CASES AND TRIBUNAL DECISIONS

Game, Set and Match; Court Finds Reasonable Decision

Dotlic v Hannover Life Re of Australasia Limited [2017] NSWSC 986

Link to decision

Background

The Supreme Court of NSW recently delivered a judgment regarding the reasonableness of an insurer's decision in a TPD claim containing an 'opinion' clause (commonly referred to as the 'stage 1' enquiry).

Decision

The plaintiff, Mr Dotlic, claimed an entitlement to a Total and Permanent Disablement benefit as a result of suffering injuries in a motor vehicle accident in 2009. At the time of the accident, Mr Dotlic was performing heavy manual work as a formwork labourer.

The relevant TPD definition was:

> *1.3.1 the Insured Person is unable to follow their usual occupation by reason of accident or illness for six consecutive months and in our opinion, after consideration of medical evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remuneration Work for which the Insured Person is reasonably fitted by education, training or experience;*

After reviewing medical and other evidence, the insurer and the trustee found that Mr Dotlic was likely to return to lighter work within his education, training and experience and declined the TPD claim. Mr Dotlic commenced proceedings in the Supreme Court.

At the hearing, Justice Pembroke decided to limit the preliminary question to whether the decision to decline the TPD claim was reasonable. The scope of the separate determination question formulated by his Honour was:

> *"I order that there be determined separately and in advance of all other issues in the proceedings the following question, whether the opinion of the first defendant pursuant to cl 1.3.1 of the policy that in its opinion the plaintiff was not "unlikely ever to be able to engage in any regular remuneration work for which he is reasonably fitted by education, training or experience" should be vitiated."*

His Honour recited, with approval, the comments of *McLelland J in Edwards v Hunter Valley* (also followed in *TAL Life Ltd v Shuetrim*) that an insurer is obliged to act reasonably in considering and determining a claim. While noting that it is not the Court's task to "*substitute its own view for that of the insurer*" unless the decision taken by the insurer can be shown to be "*unreasonable*" on the material before the insurer, the decision cannot be attacked.

In relation to the concept of "reasonableness", his Honour had regard to the High Court's decisions in *Minister for Immigration & Citizenship v Li* and *House v The King*, which concerned the exercise of a discretion. These decisions provide that unreasonableness was "*a conclusion which may be applied to a decision which lacks an evident and intelligible justification*".

The plaintiff argued the insurer had not addressed the correct question, being whether Mr Dotlic, in the real world, was likely ever to obtain the identified roles in light of the plaintiff's limited English and his past education, training and experience.

His Honour had regard to the voluminous evidence relied on by the defendants in reaching their decisions. With respect to the evidence supportive of Mr Dotlic's claim, his Honour noted the inherent difficulty in relying on a claimant's general practitioner's opinion, as treating doctors generally "*accept the patient's account, questioning neither its truthfulness nor its completeness*".

His Honour found the overwhelming weight of the evidence (both medical and otherwise) was supportive of the decision that Mr Dotlic was likely to return to regular remuneration work within his education, training and experience. In relation to the "real world" arguments made by Mr Dotlic, his Honour found that there was no requirement for the insurer to act as an employment agency and find a particular employer willing to take on Mr Dotlic. It was reasonable for the insurer to base its opinion on the "*considered professional advice of experienced vocational assessors*". The vocational evidence identified the appropriate vocational options taking into account Mr Dotlic's restrictions. The roles identified in the vocational evidence were "*the type of jobs that are frequently available in countless workplaces across a range of industries*". There was no need for the insurer to question the conclusions reached in the vocational evidence.

His Honour found that the insurer acted reasonably in forming its opinion and answered the separate question in favour of the defendants. The proceedings were dismissed and the plaintiff was ordered to pay the defendants' costs.

Implications

This decision is an important case regarding the 'stage 1' enquiry, as it provides guidance on the meaning of a "reasonable decision". Other cases have considered the concept of reasonableness, without providing an explanation of what that term actually means. In this case, his Honour accepted the arguments that a reasonable decision is a decision which has an "*evident and intelligible justification*". The decision is a reminder that the task of the Court is not to decide whether it would have reached a different decision. A court may not agree with a decision but should not disturb the decision if it is supported by evidence. The court is not required to embark on a merits review of the decision. His Honour also provided guidance on the level of analysis expected by an insurer when considering medical and vocational evidence.