

Un v Schroter & Ors [2001] NTSC 62

PARTIES: UN, Salomi
v
SCHROTER, Peer trading as POVEYS
AND
CARNEY, Jodeen
AND
NORTHERN TERRITORY LEGAL AID
COMMISSION

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NO: 100 of 1998 (9810057)

DELIVERED: 1 August 2001

HEARING DATES: 6 April 2001

JUDGMENT OF: MARTIN CJ

CATCHWORDS:

DAMAGES

General principles – reduction of damages – collateral benefits – tender of documents purporting to demonstrate payments made – whether provisions of Work Health Act 1986 (NT) operate to reduce compensation – whether payments made are deductible under common law principles.

Work Health Act 1986 (NT) s 54 and s 176

Masters Dairy Limited v Nagy, unreported, Foster, Lee and Tamberlin JJ, 4 August 1998, approved.

REPRESENTATION:

Counsel:

Plaintiff:	J Reeves QC
1 st & 2 nd Defendants:	M. Grant
3 rd Defendant	J Tippett

Solicitors:

Plaintiff:	Ward Keller
1 st & 2 nd Defendants:	Cridlands
3 rd Defendant	DeSilva Hebron

Judgment category classification:	B
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Mar0110

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Un v Schroter & Ors [2001] NTSC 62
No. 100 of 1998 (9810057)

BETWEEN:

SALOMI UN
Plaintiff

AND:

PEER SCHROTER trading as POVEYS
First Defendant

AND:

JODEEN CARNEY
Second Defendant

AND:

**NORTHERN TERRITORY LEGAL AID
COMMISSION**
Third Defendant

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 1 August 2001)

- [1] This is an action in which the plaintiff claims damages for breach of duty on the part of the personal defendant's, legal practitioners, whom she consulted concerning an incident which occurred in early May 1995.
- [2] It is alleged that the solicitors failed to advise her as to her rights to make a claim under the Work Health Act 1986 (NT) arising from that incident, in

which it is alleged she was sexually assaulted by a fellow employee and suffered injury as a result.

- [3] She further asserts that her employment was effectively terminated shortly thereafter by the employer.
- [4] If liability is established, an assessment of damages must be made for the value of the chance or opportunity of which the plaintiff was deprived in relation to the work health claim.
- [5] As a final matter before close of evidence in the case, counsel for the third defendant tendered documents purporting to demonstrate payments made to the plaintiff which, it is said, should be taken into account so as to reduce any damages. The tender was supported by counsel for the first and second defendants. The plaintiff objects to the tender on a number of grounds.
- [6] The parties have agreed that had the plaintiff instituted a claim for compensation under the Work Health Act in the ordinary course, it would have been heard in about May 1996.
- [7] The first of the documents, in time, is a letter dated October 1995 referring to an enclosed cheque for \$1,500 for “unfair dismissal”. It appears that sum represents a payment made pursuant to the operations of the Workplace Relations Act (Cwth) and was payable by the employer (“the unfair dismissal claim”).

- [8] Next, in September 1996, a written agreement was entered into, consequent upon conciliation processes under the Anti-Discrimination Act 1992 (NT) whereby the employer, without admission of liability, agreed to pay to the Anti-Discrimination Commissioner, for payment to the plaintiff, the sum of \$22,000 consequent upon the plaintiff's complaint of sexual discrimination and sexual harassment. It is expressly provided that no part of that sum represents a payment "by way of any loss of income arising out of her complaint against the employer, or at all". There is no indication as to how the sum was calculated (the "anti discrimination claim").
- [9] The third document is a copy of an order of the Local Court made on 22 February 1999, by consent, between the plaintiff and the Northern Territory of Australia that an assistance certificate issue certifying that the Territory pay the plaintiff \$18,000, "by way of assistance for injury suffered" on or about 1 May 1995. The order was made pursuant to s 10A of the Crimes (Victims Assistance) Act 1982 (NT) in relation to a claim made by the plaintiff arising from the incident (the "CVA claim").
- [10] The substantive submissions related to whether s 54 and s 176 of the Work Health Act or either of them applied to any of those payments. Relevantly, at the time of the incident (and until 1998) s 54 applied where an injury was caused to a worker which gave him a right to claim compensation or a right of action under another law in circumstances where the injury would otherwise have entitled him to compensation under Pt V of the Act. If compensation or damages had not been paid or recovered under the other

law, then the worker was entitled to compensation under Pt V. But, where a person had received compensation under Pt V, and obtains compensation or damages under the other law, then the worker's employer was entitled to recover from the worker an amount to be determined by an actuary applying a prescribed formula.

- [11] The legislative scheme is such that the worker's entitlement to compensation under Pt V is not effected by his having received or afterwards receiving an award for compensation or damages for the injury under another law.

Section 54(5) provides:

“Unless it is proved to the contrary, an amount recovered or to be recovered by a worker or his dependants under another law as compensation or damages in respect of an injury to the worker shall be presumed to be compensation or damages for the same injury in respect of which the worker claims for his dependants claim compensation under this Part.”

- [12] The reference to “another law” in s 54 includes, as well as those set out in s 54(1), laws of the Territory other than the Work Health Act. The claims for compensation referred to in s 54 are those “under another law” and thus do not include those under the Act. As to the use of the word “injury”, I am of the opinion that it bears the same meaning in s 54 as the defined meaning under the Work Health Act (see s 54(5)).

- [13] The first and second defendants concede that neither of the rights to claim compensation or damages under the Workplace Relations Act or Anti Discrimination Act is predicated on any injury caused to the plaintiff as

required by s 54(2). As I understand it, counsel for the second defendant submits that s 54 places the onus upon the plaintiff to prove that the compensation she has received is not for the same injury and therefore does not reduce the award for compensation to which she would otherwise be entitled. I do not accept that submission. The difficulty, I think, is that neither of the documents tendered nor the provisions of the Anti Discrimination or Workplace Relations Act encompass an injury as defined in the Work Health Act. I accept the plaintiff's submission that the unfair dismissal claim was not based upon an injury, but rather upon her being unfairly dismissed from her employment, and that the anti discrimination claim was not based upon an injury, but rather upon the provisions of the Anti Discrimination Act which prohibits sexual discrimination or harassment and gives the Commissioner the power to award damages to a person like the plaintiff who makes a complaint under that Act.

[14] Leaving aside for the moment any set off which may be available to the defendants as a result of the operations of the common law upon those payments, they are not shown to be relevant.

[15] Section 176 of the Work Health Act deals with remedies available against both an employer and a stranger. If an injury in respect of which compensation is payable under the Work Health Act is caused under circumstances that appear to create a legal liability in some person other than the employer to pay damages in respect of the injury, the person entitled to compensation may take proceedings against that person to

recover damages and may also make a claim against the employer for compensation. But where a person receives compensation and recovers damages from another person in respect of the same injury, he or she shall repay to the employer such amount of the compensation as does not exceed the amount of those damages recovered from that person.

[16] The plaintiff has received \$18,000 under the Crimes (Victims Assistance) Act. The scheme under that Act is to enable a victim who is injured as the result of the commission of an offence to apply for an assistance certificate in respect of injury suffered by him as a result. An application was made in which the Northern Territory of Australia was named as first respondent and the alleged assailant, since deceased, as second respondent, as the Act requires. An assistance certificate is to certify that the Territory shall pay an amount specified in the certificate. In assessing the amount of the assistance to be specified, the Court is to have regard to expense incurred, pecuniary loss as a result of total or partial incapacity for work, other pecuniary loss, pain and suffering, mental distress, loss of amenities of life, loss of expectation of life and loss or damage to the clothing of the victim (s 9).

[17] The Court was satisfied that an agreement had been reached and ordered an assistance certificate to be issued specifying the agreed amount (semble s 10A). Section 20 requires the Territory to pay the amount specified in a certificate within 28 days after the same has issued and s 21 enables the Territory, where an offender is convicted of an offence, to recover from the

offender as a debt due and payable to the Territory an amount equal to the amount of assistance.

[18] It is plain in my opinion that the scheme of the Act and the payment to which a victim of crime may be entitled under it are not encompassed by s 176. The defendants submit that an injury in respect of which compensation is payable under the Work Health Act was caused under circumstances that appear to create a legal liability in the deceased (someone other than the employer) to pay damages in respect of the injury, but in my opinion s 176 only applies if the plaintiff had taken proceedings against the deceased to recover damages. But the plaintiff did not take proceedings to recover damages. She took proceedings which entitled her to assistance under a statutory scheme pursuant to which the Territory is obliged to make payment of the amount of assistance assessed. The Crimes (Victims Assistance) Act does not provide any remedy by the plaintiff against the deceased, it is the Territory which has a statutory right of recovery as against the deceased. It may be, as the defendants submit, that the amount paid pursuant to the CVA claim may well include an amount agreed between the parties to take into account any injury in respect of which the plaintiff makes claim under the Work Health Act, but that is not the test under s 176.

The assistance certificate recites that the amount of \$18,000 was paid “for the injury suffered by the applicant on or about 1 May 1995”. There is no description of the injury nor is there any detail as to how the amount paid

was made up. Section 54 only operates in circumstances where an injury is caused to a worker which gives him a right to claim compensation or a right of action under another law in circumstances where the injury would “otherwise have entitled him or his dependants to compensation under this part”. Compensation is only payable under that part of the Work Health Act where the worker suffers an injury which results in or materially contributes to his or her death, impairment or incapacity (s 53). “Incapacity” is defined in s 3 as meaning an inability or limited ability to undertake paid work because of an injury. In a letter of 12 August 1998 the solicitors for the plaintiff wrote to the solicitors for the Northern Territory in relation to the CVA claim enclosing a number of documents, including those of a psychologist and psychiatrist, and as well put forward a basis of settlement with details of loss of earnings. They pointed out that all of that was before an attempt was made to take into account general damages to which the plaintiff was entitled for pain and suffering and loss of enjoyment of life or any special damage for medical assistance. I am not persuaded that that letter assists to determine the extent to which the amount paid under the CVA claim, if any, was related to incapacity as a result of an injury compensable under the Work Health Act. Unless it is shown that the sum of \$18,000 was paid by reference to the plaintiff’s inability or limited ability to undertake paid work because of the injury, then s 54 has no application. There is no evidence as to how the sum of \$18,000 was made up and it is therefore not shown to be covered by s 54.

- [19] Again, leaving aside for the moment the common law aspects of the disclosed material, I rule that the amount of the CVA claim is not relevant.
- [20] There remains the question of whether any of the amounts paid to the plaintiff are deductible under common law principles. As already pointed out, the plaintiff's claim is for damages for the loss of a chance to claim entitlements under the Work Health Act. Those rights are available to a worker who proves "injury" and resultant "incapacity".
- [21] As to the unfair dismissal claim, the plaintiff concedes that to the extent that it can be shown to relate to lost earnings (not costs) it may be taken into account in assessing any award for damages, if properly pleaded. (As to the pleading point, see later).
- [22] As to the other payments, the plaintiff submits that they are not deductible to any extent. Neither relate to incapacity arising from injury within the meaning of the Work Health Act. The anti discrimination claim was settled on the basis that no part of the \$22,000 represented a payment by way of loss of income and no part of the \$18,000 paid under the CVA claim is shown to be related to incapacity.
- [23] The defendants submit that the payments are deductible, pointing to what they regard as being an overlap between the benefits, especially where the employer was liable for the unfair dismissal claim, and the anti discrimination claim and would have been responsible for the work health claim.

[24] The authorities relating to this issue have been recently brought together in the Western Australian District Registry of the Federal Court of Australia by Foster, Lee and Tamberlin JJ in *Masters Dairy Limited v Nagy*, unreported, 4 August 1998. Their Honours extensively review the leading cases such as the *National Insurance Company of New Zealand v Espagne* (1961) 105 CLR 569 per Dixon CJ at 573 and Windeyer J at 599; *Graham v Baker* (1961) 106 CLR 340; *Redding v Lee* (1982) 151 CLR 117; *Manser v Spry* (1994) 181 CLR 428 and *Harris v Commercial Minerals Limited* (1996) 186 CLR 1.

[25] Bearing in mind those authorities, I consider that only such part of the unfair dismissal claim, if any, as relates to loss of earnings could be deducted from any damages awarded to the plaintiff in this case under common law. There is no evidence detailed to that point and without it the document is irrelevant. Other payments are not shown to be for incapacity for any injury compensable under the Work Health Act. These benefits are directed to assist the plaintiff in relation to matters unrelated to incapacity resulting from injury as encompassed by the Act. The work health entitlements are independent of those other rights.

The third defendant concedes that payments made pursuant to the Anti Discrimination Act are not of the same nature as benefits under the Work Health Act and therefore do not press the tender of the document recording that settlement on that basis. It is submitted, however, that the evidence is relevant to the plaintiff's claim for distress arising from her being unable to

recover in the Work Health Court. It further submits that the amount received under the anti discrimination claim was considerable and that this Court can have regard to that fact in determining whether to award a sum for distress, and if so, the amount of that award. The submission concludes that the agreement reached under the anti discrimination claim permitted her to take the amount involved in amelioration of the affects of an act of discrimination which is an award of the same nature as one for distress. I do not agree. An anti discrimination claim is not necessarily based upon distress and the two sources of distress, if any, are severable.

[26] I have chosen to deal with the substance of these matters rather than rule upon the plaintiff's submission that the issues had not been properly raised by the defendants on the pleadings. If they had been, the result must have been the same, ultimately.
