38/06; [2006] VSC 316

SUPREME COURT OF VICTORIA

T & G INDUSTRIES PTY LTD & ANOR v RANDJELOVIC

Osborn J

24, 30 August 2006

ACCIDENT COMPENSATION – CLAIM FOR COMPENSATION BY PROCESS WORKER – WORKER SUSTAINED CHRONIC PAIN SYNDROME – CLAIMANT SENT A RETURN TO WORK PLAN – WORKER ADVISED BY TREATING DOCTOR NOT TO RETURN TO WORK – WEEKLY PAYMENTS OF COMPENSATION TERMINATED – CLAIM IN MAGISTRATES' COURT SEEKING AN ORDER FOR WEEKLY PAYMENTS FOR INCAPACITY – CLAIM UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ACCIDENT COMPENSATION ACT* 1985, S93CB(3).

Where a worker received medical advice about her chronic pain syndrome which coincided with the worker's subjective belief, it was open to a magistrate to find that the worker made every reasonable effort to return to work having regard to the worker's state of mind. The question was one of fact. The statute is concerned with the objective reasonableness of the worker's behaviour and not with the subjective reasonableness of the worker's state of mind.

OSBORN J:

1. This is an appeal to the Supreme Court pursuant to s109 of the *Magistrates' Court Act* 1989 on questions of law.

2. The respondent ("the worker") instituted a claim under the *Accident Compensation Act* 1985 ("the Act") in April 2005 seeking weekly payments for incapacity from 5 November 2004, in respect of an injury sustained in the course of her employment by the first appellant ("the employer").

3. The learned Magistrate summarised the essential background facts as follows:

> "The plaintiff is 45 years old and worked for the first defendant employer for a period of ten years as a process worker doing repetitive pressing work. On 7 June 2004 the plaintiff ceased work and claimed an injury under the Act to both shoulders and neck, together with pain and distress. That claim was accepted on 18 August 2004. At the end of the first 13 week period the plaintiff was assessed as having no work capacity and was paid at the appropriate weekly rate. On 6 October 2004 a letter was sent to the plaintiff together with a Return to Work Plan ... . A copy of that letter and plan was also sent to the plaintiff's treating general practitioner, Dr M. Brkic.

After examining the plaintiff on 18 October 2004[1] Dr Brkic advised the plaintiff not to return to work and she has not done so.

A notice pursuant to s114 of the Act was served terminating her weekly payments from 5 November 2004. On 20 April 2005 the plaintiff issued proceedings seeking weekly payments of compensation under the Act, at the appropriate rate, from 5 November 2004. The notice of defence filed 23 May 2005 raises the main issue pursued during the hearing, namely, that the plaintiff had not made reasonable effort to return to work in suitable employment or to participate in the Return to Work Plan.

4. The employer was required by s156(2) and (3) of the Act to prepare the Return to Work Plan referred to by the learned Magistrate.

5. In turn, s93CB(3) of the Act provided:

> "(3) A worker is entitled to receive weekly payments under this section only if —
> (a) where sub-section 2(a) applies, the worker —
> (i) makes every reasonable effort to participate in an occupational rehabilitation service or a return to work plan; and

> (ii) makes every reasonable effort to return to work in suitable employment; and
> ...
> (4) Where a worker does not make reasonable efforts to return to work and in particular does not comply with the requirements of sub-section (3) that are applicable in his or her case, the worker's entitlement to further weekly payments in respect of the injury shall thereupon cease and determine."

6. As the learned Magistrate recorded, the onus of establishing any of the above matters lay on the appellants.

7. He concluded that although the worker did in fact have the capacity to enter into the Return to Work Plan, he was not satisfied the worker had failed to act reasonably in refusing to do so.

8. Her actions were capable of being regarded as reasonable because she was advised by her treating general practitioner that she was not fit to enter into the Return to Work Plan.

9. His Honour concluded that it could not be said the worker acted unreasonably given her doctor's advice in circumstances where she did not deliberately mislead her doctor.

10. A significant factor in this regard was opinion evidence from a number of medical experts supporting a diagnosis of a strong psychosomatic element in the plaintiff's symptomatology.

11. Ultimately, his Honour stated:

> "In all the circumstances and not without some considerable hesitation, I have reached the conclusion that the defendants have not proved the plaintiff deliberately misled Dr Brkic. Although the plaintiff stated in cross-examination the advice of Dr Brkic made no difference to her decision not to return to work, approaching the matter objectively, it was reasonable not to accept the return to work offer in the light of the advice of Dr Brkic."

The Relevant Test

12. The appellants contend first that the terms of the Magistrate's decision suggest that in his view the issue of whether the worker misled Dr Brkic was determinative of whether her refusal of the Return to Work Plan was reasonable. The appellants submit that the learned Magistrate did not consider whether the worker had made "every reasonable effort".

13. I do not accept this submission. A reading of his Honour's reasons as a whole makes clear that he arrived at the evidentiary issue identified by him, by a permissible path of reasoning. His Honour reasoned that if it were accepted that the worker was advised she should not accept the Return to Work Plan, then the course followed by her could not be said to be unreasonable unless such advice was improperly induced by her. No other supervening factor arose on the facts and it had been specifically submitted that the worker was untruthful and had exaggerated her symptoms. In my opinion the course of reasoning adopted by the Magistrate was reasonably open to him on the facts.

14. The evidentiary issue which his Honour ultimately regarded as critical logically arose from the evidence presented to him.[2]

Reliance

15. It was next submitted that it was not open to conclude the worker acted reasonably because his Honour found that the worker had not relied upon the advice of Dr Brkic. I do not accept his Honour made such a finding, albeit that he referred in his ultimate conclusion to the plaintiff's statement in cross-examination that the advice of Dr Brkic made no difference to her decision not to return to work. His Honour's reasons earlier record the fact that in re-examination the worker asserted that she was just following the instructions of Dr Brkic. This inconsistency was one of the matters instanced by his Honour as raising concerns as to the veracity of the worker as a witness. Nevertheless, the inconsistency was not resolved by a positive finding that the worker did not rely on her doctor's advice. Nor can it be said that his Honour was bound on the evidence to so conclude.

16. More fundamentally, however, the appellants' submission must fail because it postulates

a hypothetical situation which did not arise. The worker received medical advice which, taking her evidence at its highest from the appellants' point of view, coincided with her subjective belief. The question is not hypothetically what she would have done but for this advice, but whether in the presence of such advice the Magistrate was bound to find she failed to make every reasonable effort having regard to her state of mind. It cannot be said he was. The question was one of fact. Further, his Honour was correct to postulate the critical question as an objective one. The statute is concerned with the objective reasonableness of the worker's behaviour, not (as the submission assumes) with the subjective reasonableness of the worker's state of mind. The statute could hardly do otherwise when it includes within the definition of "injury" any "mental injury".

17. The evidence upon which the appellants rely simply does not produce the conclusion that the Magistrate was bound to find in favour of the appellants on the ultimate question of fact,[3] namely whether the worker failed to make every reasonable effort in the circumstances in which she found herself.

18 October

18. It is next submitted that the Magistrate was bound to conclude the worker had failed to act reasonably in failing to respond to the Return to Work Plan by 18 October 2004 and failing to see Dr Brkic until 19 October 2004.

19. In accordance with s160 of the Act the Return to Work Plan included "an estimate of the date that the injured worker should be fit to return to work" and "the steps to be taken to facilitate the worker's return to work."

20. Both the covering letter to the worker and the document itself stated that 18 October 2004 was the "estimated" date on which the plan proposed the worker could return to work.

21. The plan further expressly envisaged that the worker would liaise with Dr Brkic as to appropriate activities.

"**The steps taken to facilitate the worker's return to work**:
• Liaise with Dr Mal Brkic & Dr D. Conroy to determine the type of work Sladjana can perform *and the date that she can return to work* performing light duties and then a date that she can return to work performing normal duties." (My emphasis.)

22. In my view the worker could not be regarded as having failed to make every reasonable effort to respond to this plan simply by reason of the fact that she did not see Dr Brkic until 19 October 2004. The plan contained a flexible estimate not a stipulation fixing a cut off date.

23. The terms of the notice of termination of entitlement to weekly payments dated 20 October 2004 and relied upon by the appellants as effecting termination of the worker's employment pursuant to s114 of the Act, confirms this view.

24. The reasons stated in this notice as constituting failures by the worker to make every reasonable effort to participate in the Return to Work Plan, set out the worker's history from the making of the initial claim and its initial acceptance, through to the events of 19 and 20 October 2004. The history concludes:

> "10. On the 6th of October 2004 a copy of the Return to Work Plan was sent to Dr Brkic by your employer.
>
> 11. On the 18th of October 2004 a copy of the Return to Work Plan together with extract from independent medical exam reports was also sent to your treating doctor Dr Mal Brkic by in house General Surgeon Dr Wallin. Dr Brkic was contacted by Dr Wallin on 18/10/2004 and on 20/10/2004. Dr Brkic advised that you cannot return to work to very light minimal hours of work due to the severity of your chronic pain syndrome. He further advised that you are receiving counselling, physical treatment etc to assist your progress, and that you are happy to return to work when you recover.
>
> 12. Your employer also contacted Dr Brkic and offered that he may examine the workplace if he so chooses. Dr Brkic has not contacted the employer to arrange this.
>
> 13. Since your ceased work date, your employer has continued to offer support and assistance in

> your return to work and these were always declined.
> 14 Based on the above evidence that has been received, we have terminated your claim for weekly compensation. This is because the Independent medical evidence indicate(s) that you have a capacity to undertake suitable employment and you did not make every reasonable effort to participate in a Return to Work Plan."

25. In my view the notice is predicated upon a continuing history up to and including 20 October 2004. Having regard to the terms of the Return to Work Plan, it is hardly surprising that the response of Dr Brkic to the Return to Work Plan was necessarily seen as materially relevant to the reasonableness of the worker's position. On the evidence as a whole I am not persuaded the Magistrate was bound to regard the failure to respond to the Return to Work Plan by 18 October 2004 as determinative of the issues before him.

The Magistrate's Finding

26. The appellants also submit that there was no evidence upon which a finding could be made that the worker made every reasonable effort to return to work. For the reasons I have already stated, it was open to his Honour to reach the conclusion which he did as to the objective reasonableness of the worker's actions.

Other Matters

27. The notice of appeal also raises the question whether the learned Magistrate failed to apply s93D(2)(c) of the Act. Mr Gorton QC, who appeared as senior counsel for the appellants, has, however, quite properly indicated that this matter is not pursued as a separate basis of appeal. It was not raised before the learned Magistrate and this factor alone gives rise to a serious question as to whether it could be pursued on appeal. In addition it is attended by a number of factual and legal difficulties. In the event it is unnecessary for me to attempt to resolve them.

Conclusion

28. For the above reasons the appeal is dismissed.

---

[1] The reference to 18 October 2004 was a slip. The correct date as stated elsewhere in the decision was 19 October 2004.

[2] Counsel for the employer submitted to the Magistrate "that if there was an injury it was a minor injury, that the presentation to Dr Brkic and to the other practitioners is an exaggerated one, not in keeping either with a physical injury or a psychological reaction to a physical injury and that there was simply no impediment to her going back and attempting the first job she was offered." [T.190-191]

[3] *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19 per Stephen J; *Daylesford Sawmill Pty Ltd v Cane* [2000] VSC 431 per Kellam J at [38].

APPEARANCES: For the appellants T & G Industries Pty Ltd and Anor: Mr R Gorton QC with Mr J Gorton, counsel. Wisewoulds Lawyers. For the respondent Randjelovic: Mr M O'Loghlen QC with Ms A MacTiernan, counsel. Zaparas Lawyers.
