CASES AND TRIBUNAL DECISIONS

Return to Sender – court refers trustees decision back

Gomez v Board of Trustees of the State Public Superannuation Scheme [2017] QSC 98

Link to decision

Background

Mr Gomez was working as an intensive care nurse for Queensland Health when he injured his right shoulder and subsequently developed anxiety and depressed mood. In the context of a workers compensation claim he was provided with light duties, however he suffered a further injury to his shoulder. He continued to work in a restricted capacity until April 2013. In August 2013 he accepted a voluntary redundancy offered by Queensland Health.

He made a claim for a total and permanent disability (TPD) benefit pursuant to the terms of the State Public Superannuation Scheme. The scheme is administered by a Board of Trustees (**the Board**) in accordance with the relevant legislation and the *Superannuation (State Public Sector) Deed 1990* (**the Deed**).

Decisions

Mr Gomez's claim for a TPD benefit was determined by the Board and declined by letter of 9 January 2013 (the **first decision**).

He sought a review of that determination and provided both submissions and new material for consideration. That material was considered and the claim was declined on review (the **second decision**).

He sought a further review and again provided additional material for further consideration. A senior Board delegate determined after a review of the additional material that it did not indicate a reasonable possibility of a different result to the Board's second decision, and accordingly affirmed the refusal to pay the TPD benefit (the **third decision**).

Issues

The issues in the proceedings were firstly, whether it was reasonably open to the Board to find that Mr Gomez was not TPD (the first and second decisions) and secondly, whether the Board had failed to properly reconsider the plaintiff's request for TPD benefits (the third decision).

Findings

It was put to his Honour Justice Boddice that all 3 decisions should be considered by him. He found that as the first decision became of no practical effect once the second decision was made, there was no utility in determining whether the first decision was properly made.

Having moved to the second decision his Honour noted that the Courts' power is not a general merits based review stating:

> "if, on a consideration of the evidence as a whole, the second decision was a decision that defendant could properly make in good faith as a real and genuine consideration of the exercise of power, it is not open to successful challenge."

He noted that it is open to a court to set aside a decision if it is satisfied that the decision:

1. was not made in good faith; or
2. was not made on a real and genuine consideration of the material before it; or
3. was not made in accordance with the purpose for which the power to make the decision was conferred.

He went on to state that such "a conclusion maybe inferred by a court if satisfied the trustee has come to a conclusion no reasonable person could have come to on the evidence before it or that a real and genuine consideration of the issue required properly informed consideration by the making of relevant inquiries about giving attention to natural justice requirements. "

His Honour then considered the medical and other evidence to determine whether the second decision was sustainable by reference to the particular TPD definition in the Deed.

Having cited with approval from *Jones v United Super Pty Ltd*[1] that "the identification of some skills acquired or developed in one occupation, which may be applied in another , does not necessarily mean that the worker is fitted by experience for the second occupation"; he nevertheless found in the context of this TPD definition that limitations such as the plaintiff not having previously undertaken specific duties in the alternative occupations suggested did not mean they were occupations that he could not undertake, having regard to his education training or experience.

It was submitted that the Board should not have given weight to IME medical reports in preference to those of treating practitioners, nor preference to reports written following an examination of other reports and clinical notes rather than following examination of Mr Gomez.

His Honour held that the challenge to the second decision amounted to no more than an assertion that a different decision was open on the evidence. He concluded that this was not a sufficient basis to set aside the decision as the Board had made a reasoned choice between competing bodies of medical evidence, in accordance with its obligations and duties. Where a reasoned choice has been made, it is not proper for a Court to interfere.

He concluded that the second decision was a decision reasonably open to the Board exercising its powers in good faith and having real and genuine consideration to the claim in accordance with its duties and obligations under the Deed.

In respect of the third decision, his Honour cited with approval the obligations of a trustee in respect of a request for reconsideration as enunciated in *Gilberg v Maritime Super Pty Ltd*[2]:

1. it is relevant for trustee to take into account the trouble and expense to the trust involved in obtaining medical reports;
2. if the trustee did not consider that the material provided in support of the new application indicated a reasonable possibility of a different result by reason of circumstances occurring since the previous application or by reason of evidence not recently available at the time of the previous application, it would be appropriate for the trustee to decline to obtain further reports; and
3. if the trustee considered that the materials provided in support of the new application did reasonably indicate a possibility of a different result, by reason of circumstances post the application, or by reason of evidence not reasonably available at the time of the previous application, and that, having regard to the interests of the application and the interests of other members, that possibility justified the expense

> of appointing medical practitioners to make further report, then it would be appropriate for the trustee to take that course.

Considering the further material before the Board in the context of these obligations, his Honour found that the new material provided with the request for a further re-consideration was material which addressed matters which had not been specifically considered previously and that the Board breached its duty by failing to properly consider the application made to it and referred the claim back to the Board to reconsider, stating that:

> "Whilst there remains in any in that event, a discretion to decline to make an order that the Trustee probably consider the application, the material place before the defendant was of such a nature that it cannot be concluded there is no reasonable possibility that the defendant, acting reasonably will accede to the plaintiff's application in the event of the reconsideration. It is not appropriate to exercise the discretion to decline the order in those circumstances."

Implications

This decision serves as a timely reminder that the things a court will have regard to in determining whether the determination of a trustee has miscarried are not necessarily the same as these of an insurer though they may be similar in some circumstances.

However, a court will be reluctant to substitute its decision for that of a trustee where its determination has miscarried. The court must be satisfied that there is no reasonable prospect of the trustee properly engaging in the task required before the court would step in and exercise its discretion to make the determination instead of for the trustee.

The judgment also demonstrates that the Queensland courts continue to grapple with the lower court determination in the matter of *Jones v United Super Pty Ltd*. While Justice Boddice did not ultimately make a finding that the plaintiff was not reasonably qualified to occupations he had not previously engaged in, the factual circumstances were very limited and the occupations referred to were all nursing occupations though in areas in which the plaintiff had not had specific employment.

[1](2016) NSWSC 1551

[2](2009) NSWCA 325 at [25]-[28]