Ainslie v Commissioner for Public Employment [2002] NTSC 66

PARTIES:	AINSLIE, TERRY JOHN
	v
	COMMISSIONER FOR PUBLIC EMPLOYMENT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE WORK HEALTH COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	LA9 OF 2002 (20100561)
DELIVERED:	16 DECEMBER 2002
HEARING DATES:	1 NOVEMBER 2002
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	M. Grant
Respondent:	I. Morris

Solicitors:

Appellant:	Ward Keller
Respondent:	Hunt & Hunt

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ainslie v Commissioner for Public Employment [2002] NTSC 66
No. LA9 of 2002 (20100561)

IN THE MATTER of an appeal under the *Work Health Act*

BETWEEN:

TERRY JOHN AINSLIE
Appellant

AND:

COMMISSIONER FOR PUBLIC EMPLOYMENT
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 16 December 2002)

[1] This appeal arises out of the exercise of a discretion by a magistrate presiding in the Work Health Court. By virtue of s 116 of the Work Health Act the appeal is limited to questions of law.

[2] The appellant is a worker who was in dispute with his employer over the payment of travel costs under the Work Health Act. The matter was resolved by the parties shortly before the hearing in the Work Health Court was due to commence. A memorandum of agreement was entered into

between them. It was a term of the settlement that the employer would pay the worker's costs "with the fixing of the appropriate percentage of the relevant costs pursuant to Order 23.04 of the Work Health Rules to be reserved".

[3] Order 23.04 of the Work Health Rules was, at the relevant time, in the following terms:

> (1) Subject to these Rules, costs for work done are allowable at an appropriate percentage of the relevant costs set out in the Appendix up to and including 100%.
>
> (2) When making a costs order the Court must fix the appropriate percentage referred to in subrule (1).
>
> (3) In fixing the appropriate percentage, the Court is to have regard to –
>
> (a) the complexity of the proceeding in fact and law;
>
> (b) the amount awarded to the party;
>
> (c) the efficiency with which the parties conducted the proceeding;
>
> (d) the preparedness of the parties at a directions conference, conciliation conference, prehearing conference or hearing of an interlocutory application;
>
> (e) the efforts of the parties in attempting to come to an agreement; and
>
> (f) any other matter the Court considers appropriate.

[4] The parties were unable to agree as to the appropriate percentage and the matter came before the Work Health Court for the determination of that issue. On 17 May 2002 the learned Magistrate ordered that the appropriate percentage of the relevant costs was 50 per cent. The appellant appeals against that decision.

[5] The primary argument of the appellant centred upon the approach adopted by the learned Magistrate in determining the appropriate percentage to be allowed pursuant to the provisions of r23.04. It was submitted that his Worship improperly fettered his discretion by instructing himself that "the starting point for the assessment of the percentage amount should be less than 100 per cent". In his reasons for decision the learned Magistrate dealt with the matter in this way:

> "In determining the percentage, I take into account the following: the first thing I take into account is that the Work Health Court is an inferior court. It does not have the status of the Supreme Court of the Northern Territory. The Work Health Court is empowered to resolve matters quickly. The proceedings of the court are to be conducted with as little formality and technicality and with as much expedition as the requirements of the Work Health Act and a proper consideration of the matter permit. See s 110A(2) of the Work Health Act.
>
> Subject to the Work Health Act, the court when considering Division II claims for compensation and this matter which was settled, originally started pursuant to s 104 which is in Division II of the Work Health Act. The court when considering Division II claims for compensation is not bound by the rules of evidence but may inform itself in any matter in such manner as it thinks fit. See s 110A(3) Work Health Act.

> The Supreme Court is not empowered to resolve matters quickly or as quickly as the Work Health Court is empowered. By virtue of its inferior status, the Work Health Court should not, as a matter of course, make an award of costs at a percentage of 100 per cent of the appendix to Order 63 of the Supreme Court Rules. The Work Health Court is not designed or empowered to be as procedurally complex as the Supreme Court and thus the starting point for an assessment of the percentage amount should be less than 100 per cent."

[6] If the observations made by his Worship reflected the intention of the Rules then I would expect that intention to be spelled out within the Rules. The scale of costs applicable is not to be determined by a comparison between the procedures adopted in the Supreme Court and those adopted in the Work Health Court. There is nothing within the rule that suggests that the court should proceed from any identified "starting point" and, had that been intended, it would have been but a simple matter for the Rules to so provide. Rather the rule requires that the court fix the "appropriate percentage" by reference to a range of matters specified.

[7] In *Richfort Pty Ltd trading as JEBPAB v Baluyut* (1999) 9 NTLR 58 the Court of Appeal dealt with the predecessor to Rule 29. In that case Gallop J said (par 19):

> "There is no presumption that in ordering costs under subrule (1) a court should ordinarily fix upon the rate of one hundred per cent of the Supreme Court scale. The percentage of the Supreme Court scale must be fixed by reference to the nature of the case, its complexity, the quantum involved, the difficulty in conducting a resolution of the issues and the conduct of the parties. What the successful party's solicitor charges his client is irrelevant to the exercise of the discretion to fix a specified percentage of the fees set out in the Supreme Court Rules pursuant to r29.(3)."

[8] The guidance provided by that case is limited because of the subsequent amendments to the relevant rule however it is to be noted that the formulation provided by Gallop J has largely been reflected in the amended provisions (see r23.04(3) above). It is also to be noted that in that case Mildren J concluded [at par 32] that "the rate to be allowed should ordinarily be at the rate of one hundred per cent of the Supreme Court scale, unless there is good reason to order otherwise." However it would seem that his Honour reached that conclusion based upon the wording of the then existing rule.

[9] In my view the present formulation of the rule requires that the "appropriate percentage" is to be determined in all of the relevant circumstances of the matter including by reference to those matters identified in r23.04(3). There is no presumption that the court should ordinarily fix upon the rate of 100 percent of the Supreme Court scale or, as seems to have been suggested by the learned Magistrate in this case, some other lesser percentage. In my view his Worship fell into error.

[10] Having concluded that his Worship fell into error it is necessary for me to determine, in accordance with r23.04, the appropriate percentage of the costs set out in the relevant appendix to the Supreme Court Rules that should apply in this matter. I consider the matters set out in r23.04(3).

[11] The submission of the respondent was that this was not a complex matter. The employer pointed out that issues that usually arise in work health claims

were not in dispute. There was no dispute as to liability, injury, causation and the like. The argument related to the reasonable cost of the worker's travel from Dundee Downs to Darwin for the purposes of receiving medical treatment. One of the matters to be considered in that regard was whether the worker could or should reside in his Darwin house rather than living at Dundee Downs, some distance from Darwin. The appellant submitted that the matter was complex. It was submitted that the complexity arose out of the psychiatric condition of the worker and the competing opinions of the psychiatrists consulted in relation to that condition. One psychiatrist was of the view that the environment of the rural property where the worker lived gave him "a low level of stress and a range of relatively simple activities that he can perform, thus helping to keep the more severe depressive features in check". He expressed the view that if the appellant had to move back into town this would exacerbate his stress beyond his limit of tolerance and would precipitate an episode of severe depression. Another psychiatrist expressed the competing view that travelling the substantial distances involved was "outside the ordinary and may be deleterious, in fact, to his overall management." Clearly there was a significant medical issue to be resolved. In addition there was no agreement between the parties as to the basis upon which the travel allowance should be assessed and any hearing may have involved a detailed consideration of such things as petrol costs, wear and tear, insurance, registration, depreciation and other costs associated with the appellant travelling from Dundee Downs to Darwin.

[12] In my view in its preparation stages, and if the matter had proceeded to a hearing, it could be regarded as a matter of moderate complexity within the context of Work Health claims.

[13] There is no dispute regarding the amount awarded to the appellant which was the sum of $3274.88 plus ongoing payments in relation to future travel. It was the assessment of the respondent employer that in total the payments would not exceed $10,000. I agree with the observation made by the learned Magistrate in the Work Health Court that "[t]he settlement related to an amount which with time will not be small but is not large when compared to the effect of other awards of compensation that can be made." Whilst the quantum of an award is a matter to be taken into account it must be remembered that the quantum is not necessarily a reliable indicator of the appropriate level of costs. As was observed by Mildren J in *Richfort Pty Ltd v Baluyut* (supra at par 30):

> "Further, as Mr Trigg SM pointed out, the quantum of the award is not a reliable indicator. An applicant may seek only a declaration of liability in order to protect his position in the eventuality that his injury is productive of some future financial loss."

[14] In the context of this matter, whilst the amount of the award was not great, it was a significant amount for the individual worker and provided him with an ongoing benefit that was previously not the subject of agreement.

[15] There is no evidence before me as to the efficiency with which the parties conducted the proceeding, the preparedness of the parties at earlier hearings

or as to the efforts of the parties in attempting to come to an agreement. It was the submission of both parties that in the absence of evidence on these issues they could not be brought to account.

[16] It was the submission of the appellant that in determining the appropriate percentage the court should take into account "the general principle that the purpose of a discretionary award of costs is to ensure that a successful party is properly indemnified for the costs it has incurred." It was submitted that I should infer that the appellant would be charged 100 per cent of the Supreme Court scale in respect of this matter and that I should therefore allow that rate in the exercise of my discretion. No evidence was adduced as to the actual basis upon which the appellant was to be charged by his solicitor and I see no basis for drawing the inference that I was invited to draw. In my view the amount of costs agreed as between the solicitor and his or her client cannot determine what is an appropriate percentage of the Supreme Court scale in any matter. Order 23.04 of the Work Health Rules does not so provide. It is for the court to determine what is the appropriate percentage by reference to the matters set out in the rule. If it was intended that the appropriate percentage was to be sufficient to provide an indemnity to the worker in respect of all costs payable to his or her solicitor up to a maximum amount then the rule would have been expressed in different terms.

[17] In the circumstances I set aside the decision of the Work Health Court dated 17 May 2002 and in lieu thereof order that the employer pay the worker's

costs of and incidental to proceeding number 20100561 at 85 per cent of the Supreme Court scale.

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