

CITATION: *Cochran v CouncilBiz* [2022] NTWHC 007

PARTIES: Bertha Cochran
v
CouncilBiz

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: CIVIL

FILE NO(s): 2021-01087-LC

DELIVERED ON: 22 August 2022

DELIVERED AT: Darwin

HEARING DATE(s): 18 July 2022

DECISION OF: Acting Judge O'Loughlin

CATCHWORDS:

Pleading fraud, Indemnity Costs, S. 109 Interest

Return to Work Act 1986 (NT), sections 69, 89, 92, 109

BAE Systems Australia v Rothwell (2013) 275 FLR 244

Banque Commerciale v Akhil Holdings (1990) 169 CLR 279

Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225

Lajevardi v Performance Services [2021] NTLC 31

Shorrlong Pty Ltd trading as Centre Plumbing v Northern Territory Housing Commission [1999] NTSC 140

Stevens v Serco [2015] NTMC 27

Wormald v Aherne (1994) 26 NTLR 12.

REPRESENTATION:

Counsel:

Worker: Ms S Fernando

Employer: Mr G Nutt

Solicitors:

Appellant: Maurice Blackburn

Employer: Sparke Helmore

Decision category classification:

B

Decision ID number:

[2022] NTWHC007

Number of paragraphs:

36

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA
No. 2022-00775-LC

BETWEEN:

Bertha Cochran

Worker

AND:

Councilbiz

Employer

REASONS FOR DECISION

(Delivered 22 August 2022)

ACTING JUDGE O'LOUGHLIN

Introduction

1. This matter substantially resolved in June 2022 when the Employer consented to orders for the payment of past and ongoing compensation. The Employer also agreed to paying interest under section 89 of the *Return to Work Act 1986* ("the Act").
2. The only issues remaining in dispute was the Worker's claim that costs be assessed on an indemnity basis, and for an award of interest under section 109 of the Act.

Background

3. In August 2020, the Employer accepted the Worker's claim in respect of a back injury.
4. In February 2021, the Employer purported to cancel the payment of benefits by writing a letter stating in part:
 - that the Worker had "provided deliberately misleading information"; and
 - suggesting she had obtained compensation by "fraud or other unlawful means".
5. Usually an Employer cancels weekly benefits by following subsection 69(1) of the Act, i.e. giving 14 days' notice and providing an explanation as to why benefits have been cancelled.
6. However subsection 69(2)(c) states that these requirements do not apply if the payments of compensation "were obtained by fraud of the person receiving them or by other unlawful means". The Employer's letter alleged fraud and chose to rely on this subsection and the Employer did not issue a notice.

7. The Worker issued proceedings to challenge this cancellation, and alleged the Employer ought to have complied with section 69.
8. To this the Employer pleaded the cancellation was valid relying on section 69(2)(c) and referring to section 92:

"The Employer... says that the Worker was not entitled to compensation pursuant to section 92(1) and/or section 92(2) of the Act."
9. This provision creates an offence if a person makes a statement or provides a document to an Employer knowing that the statement or document contains misleading information.
10. The Employer did not expressly allege fraud or other unlawful means but it is reasonably clear that this was the effect of the pleading. No particulars of the fraud were pleaded in the Employer's first defence.
11. In *Banque Commerciale v Akhil Holdings* (1990) 169 CLR 279 at 285 Mason CJ and Gaudron J stated that fraud may take a variety of forms which is why *"fraud must be pleaded specifically and with particularity"*. This was applied by Mildren J in *Shorrlong Pty Ltd v Northern Territory Housing Commission* [1999] NTSC 140 at [10].
12. In this case the Employer did neither as it only pleaded fraud obliquely and without any particularity.
13. The Worker made a strike out application, where the Judicial Registrar (rightly) criticised the Employer's first attempt at pleading fraud and ordered particulars to be provided. The Judicial Registrar agreed with the submission by the Worker that the pleading was embarrassing and contained ambiguous assertions.
14. Unfortunately the Employer's second attempt at pleading the particulars of fraud was also insufficient. That pleading again failed to mention fraud, and again only implies fraud by pleading reference to section 92 of the Act.
15. Furthermore, the particulars of this implied pleading were insufficiently specific:
 - *"The Worker in providing information leading to the document set out in this paragraph made those documents misleading statements to the Employer and/or its insurer... And relies on those documents identified and to totality (sic) of the evidence in that regard"*.
 - *"The documents that contain misleading information are principally but not limited to [lists three documents without page or line references]"*.
 - *"**More generally** in reporting symptoms to her treating medical practitioners intentionally made statements and/or provided documents that contained misleading information"*.
 - *"The statements of documents did not disclose the **true extent of her symptoms**, daily activities and capacity as shown on objective surveillance evidence **including** without limitation that the Worker reported [lists nine symptoms]"*.

16. The amended pleading fails to particularise which of the information was misleading, implies but fails to allege that the Worker knew the information was misleading, did not plead the true extent of the Worker's symptoms, and, by using the phrases "more generally" and "including", failed to properly plead all the particulars to be relied upon.
17. The Worker rightly criticised the amended pleading as being insufficient and flagged a further strike out application.
18. In response, the Employer said it was "not instructed to file any further particulars or a further amended defence", however in the same letter offered to reinstate weekly benefits to the Worker.
19. Shortly after the Employer capitulated and resumed making weekly payments to the Worker.
20. In summary, the Employer implied fraud on the part of the Worker, failed to properly plead fraud even on its second attempt, and then abandoned the case entirely when given notice of a further strike out application.
21. Unfortunately the Court has no further evidence to evaluate the strength of the Employer's case. Clearly the Employer had surveillance evidence which at least caused the Employer to believe the symptoms were inconsistent with symptoms described by the Worker. Those reports describing the Worker's claimed symptoms, and the video surveillance evidence, were not put before the Court in this application costs and interest.
22. Thus the only means to determine the merit of the Employer's case is the fact that the Employer abandoned its case after the Worker criticised the second attempt at pleading fraud.
23. This is unlike the case of *BAE Systems Australia v Rothwell* (2013) 275 FLR 244 where the Court of Appeal had the advantage of seeing the medical reports and other evidence, which thereby allowed the Court to conclude that the Employer's case lack merit.
24. If the Employer had difficulty pleading its fraud case, one can probably assume it would have difficulty in proving it. If the Employer failed to prove fraud, it would have faced an inevitable order to pay arrears as it had not issued a notice under section 69 of the Act and had not pleaded a counterclaim.

Interest under section 109 of the Act

25. Section 89 provides for an award of interest on any late payments of weekly benefits. This interest does not require an order of the Court and is paid at the Supreme Court judgment debt interest rate (the Reserve Bank of Australia cash rate plus 6%). The Employer has rightly consented to section 89 interest.
26. Section 109 of the Act allows for an award of additional interest in certain circumstances, where subsection (1) provides that if the Employer has caused unreasonable delay in paying compensation, the Court must order interest on the award of compensation at a rate specified by the Court.

27. Given my findings in the Background above, I have concluded that the Employer's conduct in the running of the proceeding in the way it did, caused unreasonable delay given that:
- The Employer initially failed to plead any particulars of fraud;
 - The subsequent attempt to plead particulars was unsatisfactory;
 - The actual pleading of fraud was obtuse and only by implication; and
 - When it was pressed again to properly plead particulars, it completely abandoned its claim.
28. Although I do not have all the evidence to assess the merits of the Employer's case, the above is sufficient for me to conclude that the Employer caused an unreasonable delay in paying compensation to the Worker.
29. I therefore order interest pursuant to section 109 (1) of the Act.
30. As to the rate of interest, there have been a number of cases applying different interest rates ranging between 6.1% in *Lajevardi v Performance Services* [2021] NTLC 31 and 20% in *Stevens v Serco* [2015] NTMC 27. The interest rate is at the discretion of the Court and presumably should vary to reflect the behaviour of the Employer and other relevant matters. In this case, I find the Employer's behaviour was unsatisfactory but not especially so. I am content to apply the current section 89 interest rate of 6.85% as the additional interest under section 109(1).
31. Subsection 109(2) allows for additional interest if the Employer has not made weekly payments in a regular manner or in accordance with the normal manner of payment. This subsection does not have any application to the current facts.
32. Subsection 109(3) allows the Court to order punitive damages in addition to any interest ordered under subsection 109 (1) or (2). I do not find that the Employer's conduct warrants an award under this subsection in that it was not contumelious¹, high-handed², or otherwise sufficient to warrant this additional sanction.

Indemnity Costs

33. In *BAE Systems Australia v Rothwell* (2013) 275 FLR 244 Riley CJ dealt with the issue of indemnity costs in the context of a Work Health hearing. At paragraph [26], His Honour referred to the decision of *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 and stated:

Indemnity costs may be awarded in a variety of circumstances, and the categories in which such orders may be made are not closed or rigid. Examples of circumstances where costs may be ordered on an indemnity basis include where a party has pursued a matter which, on proper consideration, should have been seen to be a hopeless case and where there was undue

¹ *Wormald v Aherne* (1994) 26 NTLR 12.

² *Stevens v Serco* [2015] NTMC 27 at [20].

prolongation of a case by groundless contentions.

34. In that matter, the Court of Appeal had the advantage of examining all of the evidence available to the Employer such that it could clearly determine whether or not the case was hopeless or groundless.
35. *Colgate* cited an authority supporting an appropriate award of indemnity costs where there was an allegation of fraud knowing it to be false. There is nothing to suggest this was the case here.
36. Although the Employer abandoned its case at the time that it was being (reasonably) pressed to properly plead that case, I find that the evidence is insufficient to allow the Court to conclude that the case was hopeless or groundless to warrant an award of indemnity costs.

Orders

1. In addition to interest under section 89 of the Act, the Employer is also to pay interest under section 109(1) at the rate of 6.85%.
2. The costs of the proceeding are to be taxed on the standard basis.