Federal Court of Australia – Single Judge

Cook v ASP Ship Management Pty Ltd. [2008] FCA 1345 (13 August 2008)

Mr Cook (the Applicant) had an accepted claim under the *Seafarers Rehabilitation and Compensation Act 1992* in respect of cellulitis contracted in 1993.

Before the Court was an appeal from a decision of the Administrative Appeals Tribunal (the Tribunal) made on 29 May 2006. The Tribunal rejected an application for review of decisions made by the respondent on 10 July 1995 and 13 June 2000 in respect of further impairments.

The appellant argued that the question of law was whether he had been denied procedural fairness by the refusal of the Tribunal to adjourn the hearing of the application. The appellant contended that the Tribunal had failed to comply with it's obligation under s 39(1) which required the Tribunal to:

> …ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case…;

and that the Tribunal failed to take account of the effect of the refusal of the adjournment, namely, that he would not be able to lead his own evidence or cross-examine the respondent's witnesses on the days fixed for hearing.

The Judge did not accept that the Tribunal breached s39(1) of the Act, finding that it was reasonable for the Tribunal to offer the appellant a phone directions hearing in view of the circumstances of the case. It was found that the Tribunal was not obliged to simply accept the appellant's assertions in favour of an adjournment without further elaboration. Further, the Judge determined that there was nothing to suggest that the Tribunal failed to take into account the consequences of proceeding in the absence of the appellant. The application was therefore dismissed.

Administrative Appeals Tribunal

Lawson and Stateships [2008] AATA 643 (23 July 2008)

Mr Lawson (the Applicant) suffered a compensable injury to his right knee in July 1991 and has been receiving ongoing compensation since 1994. The Applicant is now suffering a psychiatric disorder, which according to expert medical opinion, has deteriorated since the Respondent made an appointment for the Applicant to attend a vocational assessment with an injury management consultant in April 2006.

The main issue for decision by the Tribunal is whether the Applicant's psychiatric disorder arose from the Applicant's employment and is therefore compensable under ss 24 and 26 (1) of the *Seafarers Rehabilitation and Compensation Act* (the Act) as argued by the Applicant. Alternatively, did the Applicant's mental ailment arise from the compensation litigation and rehabilitation processes which were subsequent and extraneous to the Applicant's employment, as argued by the Respondent.

The Tribunal accepted the Applicant's arguments, that he was suffering a psychiatric disorder and that the disorder arose from the Applicant's employment. It rejected the contention that the litigation and rehabilitation process was subsequent and extraneous to the Applicant's employment.

The Tribunal found that the Applicant's psychiatric disorder involving depression:

> *was precipitated by his (the Applicant's) perception that the Respondent had dealt with the matter of his vocational rehabilitation, following his work-related knee injury sustained in 1991, in an apparently arbitrary and inconsistent manner which indicated a 'malicious disregard for his wellbeing.*

The Tribunal ordered that the respondent is liable, pursuant to sections 24 and 26(1) of the Act, to pay compensation, in accordance with the Act, to the applicant in respect of the psychiatric disorder which he contracted in or about June 2006.

Rana and Military Rehabilitation and Compensation Commission [2008] AATA 558 (1 July 2008)

The case involved an applicant who had applied unsuccessfully for compensation on numerous occasions. When the Applicant applied to the Tribunal for review of one of the decisions made, the MRCC requested an order dismissing the application on two grounds. The MRCC firstly argued that the doctrines of res judicata or issue estoppel meant that the Tribunal had already considered the matter and could not do so again. Alternatively, the MRCC sought an order under s 42B of the *Administrative Appeals Tribunal Act 1975* (AAT Act) dismissing the application on the basis that it was frivolous and vexatious.

The issues before the Tribunal was whether the doctrines of res judicata, cause of action estoppel, Anshun estoppel and issue estoppel apply to the Tribunal; and do the facts of the case support an order under s 42B of the *Administrative Appeals Tribunal Act 1975* (AAT Act) dismissing the application on the grounds that it is frivolous and vexatious.

The Tribunal considered the issue of estoppel. In doing so, the Tribunal referred to a statement from the Privy Council, which listed the three essential elements that must exist if the doctrine is to apply. The essential elements are: "(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised."

However, the Tribunal also referred to s 25(4) of the AAT Act which provides that, *"The Tribunal has power to review any decision in respect of which application is made to it under any enactment."* Accordingly, the Tribunal felt obliged to find that the Tribunal has power to review the reviewable decision. The Tribunal held that the principles of res judicata or issue estoppel, although well established and beneficial, cannot stand in the way of the statutory provisions giving the Tribunal the power to review it.

The Tribunal also declined to dismiss the application on the basis that it was frivolous and vexatious. Established precedent has determined that the pertinent tests to apply include whether the application is: ‘so obviously untenable that it cannot possibly succeed’ or that the application is ‘manifestly groundless’. These tests are extremely difficult to meet and the Tribunal held that the facts before it did not satisfy these tests. The Tribunal subsequently held that there were insufficient grounds to dismiss the application under s42B of the AAT Act.

Industrial Relations Commission

Total Marine Services Pty Ltd and The Maritime Union of Australia [2008] AIRC 477 (3 June 2008)

Total Marine Services Pty Ltd (Total Marine) applied for an order under s.496(1) of the *Workplace Relations Act 1996* (the Act) against alleged industrial action by some crew of the Akademic Fersman who threatened to refuse to allow the vessel to sail, and that crew who are Maritime Union of Australia (MUA) members would strike and prevent the vessel from sailing and refuse to provide cooking or cleaning services should the ship sail.

Mr Llewellyn of Total Marine gave evidence that he had spoken to the State Secretary of MUA, Mr Cain, about issues concerning a hard lying allowance for employees on the vessel and about the quality of water available on the vessel. There were concerns as to whether the water on the vessel available to the crew was portable and suitable for cooking and ablutions.

Mr Llewellyn stated that since Total Marine had been providing manning for the vessel there had never been an issue reported regarding any illnesses that could be attributed to water on board, nor were any health or safety issues raised. Mr Edmonds, on behalf of MUA, submitted that there had been genuine concerns raised about the quality of the water on the vessel.

The MUA submitted that the action by the employee’s was based on a reasonable concern by that employee’s about an imminent risk to their health or safety. Subsequently, the actions by the employee were covered by the exception in s.420(1)(g) to the definition of industrial action contained in the Act. Under s.420(4) of the Act, the MUA in this matter bore the burden of proving s420(1)(g) applied. The Judge was not satisfied that the MUA had discharged that onus in this case.

Having considered all the evidence, the Judge was satisfied that industrial action within the meaning of s.420(1)(a) of the Act was threatened or possible, and that as such he was required by s.496(1) of the Act to make an order that the industrial action not occur. The Judge ordered that both the MUA and those employees who were members of the MUA working for the applicant on the relevant vessel would be bound by the order.