25/09; [2009] VSC 440

SUPREME COURT OF VICTORIA

DEPARTMENT of EDUCATION and ANOR v UNSWORTH

Pagone J

29 September, 2 October 2009

ACCIDENT COMPENSATION – PERSONAL INJURY – EXCLUSION FROM LIABILITY FOR STRESS – RELATED INJURY – CONSTRUCTION OF "AN EXPECTATION" – MEANING OF "SUCH" – WHETHER TEST SUBJECTIVE OR OBJECTIVE – FINDING BY MAGISTRATE THAT APPLICANT ENTITLED TO COMPENSATION – WHETHER MAGISTRATE IN ERROR: *ACCIDENT COMPENSATION ACT* 1985, S82(2A).

Section 82(2A) of the *Accident Compensation Act* 1985 ('Act') provides that a person is not entitled to compensation if the injury consisted of stress arising wholly or predominantly from an expectation of the taking of action related to the ordinary and necessary workings of an employment situation. The magistrate, in deciding to award U. compensation pursuant to the Act, found that the expectation which had caused injury to U. was his subjective state of mind that he was going to be dismissed. Upon appeal—

HELD: Appeal allowed. Matter referred to the magistrate for further consideration.

1. The exclusion from compensation effected by s82(2A) of the Act is intended to exclude from compensable injury what might generally be thought to be the ordinary stress occasioned by the ordinary and necessary workings of an employment situation. Compensation is not payable where the injury is the stress caused by such ordinary incidents of employment as transfer, demotions, discipline, redeployment, retrenchment, dismissal, failings to obtain promotion, reclassification or transfer and so on. The expectations which paragraph (c) excludes from compensation are necessarily linked to the actions and decisions described in paragraphs (a) and (b). That is made clear by the word "such" appearing before each of the words "action" and "a decision". The word "such" plainly makes reference to the kind, degree or category previously specified or implied in the context in which the word is found.

2. The word "expectation" is not given a particular or narrow definition. It is capable of various meanings and must be more than a fear, possibility or suspicion. There are two separate enquiries that needed to be undertaken. The first is to determine whether there was an expectation in fact and the second is to determine whether it was that expectation which gave rise wholly or predominantly to the injury constituting the illness or disorder of the mind caused by stress.

***State of Victoria v Blythman* [1999] VSC 498, not followed.**

3. The magistrate ought to have considered whether there was an expectation in fact (other than the mistaken belief existing only in the mind of U.). There was, on the magistrate's reasoning, no expectation in fact of any action being taken or any decision being made, and it was irrelevant to inquire whether what the employee feared had any overriding quality of reasonableness of a kind contemplated by paragraphs (a) or (b) of s82(2A) of the Act. In those circumstances the exclusion created by paragraph (c) would not be enlivened but not for the reason that had persuaded the magistrate.

PAGONE J:

1. The issue for my decision in this proceeding is whether a magistrate erred when deciding that Paul John Unsworth was entitled to compensation from the appellants under the *Accident Compensation Act* 1985 ("the Act"). Mr Unsworth claimed to have suffered a psychological or psychiatric injury in his employment as a teacher caused by harassment, pressure and bullying. Section 82(2A) excludes from compensation certain injuries consisting of an illness or disorder of the mind caused by stress. The reading of the section is made difficult by the presence of at least three negatives ("not payable", "unless" and "did not")[1], but its meaning can readily enough be understood. The purpose of the section is to exclude from compensation injury consisting of stress arising wholly or predominantly from particular actions taken, particular decisions made, and particular expectations. In this case the defendant relies upon the latter of these three circumstances and the dispute for my decision concerns its interpretation and application by the learned magistrate.

2. The magistrate found that Mr Unsworth had an injury within the meaning of "injury" in

s5(1) for the purposes of s82(1) of the Act arising out of or in the course of his employment as a teacher. He would not be entitled to compensation, however, if the injury consisted of stress arising:

> Wholly or predominantly from –
> (a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or
>
> (b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or
>
> (c) an expectation of the taking of such action or making of such a decision.

The appellants did not contend that the injury claimed by Mr Unsworth fell within the first two of the circumstances but, rather, that his stress arose wholly or predominantly from "an expectation" as contemplated in paragraph (c). The learned magistrate decided that the exclusion in paragraph (c) had not been enlivened because the expectation which Mr Unsworth had was an expectation which was never going to occur.

3. The proper interpretation of paragraph (c) of s82(2A) is potentially problematic. The learned magistrate construed the exclusion in paragraph (c) as adopting the qualifications attached to the action or decision contemplated in paragraphs (a) and (b). Thus, on that construction, an employee would not be denied compensation where his or her expectation was some action or decision that the employer did not intend to take or make whether reasonable or unreasonable. At one level that might seem a curious outcome if the employee's actual expectation would, if it had been intended by the employer, otherwise have come within the terms of paragraphs (a) and (b). Thus, for instance, an employee who erroneously imagined (such as to "expect" in his or her mind) reasonable action or reasonable decisions by an employer would not be denied compensation even though he or she would have been denied compensation if what the employee had imagined was what the employer actually intended. On the other hand, the competing construction urged by the appellants would broaden the exclusion of compensation effected by paragraph (c) beyond expectations which could mature into actions or decisions contemplated by paragraphs (a) and (b). The appellants' construction was that the expectation contemplated by paragraph (c) was an expectation of "the taking of such action or making of such a decision" of the kind specified in the provisions (to transfer, demote, discipline, redeploy, retrench or dismiss the worker, or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker) without the overriding qualification that such action or decision should otherwise be reasonable. This construction, for its part, would produce the surprising consequence of extending the exclusion of compensation to expectations based upon an employer's actual conduct which might be wholly unreasonable, capricious, vindictive and otherwise incapable of qualifying within paragraphs (a) and (b) if the expectation had matured into action or decision. Each of the contending constructions thus has its problems.

4. The task of construction of statutory provisions is one of ascertaining the intention of Parliament and in that task the provisions should be construed to give them a sensible operation. [2] The exclusion from compensation effected by s82(2A) is intended to exclude from compensable injury what might generally be thought to be the ordinary stress occasioned by the ordinary and necessary workings of an employment situation. Compensation is not payable where the injury is the stress caused by such ordinary incidents of employment as transfer, demotions, discipline, redeployment, retrenchment, dismissal, failings to obtain promotion, reclassification or transfer and so on. The expectations which paragraph (c) excludes from compensation are necessarily linked to the actions and decisions described in paragraphs (a) and (b). That is made clear by the word "such" appearing before each of the words "action" and "a decision". The word "such" plainly makes reference to the kind, degree or category previously specified or implied in the context in which the word is found.[3] This may also be seen from the scheme and layout of the sub-section itself. Paragraphs (a) and (b) speak of specific conduct having occurred whilst paragraph (c) contemplates that same kind of conduct expected to occur in the future. The provisions of paragraph (c) should be seen and interpreted as being symmetrical with the provisions in paragraphs (a) and (b). An expectation excluded from compensation by paragraph (c) must, therefore, be one which would be capable of exclusion by paragraphs (a) and (b) if it matured into action or decision. I am therefore

unable to accept the construction urged upon me on behalf of the appellants. In other words, the "taking of such action" or the "making of such a decision" contemplated in paragraph (c) refers to those actions or decisions which, if taken or made, would otherwise be excluded by paragraphs (a) or (b). A quality of such action is that it be reasonable and that it be taken in a reasonable manner. A quality of such a decision is that it be made on reasonable grounds.

5. That conclusion, however, does not necessarily determine the case in favour of Mr Unsworth. The problem for Mr Unsworth lies in the fact that his expectation was an expectation which could have matured into an action or a decision contemplated by paragraphs (a) or (b) but, it seems, was never contemplated. The word "expectation" is not given a particular or narrow definition. It is capable of various meanings. It must, I think, be more than a fear, possibility or suspicion.[4] In *State of Victoria v Blythman*[5] Nathan J said:

> The word "expectation" in the sub-section must be interpreted subjectively. It is the expectation of the worker whether or not one of the defined events might occur, which must be ascertained. If the worker had that expectation, and that expectation itself induced, or predominantly did so, the stress, then the employer would be excused from the obligation to pay compensation if the resultant stress was incapacitating.[6]

In each case whether or not there is an "expectation" within the meaning of paragraph (c) is a question of fact to be determined upon the evidence. I do not agree, however, that the expectation is to be found by an investigation into the subjective mind of the employee. The question to be answered is whether there was in fact an expectation of an action or a decision of the kind contemplated by paragraphs (a) and (b). Whether there was such an expectation is an enquiry into objective facts and circumstances rather than into the subjective mind of the employee. The paragraph itself does not limit its application to an expectation by the employee or in the mind of the employee, but rather, posits the existence of an expectation as an objective fact. An enquiry into the subjective mind of the employee is required only when considering whether the stress arose wholly or predominantly from the expectation. It is true that there must be an expectation and that the employee must be affected by the expectation, but the expectation must be something which exists in fact and not only as an unfounded fear or apprehension unconnected with reality. There are two separate enquiries that needed to be undertaken. The first is to determine whether there was an expectation in fact and the second is to determine whether it was that expectation which gave rise wholly or predominantly to the injury constituting the illness or disorder of the mind caused by stress.

6. In this case the magistrate found that the expectation which had caused injury to Mr Unsworth was his subjective state of mind that he was going to be dismissed. The learned magistrate said:

> In relation to the offence [sic] under s82(2)A [sic], the plaintiff expected to be dismissed from his employment. This expectation caused his injury, however Butyn never contemplated dismissing him. The plaintiff expected something to occur which would not. He did not have an expectation of a reasonable action taken in a reasonable manner. In my opinion paragraph (c) cannot avail the defendants.

It is clear from this passage that the learned magistrate considered the relevant expectation for the purposes of paragraph (c) to be the unfounded apprehension or fear which Mr Unsworth had of being dismissed. There was, however, no such expectation in fact. Mr Unsworth could not have had such an expectation because there was no action contemplated to be taken and no decision contemplated to be made of the kind he imagined. So much is plain from the learned magistrate's reasons quoted above which relies upon the non-existence of such action as the reason why he concluded that paragraph (c) was not enlivened. In my view the magistrate ought to have considered whether there was an expectation in fact (other than the mistaken belief existing only in the mind of Mr Unsworth). There was, on the learned magistrate's reasoning, no expectation in fact of any action being taken or any decision being made, and it was irrelevant to inquire whether what the employee feared had any overriding quality of reasonableness of a kind contemplated by paragraphs (a) or (b). In those circumstances the exclusion created by paragraph (c) would not be enlivened but not for the reason that had persuaded the learned magistrate.

7. The construction of the provision which I have adopted would appear to lead to the same conclusion as that which was reached by the learned magistrate. Counsel were not able to identify

any particular fact, circumstance or submission that might lead to a different outcome on the facts as found by the learned magistrate on the construction of the provision as I have adopted. However, and in fairness to the parties, the orders I make should permit and accommodate closer consideration of whether they need to put any submissions to the magistrate upon the construction of the provision as explained in these reasons. Accordingly, I will allow the appeal and refer the proceeding to his Honour Mr Lauritsen for further hearing and determination in accordance with these reasons for decision. In relation to costs, however, I will order that the respondent's costs be paid for by the appellant because, although successful in form, the appellants have substantially failed in the appeal.

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[1] There is an additional negative in "not to award" in sub-section 82(2A)(b).
[2] *Commissioner of Taxation v Government Insurance Office of New South Wales* [1993] FCA 464; (1993) 45 FCR 284, 299; 117 ALR 61; (1993) 26 ATR 544 (Hill J); *Mornington Peninsula Shire Council v Anderson* [2009] VSC 301 (Unreported, Pagone J, 27 July 2009), [11].
[3] Lesley Brown, *The New Shorter Oxford English Dictionary on Historical Perspectives* (4th ed, 1993) vol 2, 3129, "such".
[4] Compare *Hawcroft General Trading Co Ltd v Edgar* (1996) 20 ACSR 541, 548 [5] (Tamberlin J).
[5] [1999] VSC 498 (Unreported, Nathan J, 7 December 1999).
[6] Ibid [18].

APPEARANCES: For the appellants Dept of Education and CGU Workers' Compensation (Vic) Limited: Mr J Parrish SC with Mr M Fleming, counsel. Wisewould Mahony, solicitors. For the respondent Unsworth: Mr M O'Loghlen QC with Mr M Gray, counsel. Clark, Toop & Taylor, solicitors.
