period of 10 weeks up until 30 September 2013.

17. Clearly enough on the cases, the resolution of the question of where the balance of convenience lies requires the court to exercise a discretion. In the circumstances of this particular case the exercise of that discretion has been difficult. Nonetheless, in the careful balancing exercise which I have undertaken on the evidence before me I am comfortably satisfied that in this instance the balance of convenience lies with the employer. I will exercise my discretion and order accordingly.

Addendum

18. This application was argued before me on 11 November 2013 and on the morning of 15 November 2013 I was about to publish the above written reasons to the parties by email when I received by facsimile a letter, dated 14 November 2013, from the worker's solicitors. This letter sought to "reconvene the hearing of the Application" so that the worker might put a further matter before the Court and make submissions thereupon.

19. As a result I withheld publishing my reasons and made orders requiring the parties to provide affidavit evidence in support and in reply on the worker's application to

re-open, and listed the matter for argument and ruling before me on 4 December 2013.

20. On 4 December 2013 the worker's solicitors abandoned the application to re-open on grounds that they had been unable to have the worker swear the requisite affidavit material to sustain it. As there was no application for an adjournment it was not necessary for me to be told the reasons why that could not occur, nor the content of the new matter which was sought to be agitated. I mention that only to make it clear to the parties that those matters were not a part of my considerations.

21. Against that background the employer seeks its costs thrown away of and incidental to its appearance on 4 December 2013, and that the worker should bear her own costs of and incidental to the preparation of her evidence in support of her application to re-open which ultimately foundered.

22. In my opinion those costs orders cannot be resisted. But for the letter of 14 November 2013 the employer's costs liability, if it arises on the final disposition of the substantive proceeding, would be limited in time to costs incurred up to the close of the hearing on 11 November 2013. In those circumstances I cannot apprehend how any costs beyond that date pressed upon it by the worker solely for the purpose of the abandoned application to re-open might be legitimately sheeted home to the employer if the ultimate disposition requires it to pay the worker's costs.

23. A similar principle must also apply in my view to the worker's costs of the application to re-open.

24. I will order accordingly.

Orders:

1. The worker's application for an interim determination in this proceeding is dismissed.

2. Costs of the worker's application for an interim determination up to 11 November 2013 to be costs in the cause.

3. The employer is to have its costs of and incidental to the worker's abandoned application to re-open the hearing.

4. The worker is to bear her own costs of and incidental to the preparation and abandonment of her application to re-open the hearing.

5. Costs are fixed at 100% of the Supreme Court scale.

6. Certified fit for Counsel.

Dated this 5th day of December 2013

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JULIAN JOHNSON
JUDICIAL REGISTRAR