CASES AND TRIBUNAL DECISIONS

Intermittently TPD

Williams v Mercer Superannuation (Australia) Limited & Ors (2017) QDC 289

Link to decision

Background

The plaintiff was an administrative assistant, employed by a merchant bank who conducted her work primarily from her home by telephone and computer. She was diagnosed with fibromyalgia (although this was contentious) and stopped work citing ill health, subsequently accepting a redundancy.

She lodged a Total and Permanent Disability claim under a policy of insurance held by her superannuation fund in which a continuous absence from work through "injury or illness" for a period of six consecutive months (i.e. the waiting period) was a condition for payment of a TPD benefit.

The evidence before the Insurer tended to indicate that the plaintiff could work a full day or even for several days, but that the plaintiff's symptoms could strike at unpredictable times and could disable her from working at all for a day or a number of days.

Nevertheless, whilst awaiting a decision on her TPD claim, the plaintiff commenced studying a law degree in 2012 which she ultimately successfully completed, at an accelerated rate, by early 2015. She graduated with Honours class IIA.

Both the Insurer and the Fund declined the plaintiff's TPD claim.

Decision

Whilst finding that the underlying injury or illness would *'probably… have prevented her working in her former position until the end of the waiting period',* the Court also found that the fact that her position was coincidentally made redundant at that same time, meant that the redundancy was the cause of the absence from work, not the injury or illness. The plaintiff had therefore failed to satisfy a threshold requirement.

The plaintiff also failed in her claim that the Insurer had breached its duty of good faith and fair dealing by failing to consider certain pieces of relevant medical evidence which were not mentioned in the decline letter.

The Court accepted that a failure to consider the particular documents would have resulted in breach but inferred that it was probable that the insurer had considered those documents in forming its decision. This inference was made because the insurer's reasons included analysis that reflected the content of one of the particular reports and because the reports had otherwise been referred to by the insurer in earlier correspondence.

The plaintiff's allegations that the trustee had failed to consider information and make relevant enquiries in determining whether the plaintiff was TPD also failed. The Court found that the rules of the fund did not impose on the trustee an obligation to form an opinion as to a member's entitlement to a TPD benefit in circumstances where, if there was a policy of insurance, the trustee was to defer to the insurer's determination about whether the member was TPD.

In ruling against the plaintiff on stage 2, the Court determined that once it was demonstrated that the plaintiff had a capacity to do relevant part-time work or even casual work of an intermittent nature she was disentitled to the benefit under the policy.

The plaintiff's General Practitioner gave evidence that she suffered unpredictable fluctuations in energy, concentration and physical capabilities and the plaintiff gave evidence that her illness made her too unreliable to undertake permanent employment.

The Court found that given the tenacious resilience she had demonstrated for three years in completing her law degree in spite of her symptoms, she was unduly pessimistic about her unreliability and it was likely that she could "summon the same tenacious resilience if called upon to do part-time administrative work."

Implications

With its treatment of the waiting period, this judgment seems to contradict what appears to have been a relatively settled area of TPD law as expressed in the NSW decision of Mabbett (*Mabbett v Watson Wyatt Superannuation* [2008] NSWSC365), namely that where the TPD definition speaks of an absence from work due to illness or injury, all that needs to be shown is that illness or injury was a cause of absence, not the only cause.

Similarly, the judgment appears to fly in the face of *Birdsall (Birdsall v Motor Trades Association of Australasia Superannuation Fund Pty Ltd* [2014] NSWSC 632) in which it was considered that the relevant enquiry was limited to "regular employment for reward other than casual work of an intermittent nature." Whereas here the Court accepted a capacity for work of an intermittent nature was sufficient to disentitle the plaintiff. If correct, this is significant, particularly in the context of claims relating to degenerative conditions and conditions which fluctuate in severity.

However, it is worth remembering that a Queensland District Court judgment will not be binding in all courts and jurisdictions.