PARTIES:	COLLINS RADIO CONSTRUCTORS INC v HUNT, Rhonda Joy
TITLE OF COURT:	The Supreme Court of the Northern Territory
JURISDICTION:	Appeal from Work Health Court exercising Territory Jurisdiction
FILE NOS:	No. 164 of 1994
DELIVERED:	Darwin 27 July 1995
HEARING DATES:	12 and 13 December 1994
JUDGMENT OF:	Angel J

CATCHWORDS:

Work Health appeal - Capacity and cancellation of payments - Statutes - Interpretation - Causation - Undetected non-symptomatic underlying pathology - Not primary compensable injury - Whether it constitutes an "injury" as pleaded

Work Health Act, ss69(3), 4(5)(8), 75A, 65(6)

AAT Kings Tours Pty Ltd v Hughes (SC (NT) - 21 October 1994), cited

Morrissey v Conaust Ltd (1993) 1 NTLR 183, cited

Phillips v The Commonwealth (1964) 110 CLR 347, cited

Darling Island Stevedoring and Lightage Co Ltd v Hankinson (1967) 117 CLR 19, discussed

Horne v Sedco Fourex Australia (1992) 106 FLR 373, referred to

Barbaro v Leighton Contractors Pty Ltd (1980) 44 FLR 204, cited

J & H Timbers Pty Ltd v Nelson (1972) 126 CLR 625, cited

Maddalozzo & Ors v Maddick (1992) 84 NTR 24, discussed

REPRESENTATION:

Counsel:

Appellant: J Tippett

Respondent: S Gearin

Solicitors:

Appellant: Ward Keller

Respondent: Caroline Scicluna & Associates

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 164 of 1994

THE WORK HEALTH ACT

BETWEEN:

COLLINS RADIO CONSTRUCTORS INC
Appellant

AND:

RHONDA JOY HUNT
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 27 July 1995)

This is an employer's appeal and a worker's cross appeal from a decision of the Work Health Court at Alice Springs delivered on 13 July 1994.

The respondent worker commenced employment as an executive secretary with the employer on 4 August 1987. The respondent's principal duties included typing, shorthand, filing, taking telephone calls, photocopying, paper shredding and the like. Over the weekend of 16 and 17 June 1990, the worker undertook extensive

keyboard activities as a consequence of which she sustained tendonitis in her arm and shoulder.

On 25 July, 1990, she made a claim for compensation, the acceptance and liability for which was acknowledged by the appellant employer, which thereafter made payments to the respondent worker.

The worker's initial injury was diagnosed as being bicipital deltoid tendonitis (otherwise known as myalgia/muscle pain) and inflammation tendonitis. Symptoms of this were manifested by pain in the left arm and shoulder, feelings of "pins and needles", burning sensations, and a swollen left hand which occasionally became blotchy. These symptoms had occurred as early as March, 1990. Between this period and 1992 the respondent saw a retinue of doctors concerning her affliction and condition. Principally these were Dr Georgia, an American GP at the Pine Gap Base, Messrs Schmidt and Saies, orthopaedic surgeons, and Mr Awerbuch, a rheumatologist. After the initial consultation with Dr Georgia, the worker was sent back to work wearing a sling and under medical instruction for a period of one month. The worker was asked immediately to attend to a back log of word processing. After that experiment, the respondent was ordered by Dr Georgia to remain at home for a number of days.

Upon the respondent's return and up until late 1991 the worker engaged in many jobs in the workplace and showed, intermittently, signs of improvement with physiotherapy and

chiropractic treatment. But the symptoms persisted and culminated in an arthroscopic procedure to the worker's left shoulder by Mr Saies conducted in Adelaide on 9 December 1991. The immediate effect was loss of movement in the left shoulder. The specialist's advice in respect of post-operative care was for the respondent to return to work when mobility improved but with the restriction of using her right-hand only until March, 1992. There was to be a further appointment for re-examination.

In January, 1992, the worker returned to work only to be informed by the company that the company could not find work to accommodate her physical limitations. This was immediately followed on 23 January, 1992 by a letter stating the same and a subsequent letter dated 28 January, 1992, which rescinded her security status. Effectively, this made the respondent redundant. She thereafter remained at home receiving work health payments for the first time on the basis of total incapacity. In September, 1992, the worker received a retrenchment package and thereafter returned to Adelaide.

In June, 1992, at the request of the employer, the respondent saw Mr Awerbuch, the rheumatologist. On 30 July, 1992 she received a Form 5 Notice pursuant to s69(3) of the Work Health Act cancelling compensation payments. The employer sought to stop payments on the ground that the respondent "had ceased to be incapacitated for work".

A report from Mr Awerbuch was attached to the notice. On 25 August 1992, the respondent lodged an appeal from the decision of the appellant employer to terminate payments and filed a Statement of Claim alleging an injury, adhesive capsulitis, which had occurred "in the course of" her employment reaching back to June 1990. In its answer, the employer relevantly pleaded:

> "2. The respondent denies paragraph 2 of the Statement of Claim and says that the applicant's medical condition or conditions in and about the left arm and shoulder are not and never have been "injuries" of any nature within the meaning of the *Work Health Act*, and in any event did not arise out of or in the course of her employment with the respondent.
>
> ...
>
> 10. The respondent says that it accepted the applicant's Work Health claim dated 25th July 1990, in error as it did not at that time know that the applicant's medical condition was unrelated to her employment. The respondent has subsequently learned that the condition has at all times been unrelated to the applicant's employment with the respondent, as a result of learning which fact the respondent ceased payments of Work Health benefits to the applicant upon two (2) weeks' notice in accordance with Section 69(3) of the Act, by Form 5 Notice served on the applicant on 30th July 1992.
>
> 11. The respondent seeks an order that the applicant repay to it the whole of monies paid to or on behalf of the applicant pursuant to the *Work Health Act* in respect of the injury alleged on or about 22nd July 1990."

Prior to the hearing in the Work Health Court leading to the determinations from which the appeal is brought, there was some argument between the parties concerning onus of proof and as to who was to be dux litis. Those matters were argued before the Chief Magistrate, who made an order on 1 March 1993, which order has never been challenged. That order was in the following terms:

"1. On the question of justifying the cancellation of payments by demonstrating the change of circumstances and proving that the worker was not incapacitated at the time of cancellation, the Respondent employer bears the legal and evidential onus and is dux litis.

2. On the question of proof of the fact and extent of present incapacity or partial incapacity, the Applicant worker bears the legal and evidential onus and is dux litis.

3. Subject to any further direction of the presiding Magistrate the Respondent is to be entitled to call rebuttal evidence in relation to any matter raised in the Applicant's case which are at the time of the hearing not within the respondent's knowledge of the Applicant's case. This does not include any new medical evidence not contained within the reports served in accordance with the Rules. If an issue arises as to new medical evidence, that is a matter for the presiding Magistrate.

4. The Applicant is to notify the Registrar of the Work Health Court at Alice Springs and the Respondent's solicitor of the precise arrangements made in respect of video conferencing.

5. The Section 69 and Section 85 procedural issue raised by the Applicant is not to be a matter for preliminary argument at the hearing; if anything, it is a matter for evidence and final submissions."

As to authority concerning the issues of onus of proof and dux litis, see *AAT Kings Tours Pty Ltd v Hughes* (unreported 21.10.94) at 3, *Morrissey v Conaust Ltd* (1993) 1 NTLR 183 at 189 and *Phillips v The Commonwealth* (1964) 110 CLR 347.

The appeal came on for hearing before the Work Health Court on 10, 11 and 12 March, 1993, 16 and 17 August, 1993, and judgment was delivered on 13 July, 1994. Initially there were four grounds of appeal as follows:

"1. The learned Magistrate erred in law in finding that the Respondent/Worker's stated injury arose out of or in the course of her employment.

2. The learned Magistrate erred in law in finding that the Respondent/Worker was partially incapacitated.

3. The learned Magistrate erred in law in the application of the provisions of Section 4(5) and Section 4(8) of the *Work Health Act* to the circumstances that resulted in the Respondent/Worker suffering the condition of chronic adhesive capsulitis resulting in a frozen left shoulder.

4. The learned Magistrate erred in law in finding that the Respondent/Worker's stated condition of chronic adhesive capsulitis was an injury within the meaning of that term as defined in the *Work Health Act*."

Ground 2 was expressly abandoned.

A further ground of appeal was added during the hearing of the appeal by leave which was in the following terms:

"The learned Magistrate erred in law in that her finding of injury:

(a) did not forward in the allegations made in paragraph 2 of the statement of claim (sic).

(b) did not accord with the injury relied upon by the worker in the worker's case. And as a result of (a) and (b) herein, the employer was deprived of an opportunity of properly meeting the issue of what injury the worker suffered and thereby suffered a denial of natural justice."

There was conflicting medical evidence before the Work Health Court. There was evidence concerning the condition, adhesive capsulitis, to the effect that it could be a spontaneous condition quite disassociated from the respondent's work activities. There was evidence otherwise from Dr Georgia. Mr Awerbuch said he was unable to attribute the adhesive capsulitis, or "frozen shoulder"

as it was called, to the keyboard or other activities of the respondent in her employment. He said he was not aware of any suggestion in any reputable medical text that activities of that type could cause adhesive capsulitis and that the cause is idiopathic, or, unknown.

Dr Georgia said that although it is possible that adhesive capsulitis is idiopathic, that was unlikely to be the case, which supported the view that it has an aetiology. He placed a publication before the Work Health Court, The American Family Physician, Vol 45 which the learned Magistrate quoted in her reasons:

> "Many authorities in occupational health believe that the rise in incidents in the result of the increasing number of jobs that require a pinched or (incomprehensible) execution of a limited number of relatively prime motor movements of the hands and arms as in keyboarding, they talk about bicipital tendonitis, adhesive capsulitis and rotator cuff tendonitis."

Mr Awerbuch said that the adhesive capsulitis was not related to the original injury. Perhaps he meant "directly" related because the learned Magistrate said of his evidence in her reasons (at 39):

> "[Frozen Shoulder Syndrome] is more often a consequence of shoulder trauma and resultance of tissue injury than a consequence of repetitive strain injury, thickening of the tendons and bursae result in loss of range of motion. The syndrome is typically caused by prolonged immobilisation after injury. The syndrome is typically caused by prolonged immobilisation after injury and disuse of the shoulder to avoid pain."

At the heart of this appeal is the issue of causation. The learned Magistrate found a causal link between the original injury, the tendonitis, the requisite "aggressive" therapy and its resultant catalysation of adhesive capsulitis of the shoulder.

The evidence revealed the respondent's undoubted limitations. The history of the respondent is unfortunate. To the best of her ability and capacity, she partook in secretarial work. Her injury rendered difficult performance of rudimentary clerical and secretarial tasks. She remained at work as long as she could. She was divested of the opportunity to make a decision as to her employment.

The learned Magistrate who comprised the Work Health Court reached a conclusion based on some of the evidence before her. There is support in the evidence for preferring one expert's evidence to the others. Owen J adverted to matters of preference in *Darling Island Stevedoring and Lightage Co Ltd v Hankinson* (1967) 117 CLR 19 at 34. He said:

> "Medical evidence led by the appellant was to the effect that the [injury] on 3rd September was spontaneous resulting from the natural progression of the [condition] and was unrelated to the work which the respondent was doing on that day. But the learned Commissioner - as I have said - preferred the opinion expressed by Dr Paul."

And:

> "The important thing is that the Commissioner found the facts to be as I stated them and on those facts the respondent was entitled to the award which was made unless it can be said that there was no evidence to support the findings."

There was evidence, that of Dr Georgia, supporting the finding of the learned Magistrate.

In the instant case, the learned Magistrate expressed her conclusions as follows:

> "I accept the evidence of Dr Georgia, that the initial injury of Ms Hunt was bicipital and deltoid tendonitis, that developed into other forms of tendonitis throughout the shoulder, and eventually, due in part to the treatment that she received for it, that then developed to adhesive capsulitis.
>
> I am satisfied on the balance of probabilities, that the adhesive capsulitis was a direct result of the bicipital and deltoid tendonitis and the treatment that she received for it, and I accept that the initial tendonitis was suffered by Ms Hunt as a direct result of the extensive keyboard activities that she undertook over the weekend of the 16th-17th of June 1990.
>
> I note the evidence of Dr Georgia and of Ms Hunt, and I accept that she had never suffered from any pain of a similar type, except when she was working, and that while she had suffered from some earlier twinges in about March 1990, that was also at a time related to her work and when she went home and slept she was fine the next day.
>
> I take into account the inconsistencies in her testimony as between what she said in Court and what she apparently had said to doctors on other occasions, and further, her evidence and the contents of **Exhibit A5**, however, I accept she was an honest witness doing her best to recall incidents which had occurred over about a two and a half year period.
>
> Section 4, sub-section 5 of the Act requires that an injury should occur by a way of a gradual process over a period of time, and the employment in which the worker was employed at any time during that period materially contributed to the injury. The injury pleaded in this case, is (a) chronic adhesive capsulitis resulting in a frozen left should and (b) carpal tunnel syndrome to the left forearm and wrist. Part (b) has effectively been abandoned by the worker and she relies upon paragraph (a) chronic adhesive capsulitis resulting in a frozen left shoulder.
>
> I am satisfied on the balance of probabilities that the frozen left shoulder was as a result of her treatment for tendonitis and that the tendonitis was caused by her employment. I am, therefore, of the view that the employment in which she was employed at the time, materially contributed to her injury (frozen left shoulder) as pleaded."

I agree with the learned Magistrate's conclusion on the causation issue. The fact that an aetiology can not be specifically placed and universally agreed upon by some of the medical witnesses does not invalidate Dr Georgia's evidence and his conclusion being open on the facts. Undue weight was placed on the aetiology of adhesive capsulitis. The question is whether it was effected by the injury sustained whilst the respondent was employed. Causally, it was.

The learned Magistrate accepted that the worker was initially totally incapacitated, but that as at 1 January 1993, the worker ceased to be permanently incapacitated and from that date was partially incapacitated. The learned Magistrate based this on her acceptance of the respondent's evidence that she was still partially incapacitated (see at 55 of her Worship's reasons; and at 110-111 of the transcript from the Work Health Court) and the various doctors that gave evidence.

She said:

> "[There] is evidence sufficient to satisfy me that she would generally be able to undertake secretarial work, but that the extent of that work would have to be determined by the worker herself, and it may well be that extensive periods of typing are unable to be carried out by her. However, as she has not, to my knowledge at this stage, attempted such work, it is impossible to say to what extent she would be restricted."

The learned Magistrate concluded stating:

> "As there is no evidence before me as to what variation there would be between her previous income as an Executive Secretary and what she could anticipate earning as a receptionist or clerical officer, I do not consider that I am able to quantify the loss currently suffered by her.

> I anticipate that the parties should be able to reach agreement concerning the extent of her loss based on these findings.
>
> Should they be unable to do so - liberty to apply."

In respect of finding the relevant date for partial incapacity, it seems that the learned Magistrate considered Mr Awerbuch's report (Ex.R2) dated 26 January, 1993 being the last apparent report on the respondent, which she quotes:

> "I am of the view that as at January of 1993 she was able to carry out duties of a receptionist and clerical capacity and limited secretarial duties where minimal typing and word processing would be required."

Though arbitrary to some degree, I agree with that finding. It accords with the general view of the doctors who gave evidence. Their opinions indicated a state of health less than total incapacity and that the respondent could be gainfully employed, albeit in a limited capacity.

Counsel for the appellant submitted, inter alia, that while symptoms from the condition may have occurred in employment, the evidence did not sustain the finding that "the employment caused a frozen shoulder". It had not been shown, it was said, that the frozen shoulder was an injury either that arose out of employment or in the course of employment.

Given the terms of s 4(5) of the Work Health Act the conclusions of the learned Magistrate were open to her on the evidence. Section 4(5) of the Work Health Act provides:

> "(5) An injury shall be deemed to arise out of or in the course of a worker's employment where it occurred by way of a gradual process over a period of time and the employment in

> which he was employed at any time during that period materially contributed to the injury."

Section 4(8) of the Work Health Act provides:

> "(8) For the purposes of this section, the employment of a worker shall not be taken to have materially contributed to an injury or disease or to an aggravation, acceleration or exacerbation of a disease unless the employment was a real, proximate or effective cause of the injury or disease or to the aggravation, acceleration or exacerbation of the disease, as the case may be."

As Barwick CJ said in *Darling Island Stevedoring and Lightage Co Ltd v Hankinson* (1967) 117 CLR 19 at 26:

> "If incapacity in fact results from the acceleration, is that not enough to entitle the worker to an award in the same way or to the same extent as would be the case with any other injury? I have no doubt that it would. If the incapacity it causes ceases, the award will be for that reason terminable. But that incapacity does not cease because it is demonstrable that, without the injury, the worker would have arrived from another cause at the same state of incapacity. It seems to me nothing to the point that that other cause would have been the pre-existing disease in its own unaided progression. Where the incapacity which results from acceleration is permanent, in my opinion, the award is not terminable because that incapacity would in any case have been the end result of the pre-existing disease."

The learned Magistrate plainly accepted that the injury pleaded, namely "chronic adhesive capsulitis resulting in a frozen left shoulder" was materially contributed to by tendonitis which was directly caused by her employment. Counsel for the appellant employer argued before the learned Magistrate and repeated the argument here, that there is no allegation in the respondent's pleadings of tendonitis as an injury. I agree with the learned Magistrate that the respondent is required to plead the injury for which she asserts a liability by the employer to pay compensation.

In this case, the frozen shoulder was the appropriate injury to plead.

The learned Magistrate stated in her reasons:

> "Had she pleaded tendonitis, I have no doubt, it would then have been argued she could not claim the frozen shoulder as her injury as that had not been pleaded. Even though that in fact would be the injury that she would be seeking payments for."

In *Coulton v Holcombe* (1986) 162 CLR 1 at 7 a majority in the High Court comprising Gibbs CJ, Wilson, Brennan and Dawson JJ said in relation to pleadings:

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

Clearly that has not been the case here. It is apparent that the adhesive capsulitis is causally related to the bicipital tendonitis. Both parties understood the gist of the respondent's case - the incapacity and limitations of her left shoulder and arm.

In this case the parties were aware of the alleged nature of the injury. As counsel for the respondent pointed out, certificates of Dr Georgia's claiming adhesive capsulitis as an injury were given to Mr Awerbuch and were dated as early as 11 September, 1990. (cf pp22-24 of transcript, esp. @ 23).

In *Horne v Sedco Fourex Australia* (1992) 106 FLR 373 the issue of pleadings is discussed. Mildren J canvassed the situation where new issues arise in the midst of trial, and then

referred to Williams, Supreme Court Practice in Victoria, 1987, at p86.

> "A judgment cannot be impeached on appeal on the ground only that it rests upon a finding on an issue of fact that was raised by the evidence but not the pleadings, unless the party who lost on the issue can show that he did not have a proper opportunity at the trial to deal with the issue in an appropriate way."

I am unable to see how the appellant employer was disadvantaged and denied natural justice, as was submitted by counsel for the appellant, by the proceedings in the Work Health Court. The respondent's case in contention was understood by both parties. The injury pleaded was the appropriate one. The appellant called medical evidence in contest of the respondent's case. There is no substance in the appellant's last ground of appeal.

It was argued that it had not been shown that the pleaded injury arose in the course of employment- that is, whilst the respondent was at work as opposed to having arisen out of employment. Given the terms of s 4(5) of the Work Health Act, and the circumstances of this case, I do not think there is any substance in the distinction sought to be made in that regard. I note paragraph 2 of the employer's answer, referred to above, where nothing is made of the distinction.

In my opinion, there is nothing in any ground of the appeal and the appeal should be dismissed.

As to the cross-appeal there are three grounds as follows:

> "1. The learned Magistrate erred in law in finding that the worker was capable of employment as a secretary, receptionist or counsellor when there was no evidence that such employment was reasonably available to her.

2. The learned Magistrate erred in law in finding that as at 1st January 1993 the worker ceased to be permanently incapacitated and from that date is partially incapacitated only.

3. The learned Magistrate erred in law in finding that the failure by the employer to comply with s.75A of the Work Health Act was not prima facie evidence that the worker is unable to engage in profitable employment for the purposes of s.65 of the Work Health Act."

In relation to the first ground, "capability" and "availability" of employment are mutually exclusive in nature. I have already dealt with the learned Magistrate's finding of partial incapacity. There was evidence of partial incapacity. Evidence was adduced confirming the respondent had some capacity the extent of which it is for the worker to prove: see *Horne v Sedco Fourex Australia* (1992) 106 FLR 373 at 384, *Barbaro v Leighton Contractors Pty Ltd* (1980) 44 FLR 204 at 220, 251-2 and *J & H Timbers Pty Ltd v Nelson* (1972) 126 CLR 625 at 638, 641, 649, 650-651.

The worker has not discharged that onus. The learned Magistrate found this when discussing the respondent's "availability" in respect of employment:

"However, as she has not, to my knowledge at this stage, attempted such work, it is impossible to say what extent she would be restricted."

I would dismiss the first ground of the cross-appeal.

The second ground of the cross-appeal should also be dismissed. I have already dealt with the learned Magistrate's finding that partial incapacity commenced on 1 January, 1993.

The issue raised by the third ground of appeal relates to the interplay between sections 75A and 65(6) of the Work health Act, on the one hand, and the discharge of the onus as to the extent of

partial incapacity, on the other, which onus is borne by the worker.

Section 75A of the Work Health Act provides:

"s.75A. EMPLOYER TO ENDEAVOUR TO FIND OR ASSIST INJURED WORKER TO FIND SUITABLE EMPLOYMENT, &c.

An employer liable under this Part to compensate an injured worker shall -

(a) take all reasonable steps to provide the injured worker with suitable employment or, if unable to do so, to find suitable employment with another employer; and

(b) so far as is practicable, participate in efforts to retrain the worker."

Section 65(6) of the Work Health Act provides:

"For the purposes of this section, a worker shall be taken to be totally incapacitated if he is not capable of earning any amount during normal working hours if he were to engage in the most profitable employment, if any, reasonably available to him."

Counsel for the worker referred to *Maddalozzo and Ors v Maddick* (1992) 84 NTR 24. Mildren J discussed s75A of the Work Health Act at 35:

"Unlike the former Act, an employer whose employee suffers a compensable injury is required by the Act to take a real interest in his employee's welfare. Section 61 of the Act, now repealed and replaced by s.75A of the Act, requires an employer to provide suitable employment to an injured worker or find suitable work with another employer for him and to participate in efforts to retrain the employee. The focus of the Act covers a wide range: Pt IV of the Act deals with occupational health and safety, and there is also a heavy emphasis on the rehabilitation of injured workers, not merely on providing a scheme for mere monetary compensation. Thus the Act seeks to prevent injuries occurring, as well as to rehabilitate those who are injured and to provide for

> monetary compensation. The shift of emphasis, when compared with the former Act, is apparent when it is realised that the former Act provided solely for compensation for injured workers and for a compulsory insurance scheme to make sure that the compensation would be paid. Under the former Act, an employer could ignore the welfare of his injured worker and leave the whole problem, including the problems associated with compensation, to his insurers. This is plainly no longer the case."

Counsel for the worker submitted that the employer ought to have called evidence of efforts to assist in the rehabilitation, re-training, or re-integration of the worker in the work place. It was submitted that, pursuant to s 75A of the Work Health Act, the employer bore the onus of fulfilling the above obligations. The relevant time was said to be January 1992. Because that onus was not discharged, it was argued that s 65(6) of the Work Health Act meant that the worker must be taken to be totally incapacitated.

Counsel for the worker seeks an order re-instating a finding of full incapacity post-dating 1 January, 1993. To allow such would, in effect, be set aside the learned Magistrate's finding of partial incapacity. The worker bears an onus of proving the extent of that present partial incapacity and that onus has not been discharged. The learned Magistrate has granted "liberty to apply" failing agreement as to financial loss occasioned by the worker's incapacity.

Counsel for the employer submitted that a failure to fulfil the obligations of s 75A of the Work Health Act has no consequences arising under the Act. Its usage, it was argued, inter alia, is to avail an opportunity to seek declarations as to fitness for work or otherwise. The submission appears to ignore s178 of the Work Health Act.

There is no need to decide these matters now. It is sufficient to say that non-observance of s75A does not effect the

s65(6) issue here. The finding of partial incapacity stands. The extent of that incapacity is the subject of liberty to apply to the Work Health Court.

The learned Magistrate said:

"I note the submissions of counsel for the worker, that there is a statutory obligation on the employer under Section 75 of the Work Health Act, for an employer liable to compensate an injured worker to take all reasonable steps to provide the injured worker with suitable employment, or, if they are unable to do so, to find; suitable employment with another employer. And that there has been no evidence of any steps, let alone reasonable ones, to provide this injured worker with suitable employment, or to find suitable employment with another employer. And therefore, that it must be concluded that either the worker is unemployable or that the employer is in breach of their statutory duty.

I note, however, in this case that the worker has moved to Adelaide and although it is not clear to me exactly what date that was, it would appear to be relatively shortly after she was made redundant by Collins Radio. The Worker has registered with the C.E.S. in Alice Springs and in Adelaide but does not appear to have taken any further action to obtain employment. I do not consider, therefore, that it can be said that

> 'the worker has shown that she is not capable of earning any amount during normal working hours if she were to engage in the most profitable employment available to her'.

I am not satisfied that she cannot obtain profitable employment and, therefore, am not satisfied that she is totally incapacitated.

I therefore, do not consider that a great deal of weight can be placed upon that submission.

There has been no evidence placed before me by the worker as to what loss there would be suffered by her where she obtained work of the type mentioned or as a Counsellor once she concludes the course, which I understand that she is currently undertaking."

I agree with the learned Magistrate.

Compliance with s75A of the Work Health Act would be easier if the worker was in physical proximity to the employer. Distance between employer and employee is relevant to what would be considered "reasonable steps" of the employer. The respondent worker accepted redundancy and returned to Adelaide.

There is sufficient evidence from the various doctors and, indeed, from the respondent herself that she is not totally incapacitated.

I would dismiss ground three of the cross-appeal.

Both appeal and cross appeal are dismissed.

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