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Coles Supermarket Pty Ltd v Kovacevich [2015] WADC 87

Key Points

- Whether an error of law was made by an arbitrator in finding that the respondent worker suffered a conviction illness.
- It was found there was an error of law made due to an absence of any evidence that the respondent worker had developed an illness conviction.

Background

On 12 October 2006, the respondent worker suffered a groin injury when employed as a butcher by the appellant employer. Liability was admitted for the injury and initially no claim for weekly payments was made. The respondent stopped working for the appellant in September 2008 because of the physical demands of his work as a butcher. He commenced work elsewhere in another occupation. However, on 22 June 2009 he stopped working for that employer due to further and increased groin pain.

It was later discovered that hernias had developed and were larger than they had been in October 2006. The respondent underwent surgery to repair the hernias on 3 October 2009. The surgery was performed by Mr Clarke, General Surgeon. The respondent subsequently made a claim for recurrence of the injury and the cost of surgery. The appellant admitted liability and paid the statutory allowances. The appellant sought details of the respondent's rate of pay with the subsequent employer to enable weekly payments of compensation to be paid. The requested information was not provided, so weekly payments were not commenced.

After surgery, the respondent did not return to work in any capacity with any employer. In October 2009 he lodged an application seeking an order for weekly payments and statutory allowances arising from the recurrence of the compensable injury.

The matter proceeded to arbitration on 1 August 2014. The appellant contended that the medical evidence indicated that the respondent had recovered from the surgery and injury by December 2009 at the latest and also contended that he had failed to mitigate his loss.

The arbitrator published written reasons, finding that the respondent had been totally incapacitated since the date of the surgery and ordered payments for total incapacity and also expenses pursuant to clauses 17 and 19 of Schedule 1 of the Act.

The arbitrator found that the surgery resulted in the respondent being totally incapacitated on a physical basis from the date of surgery to March 2010. From March 2010, the respondent was not totally incapacitated from a physical point of view or physical perspective. The applicant had failed to meet its onus of proving that the respondent had failed to mitigate its loss. The respondent

developed an "illness conviction" which originated shortly after the surgery and which continued to the date of the arbitration. Consequently, the injury was totally incapacitating.

Conclusion – District Court Appeal

Appeal Ground 1

This ground was, in essence, that there is an error by the arbitrator in finding that the respondent had developed an illness conviction and was consequently totally incapacitated for work when there is no evidence capable of supporting such a finding.

His Honour was satisfied that this involved a question of law and that the preconditions for the grant of leave to appeal were met. His Honour carefully analysed all of the evidence adduced at the arbitration by both parties.

At no time during the conciliation proceedings, the arbitration proceedings or the arbitration hearing itself had the respondent asserted that he suffered from an illness conviction. His Honour said that it was apparent from the summary of the medical evidence adduced that none of the medical witnesses expressly adverted in their reports to the concept of an illness conviction. The first person to directly raise the issue of whether the respondent could be suffering from an illness conviction or psychological overlay was the arbitrator. He did this for the first time during the course of the appellant's closing submissions. At the conclusion of both parties' submissions, the arbitrator made an order granting leave to each party to file and serve "written submissions as to the potential issue of abnormal illness behavior". He also granted them leave to apply as to that issue.

Supplementary submissions by the respondent contended that the arbitrator could find on the evidence that he suffered a "psychological sequelae" or an illness conviction as a consequence of the injury and was, by reason of that, totally incapacitated. In support of that contention, he referred to the decisions of *Michael v. Panetta*, Unreported, WASCA, 18 December 1995, Library No. 950700 and *SDR Australia Pty Ltd v. Nedic* [2009] WACC C3-2009.

The appellant contended there was no evidence before the arbitrator that the injury had caused the respondent to suffer from abnormal illness behavior and that the respondent had never asserted as part of his case that he was suffering from such a condition. Consequently, the condition of abnormal illness behavior had no relevance to the issues argued at arbitration. It was also contended that there was no evidence before the arbitrator that the respondent was suffering from abnormal illness behavior or any psychiatric condition and that consequently it was not open to the arbitrator to make a finding that the respondent suffered from an abnormal illness behaviour or any other psychiatric condition.

His Honour found that the evidence established "on a common sense basis" that the worker was totally incapacitated from 22 June 2009 (when he ceased working) to 3 October 2009 when he underwent surgery. The arbitrator found that the respondent had failed to prove that there was, beyond March 2010 a physical cause for the ongoing pain which the respondent asserted he had been suffering from since the repair surgery.

The arbitrator then turned his attention to the issue of the "illness conviction". The arbitrator defined that term as "*an unconscious belief*" by a person that he *"has pain and/or total incapacity in circumstances where there is no diagnosed or any physical cause for the pain".* It was noted that this was not the same as a conscious belief – i.e malingering.

His Honour said that the decision in *Michael v Panetta* is not authority for the proposition that there is no forensic requirement for there to be medical evidence to establish a finding of illness conviction. Pidgeon J. had said in that decision that there was no requirement to call psychiatric evidence in order to establish the existence of psychological or functional overlay. In that case, there was a significant amount of medical evidence, although not psychological evidence, which provided a basis for a finding that the appellant was not deliberately exaggerating her symptoms, but was rather generally perceiving pain symptoms by reason of psychological factors.

As a matter of general principle it is not necessary for expert psychological or psychiatric evidence (as opposed to medical evidence of some sort) to be led in order to establish the causal involvement of an illness conviction. The arbitrator erroneously concluded that the decisions *"establish that a finding of an illness conviction can be made in the absence of such evidence".*

His Honour found that the *SDR Australia and Nedic* decision is not authority for the proposition that a finding of illness conviction can be made in the absence of medical evidence. Nothing in the two cases alters the fundamental and trite principle that before a trier of fact can make a finding of fact there must be some evidence which is capable of providing a basis for the making of that finding.

The issue at the heart of the first ground of appeal was whether there was evidence before the arbitrator upon which he could properly find that the respondent had developed an illness conviction. His Honour was satisfied that not one of the medical witnesses in their reports made reference to the possibility that the appellant had an illness conviction or abnormal illness behavior or psychological overlay.

In this instance (and unlike the situation that existed in both *Michael and Panetta* and *SDR Australia and Nedic*), there was no medical or other evidence before the arbitrator to the effect that a possible explanation for the severity of the respondent's symptoms, in the absence of apparent organic explanation, was an illness conviction or some form of psychological overlay. Indeed, there was not even evidence of what an illness conviction is. For these reasons, His Honour was satisfied that the arbitrator made an error of law in finding, in the absence of evidence, that the respondent had developed an illness conviction, with the consequence that the injury was totally incapacitating. That ground of appeal was therefore allowed.

Appeal Ground Two

The second ground was that the arbitrator erred in making findings with respect to the respondent's incapacity from 22 June 2009 to 3 October 2009 when the issue had not been previously conciliated.

The second ground of appeal clearly involved a question of law. His Honour was satisfied that the respondent, in his application for the dispute to be resolved by arbitration, did raise an issue that was not the subject of the conciliation proceedings. However, on considering sections 182E, 182O,

182ZT, 182ZU, 185, 188, 189 and 190 of the Act, His Honour did not accept that the arbitrator made an error of law.

It is implicit in the wording of section 189(2) that the arbitrator is not precluded from dealing in the arbitration with a matter that is beyond the scope of the conciliation.

If a dispute has not been resolved by conciliation, a party to the dispute can apply to the registrar for a determination of the dispute by arbitration and at that point the party can include in his or her application an issue in dispute which was not the subject of the conciliation. If the application is accepted by the registrar, the arbitration commences. It is then a matter for the arbitrator to decide if the issue in dispute which is identified in the arbitration application but which was not the subject of the conciliation should be determined in the arbitration. In deciding this question, the arbitrator must give consideration to issues of procedural fairness and the need to act according to equity, good conscience and the substantial merits of the case.

If, as in the present case, the additional issue in the dispute identified in an application for arbitration is one that arises out of or is closely related to that the issues that were in dispute in the conciliation, then the issue is one that can be dealt with in the arbitration without causing prejudice to the other party. The arbitrator will be more likely to exercise his or her discretion to deal with the issue as part of the application.

In the present case, the arbitrator obviously and understandably decided to determine the secondary issue even though it was an issue raised in dispute during the conciliation proceedings and that was something that he was entitled to do.

Lessons Learnt

Although it is not necessary for expert psychological or psychiatric evidence (as opposed to medical evidence of some sort) to be led in order to establish the causal involvement of an illness conviction, the arbitrator made an error of law in finding, in the absence of any evidence, that the respondent had developed an illness conviction.

His Honour found that the arbitrator may exercise his or her discretion to deal with the issue as part of the arbitration if the additional issue is one that arises out of or is closely related to that the issues that were in dispute in the conciliation and the issue is one that can be dealt with in the arbitration without causing prejudice to the other party.

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