

Chapels on Whatley v Bedford [2015] WADC 129

Key Points

- The onus is on a worker to prove what they earned or were able to earn in some suitable employment or business during a period of total or partial incapacity, and that this was less than their pre-accident earnings.
- The arbitrator made orders for payment of weekly compensation for partial incapacity without any evidence being adduced by the worker in respect of what she was earning or able to earn in some suitable employment or business after the occurrence of her injury.
- It was not open to the arbitrator to make this order without such evidence before her.

Background

Ms Bedford was employed by Chapels on Whatley between 2011 and 2013. On 28 December 2012 Ms Bedford had an accident at work when she attempted to move a box of beer. Ms Bedford complained of experiencing severe pain through her left rib and chest. Following this accident, Ms Bedford was absent for a couple of days before returning to work on reduced hours of five hours a day.

On 21 January 2013 Ms Bedford made a workers' compensation claim in respect of the injury on 28 December 2012 for a total incapacity for work.

On 6 February 2013 Ms Bedford had another accident at work when a wooden barrel she was sitting on gave way underneath her and after falling to the ground another barrel fell across her legs. Ms Bedford was made redundant by Chapels on Whatley two days after this accident.

The matter went to arbitration and the arbitrator ordered that the employer was liable to pay:

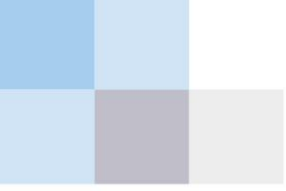
1. weekly payments of compensation for total incapacity from 31 December 2012 to 1 January 2013;
2. weekly payments for partial incapacity from 16 February 2013 onwards;
3. If the parties cannot agree, there is liberty to apply as to costs and quantification of the above orders.

The Law

58. Liability for weekly payments, arbitrator may determine

(1) Where, in the circumstances mentioned in section 57A(1) —

(a) a period of 19 days has elapsed since those circumstances arose and the worker has not received the first of the weekly payments claimed; or



an arbitrator may, on the application of the worker hear and determine the question of liability to make the weekly payments claimed.

Schedule 1 to the Act sets out the compensation entitlements of workers. Clause 7 relevantly provides,

7. Total or partial incapacity

(1) Subject to section 56 and subclause (3) when total incapacity for work results from the injury a weekly payment during the incapacity equal to the weekly earnings of the worker calculated and varied in accordance with this Schedule.

(2) Subject to section 56 and subclause (3), where partial incapacity for work results from the injury, a weekly payment during the partial incapacity equal to the amount by which the total weekly earnings of the worker calculated and varied in accordance with this Schedule would exceed the weekly amount exclusive of payments for overtime or any bonus or allowance which he is earning or is able to earn in some suitable employment or business after the occurrence of the injury.

In *Westralian Farmers Co-operative Ltd v Bunce* the Full Court held to succeed in a claim for partial incapacity pursuant to sch 1, cl 7(2), a worker must prove: (a) that she was partially incapacitated for the period of time contended; and (b) what she earned or was able to earn in some suitable employment or business during that period, and that this was less than her pre-accident earnings.

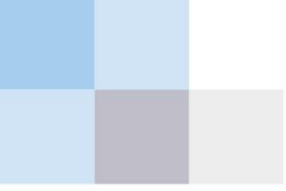
Conclusion

The District Court appeal was heard by His Honour District Court Judge O'Neal.

The appellant employer sought leave to appeal the arbitrator's decision in respect of orders 1(b) and 2. Two grounds of appeal arose directly from the arbitrator's order that there was liability for weekly payments of compensation when there was no evidence of Ms Bedford's total weekly earnings' or the 'weekly amount' which she was earning or able to earn in some suitable employment or business after the occurrence of her injury.

His Honour noted that Ms Bedford did not adduce evidence of what she was capable of earning in other positions that she was capable of performing in for the purposes of sch 1, cl 7(1) and his Honour found in puzzling that the arbitrator determined liability to pay weekly payments for total incapacity. His Honour noted that the worker's representative had made the courageous decision not to advance an alternative claim for partial incapacity at the arbitration.

His Honour commented that the provisions of the Act do give arbitrators considerable discretion as to the manner in which they conduct hearings, among other things. In his opinion however the Act does not give arbitrators power to order employers to pay compensation in circumstances where there is no evidence that the employer is in fact liable under the Act.



It was His Honour's opinion that the arbitrator was wrong to make the orders she did and allowed the appeal on this basis.

Contact

For more information on this article, please contact:

Ruth Slater
Partner
T: +61 (0) 8 9265 6014
M: 0409 291 916
ruth.slater@hbalegal.com

Rebecca Pope
Senior Associate
T: +61 (0) 8 9265 6015
M: 0414 946 662
rebecca.pope@hbalegal.com

www.hbalegal.com

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.