29/11; [2011] VSCA 259

SUPREME COURT OF VICTORIA — COURT OF APPEAL

BAHONKO v MOORFIELDS COMMUNITY and ORS

Buchanan, Redlich and Mandie JJA

2 August, 1 September 2011

NATURAL JUSTICE – JUDGES – REASONABLE APPREHENSION OF BIAS – PRE-JUDGEMENT OF ISSUES IN A CIVIL TRIAL – TRIAL JUDGE EXPRESSED VIEWS AS TO THE CREDIT AND MENTAL CONDITION OF A PARTY PRIOR TO TRIAL – WHETHER JUDGE PREVENTED FROM BRINGING AN IMPARTIAL MIND TO THE CONDUCT OF THE TRIAL AND ITS RESOLUTION.

Where, before the trial of a proceeding in which the appellant was not legally represented, the judge made a submission to the Law Reform Commission in relation to litigants who were not legally represented, the conclusions expressed by the trial judge might have led a fair-minded observer to think that the judge had prejudged issues at the heart of the appellant's claim and was thus prevented from bringing an impartial mind to the conduct of the trial and its resolution.

BUCHANAN JA:

1. The appellant brought proceedings in the County Court pursuant to the provisions of s39(1) of the *Accident Compensation Act* 1985 ('the Act') seeking to establish her entitlement to weekly payments under s93 of the Act.

2. The appellant alleged that she had sustained mental and physical injury in the course of her employment as a nurse at two nursing homes conducted by the first three respondents and the injuries resulted in her incapacity for work.

3. The appellant gave evidence of a number of arguments and confrontations with other staff employed by her employers, which she claimed constituted harassment of her and caused her to become ill. Finally, the appellant was physically restrained by members of the police force called by the appellant's supervisor when the appellant refused to hand over the keys to the treatment room at a nursing home. The appellant contended that as a consequence she suffered physical injuries.

4. Other nurses and managers employed in the nursing home gave evidence contradicting the evidence of the appellant.

5. There were also reports and evidence from general practitioners and psychiatrists as to the appellant's physical and mental health.

6. The trial judge accepted the evidence of the psychiatrists and found that the appellant had not sustained a psychiatric illness as a consequence of her employment, that she had no incapacity for work and that she had a personality disorder with delusional, narcissistic and paranoid features unrelated to employment. His Honour also found that the appellant had not sustained any physical injury as a result of her employment. For good measure, his Honour found that, even if the appellant had sustained a mental injury, it was caused wholly or predominantly by management action taken on reasonable grounds and in a reasonable manner by the appellant's employer, and thus there was no entitlement to compensation by reason of the provision of s82(2A)(a) of the Act. In so finding, his Honour accepted the evidence of the witnesses called by the respondent. The judge made observations as to the appellant's evidence. He said:

> I gained the strong impression that she had developed a belief that she was the unhappy victim of an extraordinary and wide-ranging conspiracy by Government, persons in Government, Victorian WorkCover Authority, the Transport Accident Commission, WorkSafe, the defendant and its employees and the solicitors for the defendants and counsel engaged to act for the defendants.

7. The appellant has appealed from the dismissal of her proceeding. It is necessary to canvass only one of the grounds of appeal. It is:

> The trial judge was disqualified by apprehended bias arising from the views expressed in a submission made by the trial judge to the Inquiry into Vexatious Litigants received by the Law Reform Committee on 18 June 2008.

8. This Court should deal with the issue of bias first.[1]

9. On 18 June 2008, a few days before the commencement of the appellant's proceeding in the County Court, the Law Reform Committee, conducting an Inquiry into Vexatious Litigants, received a written submission from the trial judge. The submission was prepared at the request of the Chief Judge of the County Court.

10. His Honour identified a problem which he described as:

> ... self-represented litigants who have little or no capacity to understand the nature of the litigation they have embarked upon, the function of a Court and the powers of a judge and who make demands which are unrealistic and when those unrealistic demands are not met their frustration is taken out on registry staff often leading to more litigation.

The judge said that typically self-represented litigants were not able to engage a legal practitioner '... because either there is no cause of action which is actionable in a Court or the litigants had evidenced a propensity to be difficult, demanding and unmanageable.'

11. He continued:

> These litigants only see the result which they want and then interpret any perceived adverse action to the litigation, as they have formulated it, to be unjust and 'the system' working against them.

The judge said that it was 'often impossible to have these litigants behave and think rationally'.

12. The trial judge then described 'a case in point', which the respondent accepted was drawn from the judge's experience of the interlocutory steps in the proceeding conducted by the appellant.

13. His Honour said that the statement of claim drawn by the appellant, 'did not plead a cause of action against the tortfeasor, but was a long and turgid piece of writing ... '. The judge described some of the features of the way in which the appellant prosecuted the litigation, including 'making repeated allegations ... which had no foundation', 'applying for interlocutory relief repeatedly which was almost always absurd', and making 'applications to disqualify judges who this litigant perceived not to be sympathetic to this litigant's cause'. His Honour said 'none of the interlocutory applications [made by the appellant] has had any merit and should not have been made.' His Honour said that the appellant was accorded a degree of courtesy and latitude 'because it was easier to appease this litigant where it was quite apparent that it was impossible to have this litigant understand how to conduct litigation in a conventional way.'

14. The principle of apprehended bias was stated by the Court in *Livesey v New South Wales Bar Association* as:

> That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial unprejudiced mind to the resolution of the question involved in it.[2]

15. In *Ebner v Official Trustee in Bankruptcy*[3] the Court described the application of the principle of apprehension of bias in the following terms:

> Its application requires two steps. First, it requires the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

16. It appears that the appellant learned of his Honour's submission after the dismissal of

her proceeding. The failure to disclose his published views was unfortunate.[4]

17. It is evident from the submission made to the Law Reform Committee that before the commencement of the trial of the appellant's proceeding, his Honour had determined that the appellant made allegations without any foundation, sought relief which was absurd, made applications which had no merit and did not understand how to conduct litigation conventionally. I would infer from the structure of his submission that his Honour was of the opinion that the appellant belonged to a class of litigants who saw only the result which they wished to achieve and interpreted any perceived adverse reaction to be unjust. The judge was of the opinion that it was often impossible to make such litigants behave and think rationally. These views were expressed as final, rather than tentative or provisional, conclusions.

18. Counsel for the respondent submitted that the submission to the Law Reform Committee did not disclose a pre-judgment of the appellant's entitlement to compensation. As Gleeson CJ, McHugh, Gummow and Hayne JJ said, in *Ebner v Official Trustee and Bankruptcy*, the principle is that:

> ... a judge is disqualified if a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. (Emphasis added.)

19. Although the trial judge had not expressed any views as to the appellant's entitlement to weekly payments, it was evident that he had formed views as to the mental condition of the appellant and as to matters likely to affect the credibility and accuracy of her evidence. The appellant's mental state and her credibility were critical issues in the proceeding. The trial judge appeared to have prejudged the appellant's credit and mental condition to her disadvantage.[5] I think it is stating the principle of apprehended bias too narrowly to say that the possibility of prejudgment applies only to the ultimate conclusion of liability.

20. Counsel for the respondent submitted that apprehended bias is not established by the manner in which the judge conducted the trial or his reasons for deciding the case. He said that those matters bore upon the question of actual bias. In my opinion, however, his Honour's reasons do throw light upon the question whether a fair minded lay observer might reasonably apprehend that the judge might have prejudged issues in the case. In any event, I think that a reasonable apprehension of bias was established by the submission made by the judge to the Law Reform Committee and the issues upon which the appellant's entitlement to compensation depended.

21. For the foregoing reasons, I am of the opinion that the conclusions expressed by the trial judge before the commencement of the proceedings might have led a fair minded observer to think that his Honour had prejudged issues at the heart of the appellant's claim and was thus prevented from bringing an impartial mind to the conduct of the trial and its resolution.

22. Accordingly, I would allow the appeal, set aside the judgment and orders of the court below and order that the proceeding be retried by another judge.

REDLICH JA:

23. I have had the opportunity of reading in draft the reasons of Buchanan JA with which I entirely agree. The appeal should be allowed and a new trial ordered.

MANDIE JA:

24. I agree with Buchanan JA.

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[1] See *Concrete Pty Ltd v Parramatta Design* [2006] HCA 55; (2006) 229 CLR 577, 581-2 (Gummow ACJ), 611 (Kirby and Crennan JJ); 231 ALR 663; (2006) 81 ALJR 352; [2007] AIPC 92-241; 70 IPR 468.

[2] [1983] HCA 17; (1983) 151 CLR 288, 293-4; 47 ALR 45; (1983) 57 ALJR 420. See also *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41, 67; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258; *R v Watson*; *Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248, 258-263; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11; *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568, 571-5; (1989) 87 ALR 633; (1989) 63 ALJR 610; (1989) 9 MVR 193; [1989] Aust Torts Reports 80-277; *Laws v Australian Broadcasting Tribunal* [1990] HCA 31; (1990) 170 CLR 70, 81, 87, 96, 99-100; (1990) 93 ALR 435; (1990) 64 ALJR 412; *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 [11]; (2000) 174 ALR 655; [2000] FLC

93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21; 174 ALR 655; 74 ALJR 1380; *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423, [53], [56]; (2006) 228 ALR 262; (2006) 80 ALJR 1309; [2006] Aust Torts Reports 81-851; *Concrete Pty Ltd v Parramatta Design and Development Pty Ltd* [2006] HCA 55; (2006) 229 CLR 577, [110]; 231 ALR 663; (2006) 81 ALJR 352; [2007] AIPC 92-241; 70 IPR 468; *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; (2011) 242 CLR 283; (2011) 273 ALR 429; (2011) 85 ALJR 348; (2011) 8 DDCR 426.
[3] [2000] HCA 63; [2000] 205 CLR 337, 345; (2000) 176 ALR 644; (2000) 75 ALJR 277; (2000) 63 ALD 577; (2000) 21 Leg Rep 13.
[4] See *Gascor v Elliott* [1997] 1 VR 332, 361-2 (Ormiston JA).
[5] Cf *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546, 553-4; 43 ALJR 150.

APPEARANCES: The appellant Stanislawa Bahonko appeared in person. For the respondents: Mr RP Gorton QC with Mr NB Chamings, counsel. Lander & Rogers, solicitors.
