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LEGISLATIVE DEVELOPMENTS

There are no legislative developments to report this month.

RECENT DECISIONS

- **Withholding information from a worker results in employer action not being considered reasonable under section 11A(1)**
  Rail Corporation NSW v Aravanopules (2019) NSWWCCPD 65 (17 December 2019)
- **Fake facts? The trial judge's role**
  Zaya v RPS Manidis Roberts Pty Ltd and UGL Engineering Pty Ltd t/a Energised Alliance [2019] NSWCA 320 (20 December 2019)
- **The sting in the tail! Interest on claims for statutory indemnity**
  Workers Compensation Nominal Insurer v Allmen Engineering Projects Pty Ltd [2019] NSWSC 1582 (15 November 2019)

RECENT DECISIONS

Withholding information from a worker results in employer action not being considered reasonable under section 11A(1)

Rail Corporation NSW v Aravanopules (2019) NSWWCCPD 65 (17 December 2019)

Link to decision

Summary

The employer's defence under section 11A(1) of the *Workers Compensation Act* 1987 (WCA) was rejected on the basis that the worker had not been afforded procedural fairness as he had not been provided with the statements obtained in an investigation relating to allegations of sexual harassment made against him.

The Arbitrator and the Deputy President on appeal found that a section 11A(1) defence was not made out as the issue of reasonableness due to the withholding of the statements from examination before the Commission.

Background

The worker was employed as a Security Monitoring Facility Supervisor with the employer and supervised a team of eight workers. A complaint was made against the worker by two female colleagues in October 2015 in relation to the worker harassing them, following them to the toilet and touching them.

During a meeting on 10 November 2015 with his managers, the worker denied acting inappropriately. A further meeting took place on 23 November 2015 when the matter was referred to the Workplace Conduct and Investigation Unit and on 27 November 2015 the worker was removed from his supervisory duties and transferred to a different work area pending the investigation.

The worker ceased employment in March 2016 after consulting his GP.

Following an investigation into the allegations against the worker, a further complainant was identified who also alleged inappropriate touching by the worker. On 22 March 2016 the worker was requested in writing to respond to the allegations, although the *specific dates or times* of the allegations could not be provided. The worker was notified that the investigation would continue in the absence of a response from him.

The worker instructed solicitors who responded on his behalf in April 2016. The worker was not interviewed at any time.

Ultimately the allegations were substantiated and the worker was dismissed. The worker then claimed workers compensation which was declined by way of dispute notices relying on a section 11A(1) defence. Proceedings in the Workers Compensation Commission were then commenced by the worker.

The primary issue that arose before the arbitrator was whether the employer's conduct was reasonable for the purposes of a section 11A(1) defence.

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Decision

In the first instance, Arbitrator Harris determined that the section 11A(1) defence was not made out. He did however accept that the employer's decision to transfer the worker to alternative duties during the investigation was reasonable as the safety of employees far outweighed the worker's interests.

Arbitrator Harris referred specifically to the employer's decision not to provide the worker with any of the statements or attachments obtained as part of the investigation. The arbitrator considered that the statements should have been provided to the worker in this instance however did not consider that the worker had any right to question the witnesses.

The arbitrator also accepted that there was unfairness in how the conclusions were reached in the investigation noting that the worker was not interviewed. Arbitrator Harris referred to the decision of *State of NSW v Stokes* (2014) NSWWCCPD 78 in which it was found that the employer had failed to discharge its onus of establishing that its actions were reasonable due to the absence of putting on appropriate evidence.

Arbitrator Harris held that the worker was entitled to *procedural fairness*. The arbitrator considered that the employer had intentionally withheld *the statements from examination before the Commission* with no explanation given. The arbitrator could therefore not determine the reasonableness of the employer's actions.

The employer appealed the decision of Arbitrator Harris on four grounds, all of which were rejected by Deputy President Snell and the Arbitrator's decision was upheld. D/P Snell rejected the employer's argument that the worker was fully appraised of the allegations and was given ample time to respond.

On the issue of reasonableness, D/P Snell noted that an employer's compliance with its own protocols could be highly relevant to the issue. However he noted the case of *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v Broad* which considered that an employer complying with its own protocol would only be considered reasonable if those protocols were *objectively reasonable.*

D/P Snell considered that the Arbitrator was not required to determine whether the worker had engaged in misconduct, rather whether the employer's actions were reasonable.

In addition D/P Snell noted that the employer's actions in withholding the relevant statements taken during the investigation could suggest *the depriving of the respondent of an opportunity to make submissions was the appellant's intention, or they could simply record that the respondent's ability to make submission was impeded as a result of the failure.*

Implications

This decision confirms that in relying on a defence under section 11A(1) of the WCA 1987 the actions of an employer will not be considered reasonable if procedural fairness is not afforded to the worker. In this case the withholding of statements and other information obtained during an investigation into the worker's actions resulted in reasonableness not being able to be determined.

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RECENT DECISIONS

Fake facts? The trial judge's role

Zaya v RPS Manidis Roberts Pty Ltd and UGL Engineering Pty Ltd t/a Energised Alliance [2019] NSWCA 320 (20 December 2019)

Link to decision

Summary

This case considers the evidentiary burden carried by the plaintiff and accepts that there are risks of injury on building sites which are "par for the course" and in respect of which the employee is expected to take reasonable care.

Background

Mr Zaya claimed that he slipped and fell, injuring himself, on a recently constructed concrete stairway connecting the partially completed ground floor with the basement in the building site where he was working. He sued the occupier of the building site, Energised Alliance, and his employer, Silver Raven. His employer was contracted to place formwork, fix reinforcement steel, pour and pump concrete, finish the surfaces and strip away the formwork when the concrete had cured. Much of that work was done by sub-contractors, including PNT Formwork who had the task of stripping the formwork after the concrete had cured, and Mr Zaya's role extended to supervising that process.

The primary judge recorded that it was common ground that "experienced concrete-workers are able to safely negotiate fully formed-up staircases by exercising due care for their own safety, and commonly do so". Mr Zaya's case was that the staircase was neither fully formed-up, nor completely stripped of formwork; but rather that on the lower flight of steps, beneath a landing, formwork remained on the upper surfaces of two steps. One effect of this was to broaden the tread of the higher step. However, another effect was to make the tread of a lower step narrower because part of that tread was occupied by the base of the riser formwork.

The primary judge found that, contrary to Mr Zaya's case, the staircase had not been stripped of all of its formwork save for that on two steps. His Honour found instead that formwork stripping had yet to commence on that staircase. Accordingly, Mr Zaya's claim against both defendants failed. The trial judge said:

> *The plaintiff has not proved his case about the condition of the formwork or about how it came to be in that condition to my satisfaction on the balance of probabilities. To my mind, the evidence establishes the probability that the formwork was wholly intact and unstripped at the time of the plaintiff's accident. As described in the incident report, Mr Zaya simply slipped and fell as he was descending the staircase. It is the ordinary experience of life that such falls can occur without negligence on the part of anyone responsible for the construction or maintenance of a staircase. Moreover, that such an inherent and obvious risk materialised in this case is supported by the considerations that Mr Zaya agreed that: he was not taking particular notice as he descended the staircase; he was not looking down at his feet; he would have had no trouble negotiating riser shutters if he was aware they were there; and had he used the handrail, he could have saved himself from falling."*

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Decision

The Court of Appeal noted that the trial judge had very carefully analysed all of the oral and documentary evidence, much of which related to the dates when the concrete had been poured and the usual practice of leaving the formwork in place for 21 days to allow the concrete to cure. The plaintiff was not alone at the time of the fall, so there was no dispute that the fall had occurred.

The Court said that the judge's analysis was detailed and nuanced. His Honour brought to bear a range of matters in reaching the ultimate finding that Mr Zaya had not made out his case that there remained unstripped formwork on two steps. There was no finding of reconstruction or recent invention or fabrication on the part of the plaintiff. However, in his reasons his Honour had regard to:

- the absence of any contemporaneous record,
- the obvious imperfections in the recollections of the witnesses, and
- the inherent improbability that a small component of what itself was a 1-2 hour job – stripping the formwork from the staircase – had been left undone, something which was readily described and would have been remarkable had it occurred.

The Court bore in mind that the event of slipping and falling on a staircase on a building site, with the worker walking away and not obviously requiring immediate medical attention, was scarcely a remarkable event; and that all witnesses were giving evidence of events of more than six years previously.

The Court said that the primary judge had to determine whether Mr Zaya's case that two steps' worth of formwork remained on the staircase creating a hazard was or was not made out. The onus lay on Mr Zaya to adduce the evidence to persuade the judge that this was so. The presence of residual formwork would have been remarkable, and accorded with Mr Zaya's recollection. However, it is difficult to reconcile with the absence of any mention of it in the incident report, or in the statement prepared by the witness.

In weighing up the evidence which pointed in different directions on this key issue, the primary judge was correct to state that the absence of such evidence had the result of favouring the evidence pointing against Mr Zaya's contention.

A plaintiff may succeed in the absence of contemporaneous documentation. The plaintiff's case will be made more difficult if such documents as do exist suggest that the circumstances alleged by the plaintiff would have been documented; and in particular if existing documents are inconsistent with aspects of the plaintiff's case. Ultimately, however, the task for the finder of fact is to assess the entirety of evidence which bears upon the issue and make a finding based upon a logical analysis of the evidence.

There was no reason to suggest that the primary judge departed from what are orthodox principles of fact finding. The criticism that the primary judge implicitly proceeded on the basis that Mr Zaya was under an obligation to tender contemporaneous documents corroborating his account was unfounded.

Implications

The decision provides a demonstration of the need for a plaintiff, or any party, to satisfy the trial judge as to all of the components that need to be proved to establish liability or a defence to a claim. It is for the trial judge to weigh up the merits and persuasive power of competing statements and versions of events in the context of any available documentation or objective evidence.

When the trial judge undertakes a detailed analysis of the evidence and applies acceptable standards of analysis and reasoning to reach a conclusion as to the facts, the Court of Appeal will not disturb those findings.

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RECENT DECISIONS

The sting in the tail! Interest on claims for statutory indemnity

Workers Compensation Nominal Insurer v Allmen Engineering Projects Pty Ltd [2019] NSWSC 1582 (15 November 2019)

Link to decision

Summary

His Honour Mr Justice Campbell of the NSW Supreme Court recently considered the nature of a plaintiff's entitlement to interest on a claim for statutory indemnity.

The decision provides some useful guidance points for protagonists in the conduct of such claims.

Background

The worker (Mr Taek Gyu Kim) suffered a traumatic head injury while working as a boilermaker at the defendant's premises in March 2014. The worker's services had been lent on hire by his direct employer for him to work for the defendant.

The worker commenced proceedings against the defendant claiming personal injury damages in respect of his injury. The proceedings were set down for hearing in the Supreme Court on 3 April 2019.

A claim seeking indemnity in respect of compensation paid to and on behalf of the worker was brought in the name of the Workers Compensation Nominal Insurer ('WCNI') on which recovery proceedings were commenced approximately two weeks prior to the hearing in the worker's proceedings. This followed a number of unanswered requests for indemnity.

The claim by the WCNI was brought pursuant to s151Z(1)(d) of the *Workers Compensation Act* 1987 ('WCA') which relevantly provides that if the injury for which compensation is payable was caused under circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury, then the person by whom the compensation was paid is entitled to be indemnified by *the person so liable to pay those damages.*

The parties proposed that the worker's damages proceedings and the recovery proceedings be heard together with evidence in one to be evidence in the other.

Shortly prior to the hearing date, the WCNI reached agreement with the worker's tutor to accept a reduced sum ($2.96m v $3.42m) in full satisfaction of its statutory right to recover the total compensation paid under s151Z(1)(b) of the WCA.

The agreement reached was on condition that the worker's damages proceedings were resolved on a compromise between the worker and the defendant which subsequently transpired when the claim settled for approx. $13.5m subject to approval by the court.

On entering judgment in the worker's proceedings, the court ordered and directed the defendant to pay the agreed recovery sum to the WCNI and payment was made accordingly.

The only issues then left remaining for determination in the recovery proceedings were the claims for interest and costs.

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The arithmetic calculation of the amount of interest claimed was agreed in the sum of $382,565.25, however, the defendant disputed that the WCNI had any entitlement to the interest as claimed or at all.

His Honour considered whether in the circumstances, the payment was made under s151Z(1)(b) by which a worker is obliged to repay compensation already received out of any damages recovered or under s151Z(1)(d) being by way of the right of indemnity by the person liable to pay damages.

His Honour observed that when the defendant agreed to pay the agreed recovery amount to the WCNI although the worker had obtained judgment he had not yet recovered damages by payment to the appointed manager of his estate. As such, it could not be said that the payment was made under s151Z(1)(b) and His Honour found that it was made under s151Z(1)(d) so that s151Z(1)(e1) would then operate such that the payment satisfied the judgment outstanding to the worker to the extent of the payment made.

Issues at trial and Decision

The issues at trial were distilled to the following:

1. Whether the WCNI's entry into the recovery agreement with the worker's representatives and the subsequent payment "on behalf" of the worker, entitled Allmen to a plea of accord and satisfaction barring the WCNI's remaining claims for interest and costs;
2. Alternatively, was the WCNI entitled to a judgment for interest only, given the language of s100 of the *Civil Procedure Act* 2005 ('CPA')which was said to be different from s 83A *District Court Act*, 1973 (NSW) (repealed); and
3. Whether the Court's discretion governing the award of interest should be exercised so as to refuse WCNI's claim.

The first issue

His Honour was satisfied that there was no suggestion of any collateral purpose in the commencement of proceedings by the WCNI that the proceedings were brought for the purpose of pursuing and protecting the WCNI's statutory rights notwithstanding the imminent date for the hearing of the worker's damages proceedings.

His Honour noted in particular, that the WCNI's unanswered demands for indemnity preceded the commencement of the proceedings.

As to the plea of accord and satisfaction, His Honour found that the defendant was not a party to any contract to accept a reduced repayment so that the doctrine of privity then precluded the defendant from setting up the recovery agreement in answer to the WCNI's claim.

The second issue

The defendant acknowledged that in earlier cases, the courts had awarded interest in proceedings brought to enforce the statutory indemnity where the defendant had either paid the amount due or discharged any liability under s151Z(1)(d) by paying damages to the worker.

The defendant argued that there was a difference in the language of s83A (which operated prior to the enactment of the CPA) such that a judgment was required to enliven the power for the court to award interest under s100(2) of the CPA.

His Honour took some guidance from an earlier decision in the Court's Commercial list: *Nine Network Australia Pty Ltd v Birketu Pty Ltd* [2016] NSWSC 694 in which a debtor had paid a large debt one week after commencement of proceedings and two days before the summons was returnable in the Commercial List. The payment was characterised in that case as a capitulation with judgment entered for the amount of interest only with an order for costs.

Senior Counsel for the WCNI in the present case submitted that it was also within the Court's power to enter judgment for the recovery amount together with interest and costs, noting that the principal judgment had been satisfied.

His Honour did not find this necessary, stating that the language of subsection (2) '*makes clear that judgment may be given for interest without judgment being given for the whole or any part of the debt or damages which has been paid after the commencement of proceedings, but before judgment.*'

The third issue

On the question of whether the court should exercise its statutory discretion to refuse an award of interest or reduce the period over which interest was payable,

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his Honour observed that an award of interest is compensatory, the purpose being to reimburse the employer who has paid compensation for being deprived of its money pending payment of that compensation by the tortfeasor per Clarke JA in *Kwanchi Pty Ltd v Kocisis* (1986) 40 NSWLR 270.

His Honour was not persuaded that the defendant's arguments should deprive the WCNI of its presumptive entitlement to compensatory interest under s100 of the CPA or that he should exercise his discretion to reduce the period on which interest runs.

His Honour proceeded to enter judgment for the plaintiff for the amount claimed in respect of interest together with an order that the defendant pay the plaintiff's costs.

Implications

It is critical that early steps are taken by insurers and employers pursuing statutory claims for indemnity to make demands on a third party tortfeasor formally requesting indemnity to support any subsequent recovery action.

For defendants, it is simply not enough to protest that the commencement of recovery proceedings is an abuse of process in the expectation that any liability will be satisfied by a determination or payment in the worker's proceedings.

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