Mutual mitigation: sections 75A and 75B Work Health Act

By George Roussos*

Rehabilitation objectives

As we know, regarding the *Work Health Act*, there is "...a heavy emphasis on the rehabilitation of injured workers, not merely on providing a scheme for mere monetary compensation"; Mildren J, *Maddalozzo and Ors v Maddick* (1992) 84 NTR 24.

The Doody Report of 1984 (which was the basis of the Act), specifically recommended "greater emphasis be placed on the rehabilitation of injured workers".

When the legislation commenced on 1 January 1987, a key objective of the Act included promoting "...the rehabilitation and maximum recovery from incapacity of injured workers...".

Sections 75A and 75B

On 1 January 1992, sections 75A and 75B were introduced. The second reading speech explained:

> *Rehabilitation is a critical factor in the success of any workers compensation scheme ...[and]...the bill includes specific reference to workplace based return to work programs as an integral part of rehabilitation. It also strengthens the obligations of employers to find alternative employment for their injured workers. On the other side of the coin, the workers responsibility to participate in treatment and rehabilitation or to be assessed for employment will be enhanced by the employers ability to cease payments, after 14 days notice, in cases where workers fail unreasonably to cooperate with programs aimed at returning them to work as quickly as possible.*

Sections 75A and 75B provide respectively as follows:

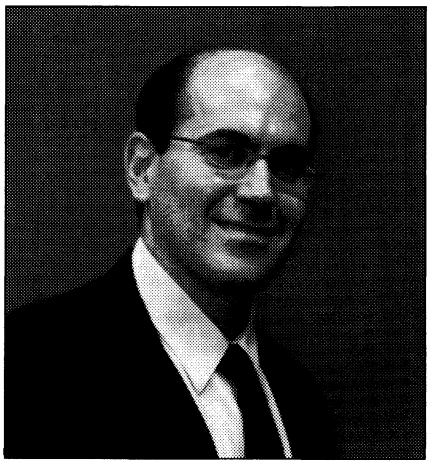
* The employer is required to assist the injured worker to find suitable employment, take all reasonable steps to provide the injured worker with suitable employment; and so far as is practicable, participate in efforts to retrain the worker;
* The worker is required to undertake reasonable medical, surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, or as required by his or her employer, present himself or herself at reasonable intervals to a person for assessment of his or her employment prospects.

In light of the above, does the Act import or recognise the common law principles of mutuality and mitigation of loss?

Whichever way we look at it, the principle where two constructions of the legislation are possible, that which is favourable to the worker should be preferred, applies (*Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at 335; *Woodruffe v The Northern Territory of Australia* (2000) 10 NTLR 52 at para 28).

This principle does not, however, invite submissions based on "the vibe". As we were recently reminded by the Court of Appeal in *Northern Territory of Australia v Pengilly* [2004] NTCA 4:

> *It is not simply a question of "construing the Act beneficially towards the worker" nor of "general equitable principles of fairness". As Lord Templeman said with the concurrence of the other Law Lords in Winkworth v Edward Baron Development Co [1987] 1 All ER 114 at 118 b: "Equity is not a computer. Equity operates on conscience but is not influenced by sentimentality."*



NT case law

It appears that, combined, the Work Health Court, Supreme Court and Court of Appeal have delivered in excess of 200 decisions interpreting various provisions of the Act.

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Sections 75A and 75B appear to have been dealt with specifically in seven decisions, mostly at the level of the Work Health Court; namely, *Hassan Bajhau v Northern Territory* (29 August 1994); *Lynnda Connell v Northern Territory* (10 November 1995); *Peter Edwards v Airpower Pty Ltd* (1 February 1996); *Christopher Cleveland v Paspaley Pearling P/L* (Supreme Court, 1999); *Denise Tanner v Anthappi Pty Ltd* (21 January 2000); *Karen Alison Power v HSE Mining Pty Ltd* (30 January 2004); and *Jason Skeen v Epsomm Pty Ltd* (18 March 2004).

From these decisions, the answer regarding mitigation of loss and mutuality is likely to turn on the meaning of the expression "suitable employment" in section 75A.

Most recently, on the basis of *Power's* and *Skeen's* cases, the legal position appears to be that s75A is exhaustively a section imposing obligations on the employer and s75B was a section exhaustively imposing obligations on the worker.

Mutuality

In *Tanner*, a permanently partially incapacitated worker voluntarily resigned her employment at Tennant Creek to follow her de facto partner to Parkes, NSW. The Court found the "employer has been most mindful of its obligations and up to the date the worker resigned appears to have acted most responsibly". The Court also found that the return to work program that the worker interrupted "was professionally run, well supervised and well managed".

The Court, however, determined the worker did not act unreasonably in leaving the program and resigning her employment. The Court observed that "it is not uncommon for workers to change jobs and locations many times throughout their working lives" and "matters personal to the worker may be considered".

By contrast, the High Court in R J Brodie (Holdings) Pty Ltd v Pennell (1968) 177 CLR 665) interpreted s11(2) Workers' Compensation Act, 1926–1964 (NSW), which provided:

> *An employer shall provide suitable employment for his injured worker during the worker's partial incapacity for his pre-injury employment. Upon any failure by such employer to provide suitable employment as aforesaid the worker's incapacity for work shall be deemed to be total, and he shall be compensated accordingly.*

The High Court described the language in this section as "somewhat loose" and observed "the "provision" of suitable employment involves an element of mutuality".

The High Court stated:

> *There can, of course, be no "failure" on the part of an employer to provide suitable employment if the employee refuses, and continues to refuse, to enter his employment, or, if the facts show that the employee's conduct is inconsistent with the necessary degree of co-operation on his part. Such would be the case where the employee has undertaken full-time employment with another employer so long as such employment continues, or, where the employee moves his residence to a place so remote from the employer's place of business as to be quite incompatible with employment by that employer...and...there cannot be a continuing failure where the circumstances are such that it can be seen that throughout any relevant period the employee is not ready, willing or able to enter the employ of the pre-injury employer.*

In Christopher Cleveland v Paspaley Pearling P/L [1999] NTSC 68, the Supreme Court came close to formally analysing and examining the meaning of "suitable employment" in the Work Health Act.

In Cleveland, "there was ample evidence from the worker to warrant his Worship's finding that the worker had resigned from his employment with the respondent, to pursue his own business venture [for]...a reason unconnected with the injury".

Justice Kearney, without deciding the issue, "expressed some doubt as to whether the principle of mutuality is applicable to the Act...".

Mitigation of loss

The Supreme Court is prepared to embrace this principle.

In Work Social Club – Katherine Inc v Rozycki (1998) 120 NTR 9, Mildren J, with whom Gallop ACJ and Bailey J agreed, noted that although a worker may be "entitled to receive the full amount of the worker's 'normal weekly earnings', so long as the worker is totally or partially incapacitated for work as the result of the injury ...[this] is of course subject to any argument pleaded and proven by the employer that the worker has failed to mitigate her loss."

This view was repeated by Mildren J in Ansett Australia v Adrian Anthony Van Nieuwmans [1999] NTCA 138: a worker "...is under a duty to mitigate his loss". Thomas and Bailey JJ agreed.

***Power's* case**

In *Power's* case, the worker commenced employment with the employer as a haulpac driver in September 1996 and the injury (post traumatic stress disorder arising out of a collision between two haulpac's) occurred in October 1996. The worker was last employed by the employer on 18 October 1996.

Although the accident was reported to the employer at the time, the claim form was not lodged until 16 months

later, on 2 February 1998. The claim was disputed.

Ms Power did not apply for mediation for four years. The employer argued it should not have to pay compensation because:

* A worker must put an employer in a position where it is able to consider action pursuant to s 75(A)(1) of the Act. An employer's obligation to make suitable work available comes into existence only if the employer is aware or ought to be aware that Ms Power "is or at least may be partially incapacitated".
* There was an implied obligation on the worker to notify the employer of her claim within the specified time and not to keep the employer in ignorance of her need to have work made available to her (obligation of mutuality).
* By reason of the workers failure to discharge that implied obligation, the employer had been deprived of the opportunity either to assess the position and make appropriate allowances or to provide the worker with suitable alternative employment.

In response, the Court decided:

* "...[T]he principle of mutuality as exists under the Work Health Act (NT) is confined to the provisions of s 75A and 75B."
* "Section 75A imposes a unilateral obligation on an employer. It does not impose an obligation on the worker in the way contended by the employer in this case, or in any other way."
* "The workers obligation is found solely in the provisions of s 75B, which casts an onus on a worker to undertake, at the expense of his or her employer, reasonable medical, surgical and rehabilitation treatment or participate in rehabilitation training or, as appropriate, in workplace based return to work programs, as required by the employer. Of course, the facts of the present case were not such as to require the worker to discharge her obligation pursuant to s 75B."

As to the failure to mitigate loss, the employer argued the worker deliberately withdrew from the labour market, failed to actively seek employment, and had not been prepared and willing to engage in employment for which she is fit.

Mr Lowndes SM held that any duty to mitigate must be found within the four corners of the legislation. A worker is only required to discharge his or her statutory obligations.

***Skeen's* case**

In *Skeen's* case, the worker was employed by the employer as a Bottle Shop Supervisor at the Humpty Doo Tavern. On 27 October 2003, the worker was shot in his right leg from a robbery during the course of his employment. The worker sustained injuries, including gunshot wounds to this right thigh, anxiety and Post Traumatic Stress Disorder. The workers compensation claim was accepted.

On 16 January 2004, the worker was certified fit to return to a Graduated Return to Work Program on restricted duties (avoid repetitive lifting, squatting or bending).

On 21 January 2004 the worker attended at work with the employer to commence the Graduated Return to Work Program on restricted duties and the employer terminated his employment on that date.

On the same day, the Work Health insurer sent the worker a Notice of Decision in accordance with s69 of the Work Health Act cancelling payments for a number of reasons, based on allegations about the workers conduct, including allegations "unrelated to your workers compensation claim".

The Work Health Insurer contended that the workers conduct and actions resulted in the termination of his employment at the Humpty Doo Tavern and "that you have unreasonably failed and/or are unable to participate in a workplace based return to work program which could enable you undertake more profitable employment and to earn an amount equal to or exceeding your normal weekly earnings at the time of your injury. But for the termination of your employment at the Humpty Doo Tavern, you would have been able to return to work and could earn an amount equal to or exceeding your normal weekly earnings at the time of the injury."

Mediation took place on 11 February 2004, following which the worker filed an application to the Work Health Court seeking compensation.

The employer alleged the worker:

* Knowingly participated in, or permitted or failed to report to the employer credit betting with the operation on Keno at the premises of the employer;
* Obtained and retained possession of several barstools that belong to the employer without employer's permission;
* Purchased stock from the employer's bottle shop at cost price without the permission or agreement of the employer; and
* Took stock from the employer' bottle shop without paying for the stock and without the permission or agreement of the employer (all of which allegedly occurred before the date of the work-related injury).

These factors resulted in the termination of the worker's employment by the employer.

The employer contended that the employer was "not required pursuant to the provisions of section 75A to take all reasonable steps to provide the worker with suitable employment and participate as far as practicable in efforts to retrain the worker because of the worker's conduct in the course is employment".

The Work Health Court disagreed. The Court ordered the employer to pay compensation.

Regarding the allegations against

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case notes with mark hunter

Hales V Hampton

Supreme Court No. JA 154/2003

Judgment of Martin (BR) CJ delivered 16 April 2004

CRIMINAL LAW - DOMESTIC VIOLENCE ACT 1997 - CONSENT ORDERS

In November 2001, a restraining order ("the order") was made against the respondent, by consent, when he appeared before a magistrate. The respondent was subsequently charged with breaching the order in February 2002.

In September 2003, the respondent pleaded guilty in the Court of Summary Jurisdiction. At an earlier mention, his counsel had informed the Court that there was *"no dispute about service or existence of the [restraining] order."*

The Magistrate hearing the case refused to act upon the guilty plea, and dismissed the charge. His Worship relied upon the fact that the precis did not establish that in November 2001 the Court had, pursuant to s 5(5) of the *Domestic Violence Act 1997* ("the Act"), explained to the respondent the effect of the order and the possible consequences if it was breached.

HELD

1. Appeal allowed; order dismissing complaint set aside.
2. The respondent having pleaded guilty, it was not incumbent upon the prosecution to prove compliance with s 5(5) of the Act.

His Honour observed that counsel for the respondent did not in the lower court seek to vacate the guilty plea entered by her client, but supported the dismissal of the charge on the erroneous basis propounded by the Magistrate.

The respondent contended on appeal that compliance with s 5(5) of the Act is a condition precedent to the existence of jurisdiction for the court making a restraining order by consent.

Mark Hunter

In his judgment, Martin CJ examined the structure of the Act and, as obiter dicta, expressed the view that failure to comply with s 5(5) does ***not*** affect the validity of a restraining order made by consent.

APPEARANCES

Appellant: R Carlin / DPP

Respondent: G Smith / NTLAC

Mutual mitigation: sections 75A and 75B Work Health Act cont...

the worker, Mr Loadman SM observed that "...all the bases upon which the Employer sought to evade its obligations are based upon hearsay or other, very circumstantial evidence which of course is when disputed capable only of being resolved by being tried."

The Court decided to deal with the case summarily because the worker (for the purposes of the summary judgement application), conceded that the allegations against him could amount to a breach of the obligation of "mutuality" under the contract of employment between him and the employer.

The worker argued that even if he breached his obligations of mutuality, such a situation did not entitle the employer to avoid its obligations under Section 75A of the *Work Health Act*. The Court agreed.

Mr Skeen referred to s75A(2) and argued that section specifically catered for a situation where an employer is unable to provide a worker with suitable employment. He contended that if the employer felt a worker had breached mutuality in some way by the workers conduct, the employer could not cancel payments but would have to follow s75A(2). The Court also agreed with this proposition.

Comment

The interpretation of "suitable employment" and the analysis of sections 75A and 75B are heavily laden with complex policy issues.

The facts of individual cases, naturally, will be key. The approach to case preparation and planning, and the presentation of the case concept at the hearing, as well as overall strategic decisions, are of elevated importance to ensuring a fair and just outcome.

Although interpreting rehabilitation provisions is inherently complex and challenging, it behoves counsel to assist the Court by distilling the principles and delivering them in a cogent and compelling way; and avoid resorting "to a welter of authorities and referral to esoteric points of law".

It would appear the Supreme Court will have an opportunity to formally analyse and examine the meaning of "suitable employment" in the Act and the principles of mutuality and mitigation of loss. The Work Health Court's decision in *Power* has been appealed to the Supreme Court. The employer/insurer in the *Skeen* case has decided not to appeal.