In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011 No: 380

IN THE MATTER OF THE WORKERS' COMPENSATION ACT, 1965

DAVE GERARD PEIRIS

Plaintiff

-v-

BERMUDA BUILDING SERVICES CO. LTD.

Defendant

EX TEMPORE RULING

(In Court)

Date of Hearing: September 17, 2012

Mr. Jai Pachai, Wakefield Quin, for the Plaintiff
Mr. Mark Daniels, Charter Chambers, for the Defendant

Introduction

1. This is a claim by the Plaintiff, Dave Peiris (Mr. Peiris"), against the Defendant, Bermuda Building Services Company Limited ("the Company"), for compensation under sections 4 and 7 of The Workers' Compensation Act 1965.

2. On 4th September 2012, Mrs. Justice Wade-Miller ordered that the claim proceed on the basis of affidavit evidence alone. Affidavits have been filed by Mr. Peiris, who filed 3 affidavits giving his own evidence, and by the Company, which filed affidavits from Mr. Rudolf Daniels and Mr. Marshall Minors, who are directors and shareholders of the Company; Mr. Mudali Peiris, who is a workmate of, but no relation to, Mr. Dave Peiris, and was present at the scene of the accident; and Mr. Rohan Sunderaraj, who was Mr. Dave Peiris' supervisor.

Core Facts

3. The core facts are not in dispute. Mr. Peiris is a Sri Lankan who was born on 6th April 1965. He has a wife and three dependent children in Sri Lanka. He is an air-conditioning mechanic, who started working with Bermuda Building Services Company Ltd. on 25th November 2005.

4. On 14th August 2008, during the course of his employment, Mr. Peiris was driving a fork lift truck down a sloping road running alongside the wall of his employer's building when he lost control of the vehicle, which crashed into the wall of the building. The fork lift overturned, and Mr. Peiris' right arm was crushed by its weight.

5. Mr. Peiris was rushed to the King Edward Memorial Hospital. The following day, due to the seriousness and complexity of his injuries, he was air lifted to the Brigham and Women's Hospital in Boston, Massachusetts to undergo several skin grafts and multiple surgeries. He remained there for approximately one month.

6. On 17th September 2008, Mr. Peiris returned to Bermuda and was again admitted to the King Edward Memorial Hospital, where he stayed for a further two weeks and underwent physiotherapy.

7. Mr. Peiris then returned to Sri Lanka for further surgery and medical rehabilitation.

Medical Evidence

8. The sole medical evidence before the court about the current state of Mr. Peiris' injuries is contained in a written report of Dr. Dammika Dissanayake dated 20th March 2011:

"At present, status of his right upper limb is as follows:

- *Elbow movement is restricted to a range of 90 – 130 degrees.*
- *Supination and pronation of forearm is inadequate.*
- *Return of wrist/finger movement is reasonable though hand is not very usable considering the fact that he is right handed, too. He cannot grasp small objects owing to inadequate flexor power as well as claw hand – result of median/ulnar nerve injury. He has no wrist extension – a manifestation of severe radial nerve injury (wrist drop).*
- *Sensory return is not complete as one would expect from the severity of nerve injury (severe crushing).*

Unfortunately, owing to the extreme nature of injury scope for further reconstructive surgery such as tendon transfers is very limited for him. Slight improvement in elbow mobility may be obtainable with flap/skin grafting procedures. However, improvement by such procedures will be mainly cosmetic – rather than functional. As it is, his present condition can be categorised as permanent disability involving his dominant right upper limb."

Payments

9. The Company entered into a written agreement with Mr. Peiris dated 4th October 2008 to pay him something while he was unable to return to work. The agreement is headed "Rehabilitation Support" and is signed by Mr. Minors and Mr. Sunderaraj on behalf of the Company,

and by Mr. Peiris on his own behalf, under the words "understood and agreed". I shall set it out in full:

"This refers to the above subject and to our meeting with the Directors of Bermuda Building Services Co. Ltd on Thursday the 2nd October 2008 and to our subsequent telephone conversation on Friday the 3rd October explaining the support package afforded for your financial, Medical and rehabilitation for the next 6 months. Please find details below:

a) Your wages will be paid out as follows:
BD$ 500.00 per week until end of October 2008
BD$ 340.00 per week until end of March 2009

b) BBSC will cover medical and physiotherapy expenses to the value of BD$500.00 per month. All invoices pertaining to your therapy, treatment and transportation should be forwarded to our accounts for processing.

All payments as per above guidelines will be processed during our normal biweekly pay period.

Please note, the above will apply if and only BBSC is financially able to meet its financial obligations with regards to its business."

10. The Company was as good at its word and made a number of payments to Mr. Peiris. The Company's version of those payments is set out in a schedule exhibited to the second affidavit of Mr. Daniels. Of these payments, the Plaintiff accepts that he received $39,683.88 by way of salary. There is a dispute between the Plaintiff and the Company as to whether a further $1,570.15 was a payment by the Company or was paid to the Plaintiff from other sources. The Plaintiff also accepts that he was paid the equivalent of $7,365.05 by way of medical expenses.

11. However, on 17th January 2011 the Company again wrote to Mr. Peiris, by a letter headed "Rehabilitation Assistance". The letter stated:

"This refers to our communication vide our letter dated 4th October 2008. As you are well aware BBSC has been extremely gracious in its support to you with your rehabilitation allowance and medical bills since October 2008. We trust the support extended to you over and beyond our commitment date of March 2009 has helped you in rehabilitating your injured arm to a great extent.

Regrettably, we have come to a point that we are no longer able to support you financially as we have done this far due to the company's financial situation.

On behalf of everyone here at BBSC we wish you all the best with your continued recovery and for the future."

It was that letter that triggered these proceedings.

Relevant Statutory Provisions

12. I turn now to the statutory provisions that govern Mr. Peiris' claim. These are set out in the Workers' Compensation Act 1965 ("the Act").

13. Section 4 of the Act, which is headed "Employer's liability for compensation for death or incapacity resulting from accident", provides as follows:

"(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the Act:

Provided that…….

(b) if it is proved that the injury to a worker is attributable to the serious and wilful misconduct of that worker, any compensation claimed in respect of that injury shall be disallowed:

Provided that where the injury results in death or serious and permanent incapacity, the court on a consideration of all the circumstances may award the compensation provided for by this Act or such part thereof as it shall think fit.

(1) For the purpose of this Act, an accident resulting in the death or serious and permanent incapacity of a worker shall be deemed to arise out of and in the course of his employment, notwithstanding that the worker was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the worker for the purposes of and in connection with his employer's trade or business."

14. Section 6 of the Act, which is headed "Compensation in the case of permanent total incapacity", provides:

"(1) Where permanent total incapacity results from the injury, the amount of compensation shall be the "actual earnings" of the deceased in the four years prior to the incident, or four years of the average annual per capita income as recorded in the most recent official national statistics, whichever is the lesser."

15. Section 7 of the Act, which is headed "Compensation in the case of permanent partial incapacity", provides:

"(1) Where permanent partial incapacity results from the injury the amount of compensation shall be –

(a) in the case of an injury specified in the Schedule such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of causing capacity caused by that injury; and

(b) in the case of an injury not specified in the Schedule such percentage of the compensation which would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury."

16. Section 2 of the Act contains an interpretation section which defines "partial incapacity" as meaning:

> *"where the incapacity is of a permanent nature, such incapacity as reduces his [i.e. the employee's] earning capacity in any employment which he was capable of undertaking at that time."*

17. The Schedule to the Act provides that a loss of arm at the shoulder should be deemed to be a 70% disability and a loss of arm at the elbow should be deemed to be a 67% disability. The Schedule further provides that total permanent loss of the use of a member shall be treated as loss of a member.

18. Section 32 of the Act deals with "Contracting out". It provides:

> *"… that a worker, who has obtained compensation in respect of permanent partial or permanent total incapacity, may enter into a contract reducing or giving up his right to compensation under this Act in respect of any further personal injury by accident if such contract is certified to be fair and reasonable by any duly authorized officer of the court."*

19. Section 34 of the Act deals with "Medical expenses". It provides:

> *"(1) The employer shall defray the reasonable expenses incurred by a worker within Bermuda as the result of an accident which would entitle the worker to compensation under this Act….*
>
> *c. in respect of surgical expenses in hospital or in a doctor's clinic, or of the fees of an anaesthetist in accordance with the prevailing scale approved by the*

Bermuda Hospitals Board for surgical and anaesthetic fees;

d. in respect of medical expenses in connection with medical treatment, skilled nursing services, ambulance charges, and the supply of medicines to an aggregate amount not exceeding $1,000; …"

Merits

Section 4(1) of the Act

20. I turn now to the merits of this case. By reason of the ruling of Mrs. Justice Wade-Miller on 4th September 2102, there was no dispute as to liability. The learned judge ruled that section 4 of the Act provides:

> "*that where an accident results in serious and permanent incapacity within the meaning of the Act even if the claimant is guilty of serious and wilful misconduct, he/she is never the less entitled to compensation."*

That does not mean, however, that at the hearing before me the correct interpretation of section 4(1) of the Act was not in dispute.

21. In a thoughtful submission, Mr. Daniels invited me to have regard to the unnumbered "paragraph" immediately following the "paragraph" numbered subsection 4(1) (b):

> *"Provided that where the injury results in death or serious and permanent incapacity, the court on a consideration of all the circumstances may award the compensation provided for by this Act or such part thereof as it shall think fit."*

22. Mr. Daniels invites me to consider that although that "paragraph" does not have a separate number, it should in fact be construed as a free standing provision, perhaps marked subsection "4(1)(c)". On this interpretation, irrespective of whether there has been fault on behalf of the worker, in any case where the injury results in death or serious and permanent incapacity, the court has a discretion to award such part of the compensation provided for by the Act as it sees fit.

In other words, Mr. Daniels submits, this "paragraph" gives the court a free standing discretion.

23. Not surprisingly, Mr. Pachai invites me to consider that that is not the correct interpretation, and clearly Mrs. Justice Wade-Miller did not consider that to be the correct interpretation either. It would be surprising had the legislature intended this "paragraph" to be a separate subsection that it is not separately numbered. It would be surprising, too, if such a discretion were to arise only in the case of a more serious injury, i.e. one resulting in death or serious and permanent incapacity.

24. My view is that, notwithstanding the ingenuity of Mr. Daniels' submission, this "paragraph" falls to be read as part of subsection 4(1)(b). The combined sense of the two "paragraphs" comprising that subsection is this: if it is proved that the injury to a worker is attributable to the serious and wilful misconduct of that worker, then, where the injury results in death or serious and permanent incapacity, the court may nevertheless award all or part of the compensation provided for by the Act. This is notwithstanding that, had the injury not resulted in death or serious and permanent incapacity, the court, by reason of the worker's serious and wilful misconduct, would not have a discretion to award any compensation at all.

Misconduct

25. If I am wrong in this interpretation, it nevertheless falls for me to consider those factors urged by Mr. Daniels as going to Mr. Peiris' discredit. If, on the other hand, I am right in this interpretation, it is open to Mr. Daniels to persuade me that Mr. Peiris has been guilty of serious and wilful misconduct to which his injury is attributable and that he should therefore obtain less compensation than he would have done otherwise.

26. There is a difficulty in ascertaining exactly what happened, by reason of the fact that this matter is tried on the basis of affidavits. I am therefore in no position to resolve any conflicts of evidence.

Accordingly, Mr. Daniels, on whom the onus lies, has only been able to satisfy me of factors going to the Plaintiff's discredit where they are not in dispute.

27. There are two such factors. First, Mr. Peiris' colleague, Mr. Mudali Peiris, was standing on the forks of the fork lift at the time of the accident. However there is no evidence from which I could reasonably conclude that that was a contributing factor to the accident. Secondly, Mr. Peiris was not, as he should have been, wearing his safety harness. This undoubtedly did contribute to the severity of his injuries – the uncontested evidence of Mr. Mudali Peiris was that Mr. Peiris was thrown from the fork lift when it fell on its side and was dragged down the road with it. Not wearing a safety harness, however, falls far short of the high hurdle set by the test of what constitutes serious and wilful misconduct.

28. In this regard I have been helpfully referred by Mr. Pachai to two old House of Lords authorities. The first is *Johnson* v *Marshall* [1906] A.C. 409. In that case Lord Loreburn LC stated at page 411:

> *"We are not dealing with negligence, but with something far beyond it, and we are applying a remedial statute. I can perceive no evidence of serious and wilful misconduct. … the word "wilful", I think, imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment. Further, the Act says it must be "serious," meaning not that the actual consequences were serious, but that the misconduct itself was so."*

29. Lord James took a similar approach at pages 412 – 413:

> *"But the use of the word "serious" shews that misconduct alone will not suffice to deprive the workman of compensation. The class of misconduct that would do so might well be represented by such instances as if a workman, whilst working in a mine on certain seams of coal, struck a match and lit his pipe, or if he walked into a gunpowder factory with nailed boots, refusing to use the list slippers provided for him. Of course, these are but instances*

illustrating conditions of absolute disregard of the lives and safety of many. ... I think that the words of the statute, "serious misconduct," represent a higher standard of misconduct than that which would justify immediate dismissal."

30. The House of Lords followed *Johnson* v *Marshall* in *Bist* v *London & South Western Railway Co* [1907] A.C. 209. Lord James stated at page 213:

"Also it occurs to me that the word "wilful" must not only mean a mere intentional breach of a rule, but it also must mean wilful with the intention to be guilty of misconduct. An instance was given, I think, by my noble and learned friend Lord Halsbury of a breach of this rule by an engine-driver leaving the engine while in motion for the purpose of seeing what is the matter. Of course he is breaking the rule, and in one sense breaking the rule is misconduct; but he does not break it for the purpose of being guilty of misconduct in such a case; he breaks it for the purpose of doing what he conceives to be best for his employer. If there may be such a case of a breach of the rule where the person through whose act the cause of action arises has done an intentional act, we must, before we give effect to the words "serious and wilful misconduct," see what was in the man's mind at the time that he did so break the rule."

31. It is clear from those cases that not wearing a safety harness is not serious and wilful misconduct. It might well, in a claim for negligence, constitute contributory negligence. But we are not dealing with a claim in negligence; we are dealing with a claim under the Workers' Compensation Act 1965, with respect to which concepts of negligence and contributory negligence are not applicable. The upshot is that, absent proof of serious and wilful misconduct, I have no discretion to reduce the amount of compensation payable under the Act.

Quantum

32. There is no dispute that Mr. Peiris suffers from permanent partial incapacity, nor that his actual wages over the past 4 years amounted

to $174,720. There is a slight dispute as to the extent of the incapacity sustained by Mr. Peiris in respect of his arm. Mr. Pachai urges me to conclude that he has sustained a total permanent loss of the use of the arm, whereas Mr. Daniels invites me to conclude that what he has in fact sustained is a loss of the use of the arm at the elbow.

33. Turning to the medical report and the photographs supplied by Mr. Peiris, I note that, whereas the arm is of little practical use, there is a slight remaining function in the hand and that Mr. Peiris can raise the arm at the shoulder. This appears to me to constitute an almost total loss of the use of the arm at the elbow, but in the context of an injury that nevertheless extends to the totality of the arm, albeit that the totality of the arm is not wholly incapacitated.

34. Quantum falls to be calculated by applying a combination of section 7(1) (a) (re the arm below the elbow) and 7(1)(b) (re the arm above the elbow) of the Act. A 70% loss of function of the entire arm would give a figure helpfully calculated by Mr. Pachai of $122,304.00. I am going to round this down to $122,000.00 as there is still some function in the arm above the elbow. That is the amount of compensation to which Mr. Peiris is entitled under the Act.

Offset

35. There then arises the question of offset, i.e. to what extent should that figure be offset against the monies already paid by the Company. Under the statutory scheme it is not possible to offset salary against compensation because compensation and salary are separate and distinct. However the medical expenses paid to Mr. Peiris were not part of his salary. Section 34 of the Act provides that medical expenses are only recoverable with respect to the reasonable medical expenses incurred by a worker within Bermuda. That provision might strike many, as it strikes me, as out of date, given that a large part of Bermuda's work force is from overseas, and that, irrespective of whether or not a worker is from overseas, he or she may well receive medical treatment outside of the jurisdiction. Nevertheless, it is not for this court to re-write the Act, although the

legislature may wish to consider whether section 34 should be amended.

36. Mr. Pachai suggests that it may nonetheless be possible for Mr. Peiris to recover the medical expenses, independently of the "main" award of compensation, if the agreement between the Company and Mr. Peiris dated 4th October 2008 is treated as an agreement concluded under section 32 of the Act. However, that section only covers agreements in which the worker reduces or gives up his rights to compensation under the Act. The agreement into which Mr. Peiris entered with the Company did not purport to do that. Therefore the award of compensation does fall to be offset against the medical expenses.

Conclusion

37. Mr. Peiris is entitled to compensation under the Act in the sum of $122,000.00, of which $7,365.00, in the form of medical expenses, has already been paid. This leaves the sum of $114,365.00 due and owing to Mr. Peiris.

38. I find that Mr. Peiris is entitled to interest on that figure, i.e. $114,365.00, at the statutory rate, which I am told is 7%, from the date of his injury.

Costs

39. There remains the question of costs. [After hearing counsel's submissions, I awarded costs to the Plaintiff, to be taxed if not agreed.]

Dated this 17th day of September, 2012 _____

Hellman J