

CITATION: James Tiedeman v Adam Champion [2018] NTLC 014

PARTIES: JAMES TIEDEMAN

V

ADAM CHAMPION

TITLE OF COURT: WORK HEALTH

JURISDICTION: Work Health

FILE NO: 21537626

DELIVERED ON: 1 June 2018

DELIVERED AT: Darwin

HEARING DATES: 21, 22 and 23 February 2018

JUDGMENT OF: Judge Neill

CATCHWORDS:

Meaning of “worker” as defined in Workers Rehabilitation and Compensation Act as at 18 October 2013

Workers Rehabilitation and Compensation Act section 3

REPRESENTATION:

Counsel:

Worker: J Ingrames

Employer: W Roper

Solicitors:

Worker: Maurice Blackburn Lawyers

Employer: Hunt & Hunt Lawyers

Judgment category classification: B

Judgment ID number: 014

Number of paragraphs: 47

IN THE WORK HEALTH COURT
AT DARWIN

No. 21537626

BETWEEN:

JAMES TIEDEMAN
Worker

AND:

ADAM CHAMPION
Employer

REASONS FOR DECISION

(Delivered 1 June 2018)

JUDGE: NEILL

Introduction

1. James Tiedeman was born on 15 January 1997 and he is currently 21 years of age (“the Worker”). On 18 October 2013 he was 16 years and 9 months of age. On that date he suffered an electric shock while working on a domestic air conditioner at residential premises in Palmerston in the Northern Territory (“the accident”). As a consequence of the accident he suffered a serious injury to his right hand (“the injury”).
2. Adam Champion at all material times conducted a business in the Darwin/Palmerston area servicing and installing air conditioners, often in residential premises. He traded under the registered business name *Cold As Ice Airconditioning*.

3. On about 20 August 2014 the Worker made a claim in respect of the accident and the injury, pursuant to the *Workers Rehabilitation and Compensation Act* (“the Act”), since amended and renamed the *Return to Work Act*. That claim was directed to the Nominal Insurer because an earlier claim had been made against the Employer personally but he had not responded in accordance with the Act, or at all. The Employer had not at any relevant time been the holder of a policy of insurance under the Act.
4. The Nominal Insurer by Notice of Decision dated 26 August 2014 disputed the Worker’s claim. The Worker sought mediation which did not resolve the dispute between him and the Nominal Insurer. He commenced these proceedings by initiating Application dated 30 July 2015.

The Pleadings

5. The Worker’s pleadings are his Statement of Claim dated 22 December 2017. The Nominal Insurer’s pleadings are its Amended Notice of Defence dated 2 February 2018 (“the Defence”).
6. The Worker pleads that at the date of the accident he was a worker as defined in the Act, in the employ of the Employer – paragraph 14(b) of the Statement of Claim. He pleads that he suffered the injury in the course of that employment and that the Employer, and therefore the Nominal Insurer, is liable to compensate him in respect of the injury and also in respect of psychological sequelae of the injury, in accordance with the Act.
7. The Nominal Insurer pleads that the Worker was not employed by the Employer at any material time - paragraph 4(g) of the Defence. It pleads that the Worker was in fact employed by the Worker’s cousin Mr Jeffrey Tiedeman at any relevant time or, in the alternative, that the Worker was a volunteer providing services to his cousin and therefore not a worker as defined in the Act – paragraph 4(h) of the Defence.

The Issue

8. By consent Order made 15 December 2017 by the Judicial Registrar of the Work Health Court the parties agreed to have a separate, preliminary hearing of the question whether the Worker at the date of the accident was a worker as defined in the Act and employed by the Employer.
9. As at 18 October 2013, the date of the accident, the definition of “worker” in section 3 of the Act was relevantly in the following terms:

“worker means a natural person:

(a) who, under a contract or agreement of any kind (whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person unless:

(i) the natural person:

(A) is paid to achieve a specified result or outcome; and

(B) has to supply plant, and equipment or tools of trade, needed to perform the work or service; and

(C) is, or would be, liable for the cost of rectifying any defect arising out of the work or service performed; or

(ii) not relevant

(b) not relevant

but does not include a natural person:

(c), (d), and (e) inclusive –not relevant

(f) subject to paragraph (b) and to subsections (7), (8) and (9), who is employed in voluntary work and receives in relation to that work, if anything, nothing more than reasonable travelling, accommodation or other out-of-pocket expenses; or

(g) to (j) not relevant”.

10. Accordingly, the issue before the Court is whether on the evidence the Worker under an agreement of any kind performed work or a service of any kind for the Employer, or whether he performed any such work or a service for his cousin Jeffrey Tiedeman, or whether he was employed in voluntary work. Evidence and submissions in respect of that question were heard by me on 21, 22 and 23 February 2018. I reserved my Decision on 23 February 2018.

The Evidence

11. Evidence was given in the Worker's case by the Worker himself and by his cousin Jeffrey Tiedeman. Each of those witnesses underwent detailed cross-examination on behalf of the Nominal Insurer.
12. Evidence was given in the Employer's case by Mr Adam Champion. Mr Champion underwent detailed cross-examination on behalf of the Worker.
13. The Worker had made a statutory declaration on 16 December 2013 which was received as exhibit E3. That statutory declaration was made to an officer of NT Worksafe in the context of an investigation into the accident, for occupational health and safety purposes.
14. The Worker made a second statutory declaration on 7 September 2014. This was received as exhibit W7. It was made to Ms Ginny Rabeling of Cerno Investigations who took the Worker's statement on behalf of the Nominal Insurer.
15. Mr Jeffrey Tiedeman also made a statutory declaration to an officer of NT Worksafe investigating the accident. The copy received into evidence before me as exhibit E5 is not dated, but it is probable it was made at around the same time as the Worker's statutory declaration made 16 December 2013.

16. Mr Jeffrey Tiedeman made a second statutory declaration also to Ms Ginny Rabeling of Cerno Investigations for the Nominal Insurer. This was made on 5 September 2014 and was received as exhibit W6.
17. The Employer Mr Adam Champion made one statutory declaration. This was made to Ms Rabeling of Cerno Investigations on behalf of the Nominal Insurer. It was made on 7 September 2014, and it was received in evidence before me as exhibit W8.
18. All three witnesses in their oral evidence and in their statutory declarations identified two separate periods when the Worker was involved with the Employer's business in some way. The first of these two periods was during all or part of the 2013 mid-year school holidays which ran for four weeks from late June to late July 2013 ("the first period"). The second period commenced in late August or early September 2013. The Worker had returned to school after the first period, but after a month or so he decided to quit school. He then worked on air conditioning jobs with his cousin Jeffrey Tiedeman in connection with the Employer's air conditioning business ("the second period").
19. The Worker and Mr Jeffrey Tiedeman gave evidence that during the first period the Worker at times worked at private homes carrying out tasks related to air conditioning work. They said the Worker had at first worked at the Employer's house for about two days breaking up old air conditioners for scrap, and thereafter for a further period of up to three weeks the Worker had attended at private home air conditioning jobs assisting Mr Jeffrey Tiedeman and sometimes assisting the Employer.
20. The Worker said the Employer paid him \$550 cash in hand at the end of each Friday at the end of each week in the first period. Mr Jeffrey Tiedeman said he did not pay the Worker anything in the first period.

21. The Employer in his statutory declaration exhibit W8 said in paragraph 15 that the Worker did assist Jeffrey Tiedeman with air conditioning related tasks in the first period, by helping lift air conditioners and passing tools. He also said in that paragraph that there was no mention of wages to be paid to the Worker in the first period, and that he, the Employer, at no time employed the Worker in the first period.
22. The Employer went on in exhibit W8 to discuss his involvement with the Worker during the second period, from September 2013.
23. However, in the Employer's oral evidence before me on 22 February 2018, four and a half years after the relevant events, he told a different story. He now claimed to have been mistaken in paragraph 15 of exhibit W8. He now said that the Worker worked for him during the first period for less than one week – transcript page 149.2. He now conceded that whatever the duration of the Worker's work in the first period, the Worker had indeed been working for him, and that he had paid the Worker in cash - transcript p.149.6. He now said that the Worker definitely did not at any time in the first period work anywhere except at the Employer's house dismantling air conditioners for scrap – transcript page 164.3. He now denied that in the first period the Worker went out to private homes, or that he helped to lift air conditioners or pass tools. This was contrary to the Employer's statutory declaration exhibit W8 – transcript page 166.1 and 166.2.
24. The Employer was cross-examined about these inconsistencies between his statement in exhibit W8 and his oral evidence on 22 February 2018. He was reminded that he had deposed to the truth of his statutory declaration exhibit W8 when he made it on 7 September 2014. The Employer sought to explain these significant differences in his evidence by saying “...well, I've obviously got my mistakes wrong (sic) back then, but I know now. Or I was misinterpreted...” – transcript page 167.8.

25. The Worker and Mr Jeffrey Tiedeman gave evidence about how the Worker once again became involved with the Employer's air conditioning business in about August or September 2013. The Worker said in his second statutory declaration exhibit W7 at paragraph 19 that he was telephoned by the Employer in about August 2013 to come back to work because the Employer had work for him. Mr Jeffrey Tiedeman said in paragraph 17 of his second statutory declaration exhibit W6 that the Employer asked him to get the Worker to come back and help out Jeffrey Tiedeman when the Employer could not be available to help him.
26. The Employer told a different story. He said in paragraph 17 of his statutory declaration exhibit W8 that Jeffrey Tiedeman approached him, with the request that the Worker might assist on the jobs given to Jeffrey Tiedeman by the Employer. The Employer said he agreed to this but not on the basis he would pay the Worker. He said he could not afford to do this.
27. In his oral evidence the Worker said that in the second period the Employer once again paid him \$550 each week, paid at the end of each Friday. He said he worked mostly with Jeffrey Tiedeman on the Employer's jobs but the Employer would also provide him with instructions and training from time to time.
28. Jeffrey Tiedeman said in his oral evidence about the second period that the Employer asked him to see if the Worker wanted to come back and help him – transcript p.117.9. Jeffrey Tiedeman denied paying anyone in respect of work that he did for the Employer – transcript p.118.5. He specifically denied paying the Worker for his work – transcript p.137.3.
29. The Employer in his oral evidence was firm that Jeffrey Tiedeman contacted him before the second period, asking whether there was a job for the Worker. The Employer said he did not have the money to do that. He said if Jeffrey Tiedeman wanted to take the Worker on to help him “...*that's between you two*” – transcript p.151.9.

30. The Employer denied paying the Worker anything in respect of the second period – transcript p.152.2.
31. The Employer gave oral evidence about some of his financial records, and these records were in evidence. These appeared consistent with his paying Jeffrey Tiedeman as a sub-contractor during both the first period and the second period. There were no financial records in evidence which showed any payments from the Employer to the Worker at any time, either in the first period or the second period.
32. The Employer explained the absence of bank records showing any payment to the Worker in the first period, when he now admitted paying him. The Employer said he only made a single payment for the first period to the Worker, of \$300 or \$400, and that this came out of the cash proceeds from the sale of scrap salvaged from the old air conditioners – transcript page 157.5.
33. The Employer denied ever making any payments to the Worker for the second period – transcript page 168.3.
34. Notwithstanding the Employer’s production of his financial records, it is clear and I find that he did sometimes do cash jobs through the relevant periods in 2013. At transcript page 178.5 the Employer was asked “*Did you have any cash jobs though this period?*”. He replied “*I’m not willing to discuss that*”. He was then asked “*So you’re saying you did or you didn’t?*” The Employer then answered “*I can’t remember*”.
35. At transcript page 180.9 the Employer was asked “*Where did you obtain the cash to pay Mr Tiedeman?*” The Employer answered “*Well we’ve already proven to Mr Tiedeman that he reckons that money that he’s – he doesn’t even have any evidence of receiving that amount. It was never put in a bank account. So the actual money in question is all hearsay*”. The context from immediately prior questioning suggested the answer related to

Jeffrey Tiedeman but at transcript page 181.3 it became clear that the witness Mr Champion was referring to the Worker Mr James Tiedeman. It was clear that the Employer was arguing with counsel for the Worker, challenging him to prove any cash payments to the Worker in the absence of records.

36. The Employer was questioned about earlier bank records and whether they would reveal cash payments to Mr Jeffrey Tiedeman. The Employer was asked whether he still had such records anywhere. He replied *“Possibly, but it’s possible too that even though I did an invoice a customer could still pay me cash for an invoiced job. Old ladies in Palmerston are great at giving you thousands of dollars for a job that even an invoice has gone through in the bookwork, so that’s possible how I paid him too”* –transcript page 182.3.
37. There was no evidence before me supporting or consistent with the Employer’s pleading that the Worker was employed in voluntary work when he performed work in connection with the Employer’s air conditioning business.

Analysis and Conclusion

38. I formed definite and strong impressions of all three witnesses through listening to their responses to questions and to their language and tone of voice, and observing their body language. I am satisfied that both the Worker James Tiedeman and his cousin Jeffrey Tiedeman are men of limited intelligence, education and sophistication. I am satisfied that each man tried his best to answer questions honestly and without attempting to avoid answering difficult questions. The Worker in particular was frank and honest in cross-examination about his history in the years after the accident, involving his drug use and possible illegal activities.
39. I formed a different impression of the Employer. I am satisfied that the Employer Adam Champion is a man of high average or even above average

intelligence. He was articulate. He was clearly often engaged in second-guessing where counsel were heading with their questions, and the tone of his answers sometimes contained a triumphant note, as if he had just won a point. His answers were frequently glib, in the sense of being superficial or even insincere.

40. I am satisfied that paragraph 15 of the Employer's statutory declaration exhibit W8 accurately recorded the Employer's then version of what took place in the course of the first period. I do not accept that the Employer was confused or mistaken at the time he made that statutory declaration in September 2014, one year after the relevant events. I do not accept that he was misinterpreted in any way.
41. I disbelieve the Employer's explanation for the significant discrepancies between paragraph 15 in his statutory declaration exhibit W8 and his oral evidence. I disbelieve his oral evidence that the Worker worked for him for only a few days during the first period and that the Worker did not in that period go on to work on jobs at private homes for the Employer. I disbelieve his evidence that he made only one payment of \$300 or \$400 to the Worker during the first period.
42. I conclude that the Employer was not a witness of truth.
43. I disbelieve the Employer's evidence that he did not reach out to the Worker to invite him to return to work for the second period.
44. I disbelieve the Employer's evidence that he did not pay the Worker in cash or at all for his work in the second period.
45. I disbelieve his evidence that he did not significantly control the work undertaken by the Worker in the second period and direct when and where and on what tasks the Worker worked. I am satisfied the Employer did do exactly that.

46. I am satisfied on all the evidence on the balance of probabilities and I find in respect of the second period:

(a) Mr Jeffrey Tiedeman worked as a sub-contractor to the Employer but worked solely in the Employer's air conditioning business subject to the Employer's directions as to where he was to work and what work he was to undertake;

(b) the Employer requested Mr Jeffrey Tiedeman to contact the Worker in about August or September 2013 and ask him if he wished to return to work in connection with the Employer's air conditioning business;

(c) the Worker did work in connection with the Employer's air conditioning business from late August or early September 2013 until and including 18 October 2013;

(d) the Employer directed the Worker both face to face and through Mr Jeffrey Tiedeman from time to time as to where the Worker was to work, and as to the tasks the Worker was to carry out, in connection with the Employer's air conditioning business;

(e) Mr Jeffrey Tiedeman did not at any time pay the Worker for work he carried out in connection with the Employer's air conditioning business; and

(f) the Employer did pay the Worker for his work in connection with the Employer's air conditioning business from late August/early September 2013 up to 18 October 2013 in the amount of \$550 cash-in-hand at the end of work on each Friday in each week.

47. I am satisfied on the basis of these findings that the Worker at all material times was a natural person who under an oral agreement with the Employer performed work for the Employer. I am satisfied that he did not perform any such work for Mr Jeffrey Tiedeman. I am satisfied he was not employed in voluntary work for any person or at all.

Orders

1. I rule that the Worker Mr Jeffrey Tiedman was a worker within the meaning of the Act in the employ of the Employer Mr Adam Champion on or about 18 October 2013.

2. I find that the Worker sustained an electrocution injury to his right hand on 18 October 2013 in the course of his employment with the Employer.
3. The matter is referred to the Judicial Registrar to arrange a pre-hearing conference on a date and at a time to be notified in writing to the parties for the purpose of listing remaining issues in the proceeding for hearing.
4. The Employer is to pay the Worker's costs of and incidental to the hearing on 21, 22 and 23 February 2018, certified fit for counsel, to be taxed in default of agreement at 100% of the Supreme Court scale.

Dated this 1st day of June 2018

John Neill
Managing Judge
WORK HEALTH COURT