hba *legal.*

Skippers Aviation Pty Ltd v Curtin [2015] WADC 82

Key Points

- An appeal brought on the basis that the Arbitrator erred in law by not considering all relevant evidence or give adequate reasons for their decision. Appellant also contended that the Arbitrator erred in law in finding that the respondent had total incapacity for work.

Background

The arbitration concerned the entitlement of the respondent, Ms Curtin, to payment of weekly payments and statutory expenses for a period from 11 February 2010 to 30 September 2010.

From 18 December 2006 until 10 February 2010 the respondent was employed by the appellant as a flight attendant.

On Friday 26 June 2009 the respondent had been subjected to highly inappropriate and derogatory remarks, inappropriate touching, foul language and other unacceptable behaviour, including food throwing, from intoxicated passengers during a flight from Learmonth to Perth (**the incident**).

The respondent continued to work for the appellant as a flight attendant after this incident for another 7 1/2 months until 10 February 2010.

The matter went to arbitration in respect of:

(a) Whether the respondent suffered a compensable injury as a result of the incident. The principal injury which she claimed to have suffered was post-traumatic stress disorder (PTSD).

(b) If she had suffered a compensable injury, whether that resulted in an incapacity for work after she ceased working for the appellant on 10 February 2010.

On 2 December 2014, for reasons which she published in writing on that day, the Arbitrator found in favour of the respondent on both issues.

Conclusion

Grounds of appeal

Ground 1: The Arbitrator erred in law by failing to discharge the obligation to act judicially to:

(a) consider relevant evidence and make proper findings; and

(b) give adequate reasons for decision;

Ground 2: The Arbitrator erred in law in failing to discharge the obligations to act judicially, where the Arbitrator's adverse findings on credibility meant that she carefully had to:

(a) consider relevant evidence and make proper findings; and

(b) give adequate reasons for decision; and

(c) then properly apply the rule in ***Pollock v Wellington*** (1996) 15 WAR 1 to find that there was no sufficient factual foundation for any medical opinion as to '*injury*' and '*incapacity*'.

Ground 3: The Arbitrator erred in law in finding that the Respondent had total '*incapacity for work*', in that the Arbitrator:

(a) failed to properly apply the burden and standard of proof as to whether the Respondent had the capacity for suitable employment in the relevant period; and, instead

(b) reversed the onus of proof, by concluding that the appellant's evidence was insufficient to establish that the respondent had capacity for her full time pre-accident employment and/or alternative duties.

Appeal ground 1(a) – failure to consider relevant evidence and make proper findings

The appellant submitted that the Arbitrator's findings were contradictory. However, Her Honour stated that an inconsistency or lack of logic in the Arbitrator's reasons does not mean that there has been an error involving a question of law.

The appellant also submitted that the Arbitrator should have made a finding as to whether the respondent was a credible witness and failed to make other findings relevant to credibility including her demeanour when giving evidence. The appellant relied on *Beale v Government Insurance Office of NSW* and *Velez v Tudor* in this respect.

Her Honour noted that these authorities stated that there must be a proper assessment of credibility issues in a case which turns on credibility and adequate reasons must be given for findings on credibility. Where one set of evidence is accepted over conflicting evidence an Arbitrator is required to set out findings as to how it is that the one has been accepted over the other. Specific findings to be made concerning the demeanour of a witness are not required.

Caution must be exercised with respect to an assessment of credibility on demeanour or the mere appearance of witnesses. As was stated in *Fox v Percy*, Trial Judges (or Arbitrators) should *'limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events'*.

The appellant argued that the respondent's evidence should have been rejected in its entirety because it was not reasonably open after having a look at the overall effect of the evidence because of the litany of problems with inconsistencies in her evidence. Although the Arbitrator recognised

that there were a number of problems with the credibility of the respondent and there were objective grounds to doubt her complaints, in the Arbitrator's view these matters did not carry significant weight to cause her to disbelieve the respondent on the substantive issues.

Her Honour noted that the Arbitrator was able to accept part of the respondent's evidence and reject (or form no view) on other parts.

It was clear that the Arbitrator did accept parts of the respondent's evidence and made findings accordingly and noted that all of the findings of fact made by the Arbitrator were reasonably open to her.

The appellant complained that the Arbitrator had failed to make findings in respect of several factual assertions. Her Honour considered that it was not necessary for the Arbitrator to make findings about these matters. From both s 213(4) of the Act, and the authorities, it was clear that it is not necessary for an Arbitrator to canvass all of the evidence or all of the factual and legal arguments which arise in an arbitration.

This ground of appeal did not involve a question of law. This is more in the nature of a complaint about allegedly illogical and inconsistent reasoning of the Arbitrator, or a complaint about the weight which the Arbitrator gave to parts of the evidence.

Leave to appeal on ground 1a was refused.

Appeal ground 1(b) – failure to give adequate reasons for decision

A function of reasons is to provide procedural fairness to a litigant who is entitled to know why he or she has been successful or unsuccessful, and to allow an appeal court to determine whether the decision was based on an appealable error. The reasoning process which led to the result must be disclosed with sufficient certainty to achieve those ends.

While this has been modified by the provisions of s 213(4) of the Act, the Arbitrator must still expose the facts accepted and the reasons for doing so, the law applied and the reasons for doing so, and then the reasoning process linking them and justifying the ultimate result.

The appellant submitted that given the adverse credibility findings made by the Arbitrator, the acceptance of the respondent's evidence as to her symptoms was not adequately explained and the appellant was left in a position of not knowing why it had lost in the arbitration. It was submitted that in the face of the Arbitrator's adverse findings, *'the obligation to expose the reasoning process as to why the uncorroborated evidence of a discredited witness should be accepted was an onerous one that was simply not discharged here'*.

Given the difficulties with the credibility of the respondent as identified by the Arbitrator, it was submitted by the appellant that it was not sufficient for the Arbitrator to state in her reasons that she was not prepared to dismiss totally the respondent's history simply on the basis that *'I find it difficult to believe that someone having been subjected to the appalling behaviour and physical abuse by the passengers on that flight would not suffer some sort of trauma'*.

Her Honour accepted that the fact of a trauma does not inevitably lead to a finding that there has been an incapacitating, compensable injury. However, one must look at the reasons of the Arbitrator as a whole *'to see if they give the sense of what was intended in a way that achieves the required exposure of the Arbitrator's reasoning process'*, the test in *Garrett v Nicholson*.

Reading the reasons as whole, Her Honour did not consider that the Arbitrator was equating the trauma with an injury. The Arbitrator intended to convey that the incident was the very sort of thing which might be expected to give rise to the symptoms which the respondent said she had suffered following that incident.

The Arbitrator found the respondent to be dishonest in a number of respects. However, the fact that a lie is told is not necessarily fatal to a worker's case. The Arbitrator recognised that there were problems with the credibility of the respondent, but in the end the Arbitrator determined that these matters did not carry any weight and expressly accepted the respondent's evidence about other matters.

The language used and approach taken by the Arbitrator often tended to obscure rather than expose her reasoning. The Arbitrator could have dealt with matters to do with the respondent's credibility in a far more logical and consistent way, but the fact that there is a lack of logic or inconsistency in the Arbitrator's reasons does not raise an error involving a question of law.

However, leave was refused to appeal on this ground for the following reasons.

First, although this ground of appeal was one which on its face raises a question of law, it was an attempt to persuade the Appeal Court to engage in a pure factual review.

Secondly, the result had been disclosed with sufficient certainty to enable the appellant to know why it was unsuccessful in the arbitration. Even if there are aspects of the Arbitrator's reasons which appear to be illogical and inconsistent, the reasons given are adequate. It was apparent that notwithstanding real problems with the reliability of parts of the respondent's evidence, the Arbitrator accepted other parts of her evidence.

Thirdly, in terms of the statutory obligation in s 213(4) the Arbitrator identified the facts which she accepted in coming to the decision and gave reasons for doing so.

The findings which the Arbitrator made were open to her on the evidence.

Appeal ground 2

This ground of appeal relates to the way in which the Arbitrator dealt with the medical evidence and the acceptance of medical evidence for which, it was submitted, the factual basis had not been established in accordance with the principles in *Pollock v Wellington*.

The principles of law concerning expert medical evidence contained in the decision of *Pollock v Wellington* were set out by Anderson J:

> *Before an expert medical opinion can be of any value the facts upon which it is founded must be proved by admissible evidence and the opinion must actually be founded upon those*

> *facts….As with any other evidence, expert opinion must be comprehensible and the conclusions reached must be rationally based. A court ought not to act on an opinion, the basis for which is not explained by the witness expressing it* ....

In *Beer v Duracraft Pty Ltd* McLure J stated:

> *In this case, as with the majority of cases involving medical expert evidence, the relevant history supplied by the claimant provides the factual foundation for the statement of expert opinion. In many cases there is not an exact correlation between the facts proven in evidence and the facts relied upon by the medical practitioner upon which his or her opinion is based. The role of the decision maker is to examine any variation between the two in order to assess whether any unproven fact relied on by the medical practitioner or any omission from the material given to him or her renders the opinion inadmissible or of no weight.*

The appellant argued that it was necessary for the Arbitrator to make findings about the facts as the experts understood them to be, and then as to the accuracy of those facts, for the purpose of determining the admissibility and weight of their opinions and address whether any discrepancies could be accommodated. It was submitted that there was no real analysis by the Arbitrator of the weight that could be given to the opinions expressed in the medical reports, particularly in circumstances where the Arbitrator stated that there were things said to doctors that were simply not true and doubts expressed about the extent of the respondent's social isolation.

In their first reports, both doctors relied, at least in part, on the accuracy of the history obtained from the respondent. By the time of their second reports, however, both of these doctors were aware that there were issues relating to the reliability of the histories which had been given to them by the respondent.

Her Honour noted that the Arbitrator did not examine the factual foundation for the medical opinions, but in the circumstances of this arbitration it was not necessary for the Arbitrator to do so. This was because by the time the relevant medical practitioners provided their second reports they had the surveillance material, Facebook pages and the witness statements of the respondent's work colleagues. With this information, each doctor specifically addressed whether any of this material changed their opinions.

Ultimately, however, the reliability of the histories given by the respondent to each doctor was a matter for determination by the Arbitrator.

Her Honour found that there was a factual foundation for the medical opinions. The Arbitrator made findings that were favourable to the respondent and which were open to her to make. The Arbitrator did not accept all of the evidence from the respondent (and thus the histories she gave) finding that the respondent had said some things that were not true and in effect that she had exaggerated the extent of her social isolation. However, it was not necessary for there to be an exact correlation between the facts as found and the histories relied upon by the experts: *Beer v Duracraft Pty Ltd*. It is necessary that there be a sufficient correlation to justify reliance on the expert opinion.

The submissions made by the appellant included a complaint that the Arbitrator 'cherry picked' from Dr Edwards-Smith's first report. Her Honour commented, like with any other witness in the

arbitration, the Arbitrator could accept or reject any part of Dr Edwards-Smith's evidence. There is no error of law in the Arbitrator relying on only part of Dr Edwards-Smith's first report, particularly because there was a factual foundation for the opinion expressed in that first report given the Arbitrator's findings as to the reliability of the respondent's evidence (and thus history).

The appellant contended that the Arbitrator should have found that the surveillance material and other evidence was a reliable indicator of the respondent's capabilities and showed that she socialised regularly, went out, and seemed happy and confident. Her Honour commented that this was a complaint as to the weight placed by the Arbitrator on this evidence and a submission that there should have been a different outcome. This was also a complaint about the Arbitrator's finding of fact in relation to the surveillance material. No question of law was involved in any of these matters.

The next submission made by the appellant was that the Arbitrator had sought to substitute her own diagnosis for those of the psychiatrists. On Her Honour's reading of the reports, neither psychiatrist diagnosed delayed onset PTSD. Both of them referred to symptoms beginning soon after the incident and progressing over time.

Having regard to context in which delayed PTSD was mentioned, as well as the balance of the reports, Her Honour did not consider that either of the psychiatrists did, in fact, diagnose delayed PTSD. Rather, they were of the opinion that symptoms of PTSD had been suffered by the respondent before she stopped work in February 2010. So far as the Arbitrator suggested otherwise in her reasons, that is a mistake of fact and there is no error of law involved.

Her Honour was satisfied that the facts as found sufficiently vindicated the Arbitrator's conclusions, both as to compensable injury and incapacity. She found no merit in this ground of appeal, and refused leave.

Appeal ground 3

This ground arises from the Arbitrator's statement in her reasons that having considered the evidence and in particular the appellant's submissions as to the reliability of the respondent's evidence, '*I am not satisfied that the discrete and relatively low key outings constitute a capacity to work full time in her pre-accident duties or other duties or even on a part-time basis*'.

The appellant submitted that the Arbitrator's reasons did not reflect the onus of proof and, in fact, reversed the onus.

Her Honour concluded that this was another example of infelicitous language and lack of clarity. Reading the reasons as a whole Her Honour interpreted this as a finding that the respondent's activities and social engagements were 'relatively low key outings' and that the Arbitrator accepted that she had an incapacity for the whole of the period as claimed.

This part of the Arbitrator's reasons was not material to her decision, in the sense that it contributes to it so that, but for the error, the decision would or might have been different, or that there has been miscarriage of justice.

Her Honour refused leave to appeal on this ground. As all 3 grounds of appeal failed and the appeal was dismissed.

Lessons Learnt

Although the Arbitrator recognised that there were a number of problems with the credibility of the respondent and there were objective grounds to doubt her complaints, in the Arbitrator's view these matters did not carry significant weight to cause her to disbelieve the respondent on the substantive issues.

The Arbitrator was able to accept part of the respondent's evidence and reject (or form no view) on other parts. From both s 213(4) of the Act, and the authorities, it was clear that it is not necessary for an Arbitrator to canvass all of the evidence or all of the factual and legal arguments which arise in an arbitration.

Where there are aspects of an Arbitrator's reasons which appear to be illogical and inconsistent, should the reasons, when read as a whole be adequate there will not be an error of law.

In respect of the medical evidence, although the Arbitrator did not accept all of the evidence from the respondent it was not necessary for there to be an exact correlation between the facts as found and the histories relied upon by the medical experts. It is only necessary that there be a sufficient correlation to justify reliance on the expert opinion.

Where there was infelicitous language and/or lack of clarity within written reasons, the reasons were read as a whole to determine whether the error in wording was material to the decision. As it was not material to the decision it was found that there had been no error in law.

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