Conservation Commission of the NT v Hudi [2001] NTSC 71

PARTIES:	CONSERVATION COMMISSION OF THE NORTHERN TERRITORY v HUDI, Vladimir
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	32 & 33 of 2001
DELIVERED:	17 August 2001
HEARING DATES:	31 May 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

WORKER'S COMPENSATION

Application by employer for stay of execution pending outcome of appeal – principles applicable to whether a stay should be granted.

Work Health Act 1986 (NT)

Maddalozzo v Maddick (1992) 108 FLR 159, referred to.
Mengel v Northern Territory (1993) 113 FLR 160, applied.
Enterprise Gold Mines NL v Mineral Horizons NL (No 1) (1988) 91 FLR 403, followed.

REPRESENTATION:

Counsel:

Appellant:	P Barr
Respondent:	C Scicluna

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Caroline Scicluna & Assoc

Judgment category classification:	B
Judgment ID Number:	mar0125
Number of pages:	7

Mar0125

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

Conservation Commission of the NT v Hudi [2001] NTSC 71
No. 32 & 33 of 2001

BETWEEN:

CONSERVATION COMMISSION OF THE NORTHERN TERRITORY
Appellant

AND:

VLADIMIR HUDI
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 17 August 2001)

[1] This is an application by the appellant employer ("the employer") of the respondent worker ("the worker") for a stay of execution of a judgment in favour of the worker delivered by the Work Health Court sitting at Alice Springs in February this year. The stay is sought pending the outcome of the employer's appeal to this Court.

[2] The issue to be determined in each appeal is whether the learned Magistrate erred in finding that notice of the worker's alleged injury had been given to or served on the employer as soon as practicable as required by s 80 of the Work Health Act 1986 (NT). The injury is said to be of a psychiatric nature.

[3] It appears from the reasons for judgment of the learned Magistrate:

> "(1) that the employer's purported cancellation of the worker's benefit under the Worth Health Act was invalid;
>
> (2) that the worker's entitlements to benefits under the Act be reinstated from the date of cancellation of the same and to be paid in accordance with the Act;
>
> (3) that the employer pay the worker interest pursuant to section 89 of the Act;
>
> (4) that the employer pay the worker penalty interest pursuant to section 109;
>
> (5) the employer pay the worker's costs of and incidental to these proceedings.
>
> The following matters are not in dispute:
>
> (1) the worker was at all material times a worker within the meaning of the Work Health Act;
>
> (2) the worker was employed by the Conservation Commission of the Northern Territory;
>
> (3) the worker sustained injury to his back in the course of his employment with the respondent in 1985 whilst engaged in building a walking trail. The worker was pushing a wheelbarrow across planks which had been placed over a hollow in the ground, when he fell off the planks approximately 2 metres, twisting his back in the process. He received treatment for his injuries and was absent from work as a result.
>
> (4) on about 8 May 1990 the worker sustained further injury to his back in the course of his employment;
>
> (5) in about August 1990 the worker made a claim for compensation pursuant to the Work Health Act.

(6) on or about 13 September 1990 the employer accepted liability to pay compensation in respect of a claimed injury to the lower back;

(7) on 30 September 1991 the worker retired from his employment on the grounds of invalidity and subsequently continued to receive his entitlements pursuant to the Work Health Act."

[4] The employer purported to cancel payment of weekly benefits in early 1995 pursuant to s 69 of the Work Health Act, but it was held that the notice it had required was invalid.

[5] The employer had sought an order under s 104(1) of the Work Health Act read with s 94(1)(a) of the Act for cancellation or reduction, as the case may be, of the worker's compensation payable to the worker claiming that the worker was no longer totally incapacitated or, alternatively, was only partially incapacitated. When that application was made is unclear. It was the employer's case in that regard that the worker had ceased to be incapacitated in any way for work as a result of his injury on 8 May 1990, and that the Court was not entitled to take into account any psychiatric injury, it being put that no notice of any such injury was given to the employer until about 10 October 1994 when the worker brought an application for permanent impairment (s 71).

[6] A Worker's Compensation claim form of 10 October 1994 indicated the type of injury or disease as being "spine/back and anxiety" and was served upon the employer. The Court held that as at that date it was plain that anxiety, at least, was part of the claim. Objection was taken by the employer that the

notice should have been given earlier in order for it to consider a claim based upon alleged psychiatric injury. The learned Magistrate made reference to a report of a doctor of 29 November 1991 in which reference was made to "psychiatric help and counselling", but the court observed that it did not appear to suggest that any anxiety or psychological injury was as a result of the physical injury. The learned Magistrate's reasons proceeded:

> "The report of Dr Girgis dated 19 April 1994 would appear to be the first suggestion that the worker was suffering from depression and somataform pain disorder. Therefore, whilst it may be said in hindsight those who believe he is suffering from anxiety or from some psychiatric impairment believe that it may have existed for some considerable time, the only clear evidence of that occurred in early 1994. I therefore consider the worker has given notice at the earliest reasonable opportunity to the employer of the psychiatric component of his injury. Whilst he may have suffered from some of the symptoms prior to that, he has given notice at the first opportunity after a medical practitioner has formed that form, or made it known to him".

[7] After review of all of the evidence the court accepted that the worker was suffering depression as a result of the original injury to his back and associated loss of employment, and that his mental state was directly attributable to the physical injury he suffered in 1985. It was ordered that the worker's entitlements under the Act be reinstated from the date of the purported cancellation and that the employer pay interest and costs.

[8] It was held by Mildren J in *Maddalozzo v Maddick* (1992) 108 FLR 159 that compliance with s 80(1) of the Act is a condition precedent to a worker's entitlement to compensation, it was not merely a procedural section. At p 168 his Honour noted that the subsection did not use the expression "as

soon as practicable *after the injury*", so that the fact that a worker was unaware that he had an injury or disease conferring a right to compensation under the Act, for example, is accounted for by the wording of the section. At p 169 his Honour said: "Therefore, the date of the injury is not necessarily the appropriate reference from which that time is to be read". His Honour also noted that the question of whether or not a worker has failed to give notice as soon as practicable is a question of law, p 170.

[9] I was informed that the consequence of her Honour's orders are that a sum of approximately $125,000 would be payable to the worker plus ongoing compensation. I was not given any indication of the effect which the employer's appeal would have on its liability to the worker if the appeal was allowed.

[10] The evidence on this application is that the worker resides in Whyalla and is the owner of the property which he had been attempting to sell. The property is valued at $39,000. There is no evidence on the part of the worker going to his assets beyond that nor of his being in receipt of any income.

[11] In *Mengel v Northern Territory* (1993) 113 FLR 160 Kearney J referred to the principles on the question of whether a stay should be granted by reference to *Enterprise Gold Mines NL v Mineral Horizons NL (No1)* (1988) 91 FLR 403 at 410:

> "… the principles applicable upon this application are as follows. To succeed, the applicant must make out a case which warrants the discretion to stay being exercised in its favour. The court has a general discretion on the question of granting a stay and the terms on which it will be granted. In exercising its discretion the court will consider the balance of convenience and what is fair and just as between the parties. If it is established, for example, that there is a real risk that the appeal will be nugatory without a stay, in the sense that there is a real risk that it will not be possible for a successful appellant to be restored substantially to its former position if the judgment of the warden's court is executed, a stay will normally be granted: see *Scarborough v Lew's Junction Stores Pty Ltd* [1963] VR 129 at 130. The court will not speculate on the applicant's prospects of success in its appeal, unless it appears not to have an arguable case. The terms of any stay must fairly take account of the interests of both parties."

[12] The Court must weigh the balance of convenience and the competing rights of the successful party and the party appealing. The ordinary principle is that a successful party is entitled to the fruits of the judgment and there must be sound reason sufficient to justify the court in suspending that right. A consideration relevant to the grant of a stay is that there is real risk that if the judgment is executed and the appeal succeeds, it will not be possible to restore the appellant to its former position. The risk that a successful appeal will prove abortive will generally arise where a defendant appeals against a judgment for money and because of the poor financial state of the respondent there is no reasonable prospect of recovering money paid pursuant to the judgment.

[13] On the information available on this application it is not possible to know or even estimate what part of the monies adjudged to be paid by the employer to the worker would be at the employer's risk if the appeal was successful.

That is, assuming the judgment to be executed, there is no basis upon which this Court on this application can identify the monetary value of the risk that the employer runs if the appeal is successful, and it seeks to be restored to its former position by recovery of any overpayment to the worker pursuant to the judgment.

[14] There was also an application to stay an order that the employer pay costs to the worker in respect of the vacation of the hearing date in September 1999, but the employer does not pursue that application. It does, however, seek a stay in respect of execution of the order for payment of costs arising upon the proceedings before the learned Magistrate. It is unclear to me why that should be so. As I understand it from the reasons of the learned Magistrate the worker was entirely successful and the issue going to the heart of the appeal in the substantive proceedings would only seem to have some bearing upon the quantum of the employer's liability to the worker which it would seem has not yet been explored before the Work Health Court.

[15] The application is dismissed. The employer must pay the costs of the application.
