

CITATION: *Skeen v Epsomm Pty Ltd [2004] NTMC 018*

PARTIES: JASON ANTHONY SKEEN
v
EPSOMM PTY LTD
ABN 31 286 933 565
T/AS THE HUMPTY DOO TAVERN

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH ACT

FILE NO(s): 20403858

DELIVERED ON: 12 March 2004

DELIVERED AT: DARWIN

HEARING DATE(s): 18 March 2004

DECISION OF: D LOADMAN, SM

CATCHWORDS:

WHETHER BREACHES BY AN EMPLOYEE OF MUTUALITY PHILOSOPHIES EXISTING IN CONTRACT OF EMPLOYMENT ENTITLE AN EMPLOYER TO BOTH REFUSE TO PARTICIPATE IN A SPECIFIED GRADUATED RETURN TO WORK PROGRAM PRESCRIBED IN TERMS OF SECTION 78A WORK HEALTH ACT AND FURTHER AVOID OBLIGATIONS OF PAYMENT CONCOMITANT WITH THOSE PERTAINING TO A TOTAL DISABILITY CLAIM

Sections 78A and 78B Work Health Act

REPRESENTATION:

Counsel:

Worker: S Southwood
Employer: I Morris

Solicitors:

Worker: Priestley Walsh
Employer: Hunt and Hunt

Judgment category classification: B
Judgment ID number: [2004] NTMC 018
Number of paragraphs: 29

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

No. 20403858

BETWEEN:

JASON SKEEN
Worker

AND:

EPSOMM PTY LTD
ABN 31286 933 565
TRADING AS THE HUMPTY DOO
TAVERN
Employer

DECISION

(Delivered 18 March 2004)

Mr David LOADMAN SM:

1. By Form 5A Application, dated 11 February 2004, pursuant to Rule 5.02(1) of the Work Health Rules the Worker applied to the Court for:-

“(f) order in respect of claim for compensation under Part V or determination of dispute between worker and employer following mediation under part VIA:s.104 (see note 2)”

2. That application was undoubtedly instigated as a consequence of a Notice of Decision dated 21 January 2004, the relevant portion whereof are set out below:

“• Cancels payments of weekly benefits to you pursuant to Section 69 of the Work Health Act. The cancellation will be effective in 14 days from your receipt of this notice.

The reasons for this decision are:

1. *You have been certified fit to return to work in a workplace based graduated return to work program with the Humpty Doo Tavern commencing on 21 January 2004.*

2. *The employer states that your employment with the Humpty Doo Tavern has been terminated for reasons unrelated to your workers compensation claim.*

3. *The employer states that your employment was terminated due to your conduct and actions that were inappropriate in your employment at the Humpty Doo Tavern.*

4. *Due to your conduct and actions which resulted in the termination of your employment at the Humpty Doo Tavern, the employer states that you have unreasonably failed and / or are unable to participate in a workplace based return to work program which could enable you undertake more profitable employment and to earn an amount equal to or exceeding your normal weekly earnings at the time of your injury.*

5. *But for the termination of your employment at the Humpty Doo Tavern, you would have been able to return to work and could earn an amount equal to or exceeding your normal weekly earnings at the time of the injury*

6. *Pursuant to section 75B of the Work Health Act (NT), the employer cancels payment of your weekly benefits."*

3. A Statement of Claim in Form 9A and dated 11 February 2004 was filed by or on behalf of the Worker and conjointly with the filing of that Statement of Claim the Worker filed an Interlocutory Application.

4. The contents of the Statement of Claim and the relief sought in the Interlocutory application are set out under the respective headings below:

"STATEMENT OF CLAIM

PARTICULARS OF CLAIM

1. At all material times the Employer was incorporated pursuant to the Corporations Law and is capable of suing and being sued in its own name.
2. The Worker's date of birth is 15 November 1972.
3. At all material times the Worker was employed by the Employer as a Bottle shop Supervisor at the Humpty Doo Tavern in the Northern Territory.
4. On 27 October 2003 the Worker was shot to his right leg from a robbery during the course of his employment. He was subsequently admitted to the Royal Darwin Hospital where he underwent surgery to repair his right leg ("the accident").
5. As a result of the accident the Worker sustained injuries, including gunshot wounds to right thigh, anxiety and Post Traumatic Stress Disorder ("the injuries").

6. The injuries arose out of or in the course of the Worker's employment with the Employer.
7. The Worker submitted a Claim for Workers Compensation to the Employer in respect of the injuries and the Employer accepted that claim and made payments of compensation to the Worker pursuant to the *Work Health Act* ("the Act").
8. On 16 January 2004 the Worker presented to a registered medical practitioner approved by the Employer and was certified fit to return to a Graduated Return to Work Program on restricted duties.

PARTICULARS OF RESTRICTED DUTIES

8.1 Avoid repetitive lifting, squatting or bending.

9. On 21 January 2004 the Worker attended at work with the Employer to commence the Graduated Return to Work Program on restricted duties and the Employer terminated the employment of the Worker on that date.
10. By Form 5 dated the 21st of January 2004, the Employer purported to cancel payments of weekly compensation.
11. The reasons given to the Worker for purporting to cancel weekly payments of compensation were:

"You have been certified fit to return to work in a workplace based graduated return to work program with the Humpty Doo Tavern commencing on 21 January 2004.

The employer states that your employment with the Humpty Doo Tavern has been terminated for reasons unrelated to your workers compensation claim.

The employer states that your employment was terminated due to your conduct and actions that were inappropriate in your employment at the Humpty Doo Tavern.

Due to your conduct and actions which resulted in the termination of your employment at the Humpty Doo Tavern, the employer states that you have unreasonably failed and/or are unable to participate in a workplace based return to work program which could enable you undertake more profitable employment and to earn an amount equal to or exceeding your normal weekly earnings at the time of your injury.

But for the termination of your employment at the Humpty Doo Tavern, you would have been able to return to work and could earn an amount equal to or exceeding your normal weekly earnings at the time of the injury.

Pursuant to section 75B of the Work Health Act (NT), the employer cancels payment of your weekly benefits."

12. The Worker seeks a review of the decision to cancel weekly payments of compensation.
13. The Worker claims;
 - 13.1 Resumption of weekly payments of compensation from on or about 4th February 2004 to the present and continuing;

13.2 Interest; and

13.3 Costs”

“INTERLOCUTORY APPLICATION

1. A Declaration that the Form 5 issued by the employer on 21 January 2004 is invalid and of no effect.
2. That the employer pay all arrears of weekly payments and entitlements from the date of cessation of benefits and continue to pay weekly payments and entitlements until such payments are reduced or cancelled in accordance with the *Work Health Act*.
3. Interest, pursuant to sections 89 and 109 of the *Work Health Act* on arrears of weekly payments.
4. Costs on an indemnity basis in relation to the worker’s application for a review of the employer’s decision to cancel weekly payments, such costs to be paid within 7 days of being taxed or agreed.

This application is made in pursuance of rule 6.03(a)”

5. A great deal of material was filed in the form of affidavits by both parties but for reasons which will become apparent the Court does not descend to incorporating that material in this decision.
6. The Court does however set out particulars of defence as filed on behalf of the Employer which are in the following terms:

“PARTICULARS OF DEFENCE

1. The employer admits the allegations contained in paragraph 1 of the Particulars of Claim.
2. The employer admits the allegations contained in paragraph 2 of the Particulars of Claim.
3. The employer admits the allegations contained in paragraph 3 of the Particulars of Claim.
4. The employer admits the allegations contained in paragraph 4 of the Particulars of Claim.
5. The employer admits the allegations contained in paragraph 5 of the Particulars of Claim save to say that the psychological condition suffered by the worker appears not to have been diagnosed as Post Dramatic Stress Disorder but instead has been diagnosed as Acute Stress (Anxiety)

Disorder (report of Dr J. Isherwood-Hicks) and "persisting anxiety state, characterised by hyperarousal, mistrust and a preoccupation with security" by Dr McLaren.

6. The employer admits the allegations contained in paragraph 6 of the Particulars of Claim.
7. The employer admits the allegations contained in paragraph 7 of the Particulars of Claim.
8. The employer admits the allegations contained in paragraph 8 of the Particulars of Claim in so far as the worker was certified fit to return to a Graduated Return to Work Program on restricted duties but otherwise is not admit the allegations contained in paragraph.
9. The employer admits the allegations contained in paragraph 9 of the Particulars of Claim.
10. The employer admits the allegations contained in paragraph 10 of the Particulars of Claim.
11. The employer admits the allegations contained in paragraph 11 of the Particulars of Claim.
12. The employer says in respect of the matters pleaded in paragraph 12 of the Particulars of Claim that the worker is not entitled to a review of decision to cancel weekly payments of compensation and further is not entitled to the orders sought in paragraph 13 of the Particulars of Claim or at all

COUNTERCLAIM

1. The employer repeats the allegations contained in paragraphs 10 and 11 of the Particulars of Claim herein.
2. The employer says that it is not required pursuant to the provisions of section 75 A to take all reasonable steps to provide the worker with suitable employment and participate as far as practicable in efforts to retrain the worker because of the worker's conduct in the course of employment leading up to the date of the incident complained of in paragraph 4 of the Particulars of Claim.

PARTICULARS OF CLAIM

1. The particulars of conduct:
 - (a) the worker knowingly participated in, or permitted or fail to report to the employer credit betting with the operation on Keno at the premises of the employer.
 - (b) the worker obtained and retains possession of several barstools that belong to the employer without employer's permission.

- (c) the worker purchase stock from the employer's bottle shop at cost price without the permission or agreement of the employer.
 - (d) the worker took stock from the employer' is bottle shop without paying for the stock and without the permission or agreement of the employer.
- 2. As a result of the matters pleaded in paragraph 14 above the employer has lost trust in the worker in the proper performance of his duties with the employer.
- 3. In the premises the employer says that is not required to provide the worker with suitable employment and to participate in efforts to retrain the worker because of the worker's conduct in the course is employment which conduct is referred to in paragraph 14 above.
- 4. Further the employer says that the worker's conduct represents a failure in the worker to participate in rehabilitation training or a workplace based return to work program which could enable him to undertake more profitable employment.
- 5. As a consequence of the matters pleaded in paragraphs 16 and 17 above the worker is deemed to be able to undertake the most profitable employment there would be reasonably possible for a willing worker with his experience and skill and who has sustained a similar injury and is in similar circumstances, that is full-time work of the sort performed by him immediately prior to his injury and the worker is thereby not entitled to payment of compensation pursuant to the provisions of the Work Health Act.
- 6. The employer seeks declaration that:
 - (a) the form 5 served upon the worker in this matter is valid.
 - (b) the worker is not entitled to payment of compensation from the date of cessation to date and continuing.
 - (c) the worker pays the employer's costs of the application of compensation.”
- 7. Initially the issues to be decided were much more far-ranging than they ultimately transpired to be. Because of concessions made by Counsel for the Worker which will be specified in this decision, the Court does not propose to canvass the extensive argument and legal authorities which were in fact handed up by both counsel during their submissions.
- 8. In summary form, the Employer was asserting that which is recited in the particulars of claim to the counterclaim and can be ascertained from the

defence and counterclaim. At the outset the Court expressed concern at the consequences of the validity of the Employer's assertions. In essence they relieved it of its obligations as the Employer because of those matters if valid. As stated to counsel for the Employer, there would seem to be an intrinsic evil reposing in the Employer being able to avoid obligations, otherwise incumbent upon it. This would be the effect of raising alleged breaches of obligations comprising part of the contract of employment, when firstly, as is the case in this matter, apart from the issue of some bar stools, all the bases upon which the Employer sought to evade its obligations are based upon hearsay or other, very circumstantial evidence which of course is when disputed capable only of being resolved by being tried.

9. That as the Court observed would leave a great deal of workers at the mercy of their Employer.
10. In the event but exclusively for the purposes of the worker's current application, counsel for the worker conceded:
 - (a) that those matters set out in the particulars to the counterclaim, notwithstanding they preceded the date of the injury, could indeed amount to a breach of the obligation of "mutuality" under the contract of employment between the worker and the Employer;
 - (b) the breach of the philosophy of mutuality as a consequence of such allegations.

Nevertheless he said such a situation did not entitle the employer to avoid its obligations under Section 78A of the Work Health Act. .

11. Most of the argument put forward by Employer's counsel was by such concession rendered unnecessary to consider.
12. Employer's counsel nevertheless asserts that because of the existence of such conduct and because such conduct comprises a breach of the principles

of mutuality referred to, the Employer is entitled to act as he purports to have done.

13. Sections 75A and 75B are part of **Division 4 - Rehabilitation and other Compensation** of the Work Health Act. That division has a stated purpose and for reason of comprehension of this decision and for convenience the content of the provisions of sections 75, 75A and 75B are set out hereunder.

“Division 4 – Rehabilitation and other Compensation

75. Purpose

(1) The purpose of this Division is to ensure the rehabilitation of an injured worker following an injury.

(2) For the purposes of subsection (1), "rehabilitation" means the process necessary to ensure, as far as is practicable, having regard to community standards from time to time, that an injured worker is restored to the same physical, economic and social condition in which the worker was before suffering the relevant injury.

75A. Employer to assist injured worker to find suitable employment

(1) An employer liable under this Part to compensate an injured worker shall –

- (a) take all reasonable steps to provide the injured worker with suitable employment; and
- (b) so far as is practicable, participate in efforts to retrain the worker.

Penalty: In the case of a body corporate – \$3,000.

In the case of a natural person – \$1000 or imprisonment for 3 months.

Default penalty: In the case of a body corporate –\$500.

In the case of a natural person – \$50.

(2) Where an employer liable under this Part to compensate an injured worker is unable to provide the worker with suitable employment in accordance with subsection (1)(a), the employer must refer the worker to an alternative employer incentive scheme developed by the Authority.

Penalty: In the case of a body corporate – \$3,000.

In the case of a natural person – \$1000 or imprisonment for 3 months.

Default penalty: In the case of a body corporate –\$500.

In the case of a natural person – \$50.

(3) Where an injured worker for whose injury an employer is liable under this Part is employed by another employer under an alternative employer incentive scheme referred to in subsection (1), the first employer is liable to compensate the injured worker for any aggravation, acceleration or exacerbation of the injury that occurs within one year after the worker commences employment with the other employer.

(4) [Omitted]

75B. Worker to undertake reasonable treatment and training, or assessment

(1) Where compensation is payable under Subdivision B of Division 3 to a worker, the worker shall undertake, at the expense of the worker's employer, reasonable medical, surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, or as required by his or her employer, present himself or herself at reasonable intervals to a person for assessment of his or her employment prospects.

(1A) The employer of a worker who participates in a rehabilitation program or workplace based return to work program under subsection (1) must ensure that program is provided by an accredited vocational rehabilitation provider.

(2) Where a worker unreasonably fails to undertake medical, surgical and rehabilitation treatment or to participate in rehabilitation training or a workplace based return to work program which could enable him or her to undertake more profitable employment, he or she shall be deemed to be able to undertake such employment and his or her compensation under Subdivision B of Division 3 may, subject to section 69, be reduced or cancelled accordingly.

(3) Where a worker so required under subsection (1) unreasonably refuses to present himself or herself for assessment of his or her employment prospects, he or she shall be deemed to be able to undertake the most profitable employment that would be reasonably possible for a willing worker with his or her experience and skill and who has sustained a similar injury and is in similar circumstances, having regard to the matters referred to in section 68, and his or her compensation under Subdivision B of Division 3 may, subject to section 69, be reduced or cancelled accordingly.”

14. Counsel for the Employer contended that because only a Court hearing evidence could determine the validity of the allegations set out in the said particulars of claim, that in itself precluded this Court from entertaining the Worker's application for summary judgment. That issue however fell away in the light of the Worker's concessions.
15. For the purposes of highlighting the principles upon which he sought to rely, the Employer's counsel postulated the following example:

Assume the Employer operated a kindergarten and the Worker was employed as a teacher in the day to day operations of that kindergarten. Assume that the Worker was found to be, and was indisputably so found, to have convictions in relation to paedophilia in his past employment as a kindergarten teacher. Assume that the Worker was injured in circumstances where he was entitled to compensation and ultimately the relevant prescription was for a Graduated Return to Work Program in terms of Section 78A of the

Work Health Act. In such circumstances, it simply could not be the case that the legislature contemplated an obligation reposing in the Employer to participate in the graduated return to work program. In those circumstances the Employer was clearly entitled to refuse to do so and do so in circumstances where it did not attract liability as for total incapacity.

16. Much if not all of the submissions of Employer's counsel predicated upon this philosophy were initially appealing, at least in logic, because of course it would be outrageous to compel an Employer to reemploy the person in the example.
17. Counsel for the Worker argued that section 75A was exhaustively a section imposing obligations on the Employer. Further that section 75B in turn was a section exhaustively imposing obligations exclusively (with the exception of Section 75B(1A)) on the Worker.
18. Further, counsel for the Worker pointed out that the Employer's counsel's argument overlooked entirely that section 75A(2) specifically catered for a situation where "an Employer ... is unable to provide the Worker with suitable employment ...". He said that in the example postulated, and in the current circumstances, the position was, having made the concession previously set out, that the Employer could do no more than invoke the above section. It was not entitled to proceed with the action set out in the notice of 21 January 2004.
19. The Court is relieved of relying on principles relating to the interpretation of statutes being "the purposive" interpretation. That is expressly set out in Section 75. A construction of 75A and 75B of the Work Health Act which advances such purpose must clearly be employed.
20. Succinctly and unequivocally the Court upholds the argument of counsel for the Worker. The Employer's counsel did say that at no time in fifteen years

had an argument such as was now before the Court been mounted. Small wonder, the Court opines, it being aptly capable of classification and description in the terms of the comments of Asche CJ in [CIVIL and CIVIC PTY LTD v. PIONEER CONCRETE \(NT\) PTY LTD No. 345 of 1990 Practice and Procedure - Contract - Tort \(1991\) 103 FLR 196 \(1990\) 1 NTLR 43; \[1991\] NTSC 3 \(1 February 1991\)](#). It being in this Court's perception that respondent's counsel is one of those

“ingenious counsel [adopting] ... what one would have to call a ‘cuttlefish’ defence. That sagacious mollusk endeavours to confuse and defeat its enemies by pouring forth clouds of inky blackness when attacked. So, resort to a welter of authorities and referral to esoteric points of law might be employed to persuade an overworked judge that the answer is too hard to find on summary proceedings; and the defence thereby gain a much desired breathing space; at the expense of the plaintiff”.

Court findings

21. Having found unequivocally that as a matter of law the Employer is not entitled to proceed down the course upon which it has embarked, and leaving aside the counterclaim for present purposes, it is then this Court's finding to adopt a further quote of His Honour Mr Justice Asche:

“if the court is sufficiently satisfied that a point of law raised by the defendant is not sustainable, it should give judgment on summary procedure”.

22. That is what this Court proposes to do. The exact formulation of the order, which in light of its decision, is to be specified is a matter upon which the Court will hear from counsel.
23. There is furthermore the question of costs.

The Counterclaim

24. As indicated the Court will briefly deal with the issue of the counterclaim.

25. It is a matter of no relevance, as stated by counsel for the Worker, that a counterclaim exists in addition to the 'defence', which the Court has found does not, as a matter of law, exist to be embraced by the Employer.
26. There is no application before the Court to strike out the counterclaim, nor is there any application to give summary judgement against the Employer in relation to same.
27. As a matter of commonsense and logic, there not having been thus far been either such application, it may be appropriate that they should subsequently be made. Whether that be so or not, illogically or otherwise, the counterclaim is not the subject of the current application and there is no reason why it cannot stand alone. Its mere existence, legislatively contemplated, imports also obligations to file defences to it and to proceed down a path which in the light of this Court's finding is a path which is unlikely to result in any fruitful outcome.
28. Perhaps if nothing more happens it may like the bloom in Thomas Gray's *Elegy in a Country Churchyard* be categorised or described as analogous with the flower. The quote of course is

*"full many a flower is born to blush unseen,
and waste its sweetness on the desert air.*

Court orders

29.
 1. Judgment for the Worker on the claim.
 2. The Court will hear the parties on the precise terms of the orders to be made.

Dated: 18 March 2004

DAVID LOADMAN
STIPENDIARY MAGISTRATE