



WORKERS' COMPENSATION CLAIMS WA NEWSLETTER

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1. LEGISLATIVE DEVELOPMENTS

There have been no legislative changes.

2. CASE SUMMARIES

KANAR–v- A & S SADAK PTY LTD [No. 2] [2015] WADC 43

The Respondent contended that the Court did not have jurisdiction to hear and determine the appeal because Registrar Melville did not provide “written reasons” for his decision on 16 May 2012. It was submitted that as there are no written reasons for decision, the statutory right of appeal conferred by Section 247(1) of the Act was not enlivened.

Stevenson DCJ concluded that the District Court did not have jurisdiction to hear and determine the appeal and he found as follows:

1. It is a pre-condition of an appeal at the District Court for the Appellant to obtain written reasons of the Arbitrator’s decision to be appealed against.
2. Section 247 is not ambiguous. The provisions mean what they say.
3. Section 213 of the Act imposes an obligation on an Arbitrator to provide written reasons at the request of any interested party. An Appeal Court requires an outline of the Reasons for Decision either in writing or by way of transcript so that the position sought to be overturned can be properly understood and the reasoning for the primary decision makers’ conclusions exposed. Such a starting point is fundamental to any orderly appeal process and it is an essential requirement to ensure procedural fairness is accorded to all affected parties. The 28 day time limit within which to appeal is predicated on the provision of written reasons for the decision to be appealed against.

Comment:

If you have been unsuccessful in the defence of a matter and wish to give consideration to appealing it is essential to request the Arbitrator to give written reasons in accordance with Section 213(3) of the Act. In the absence of written reasons, the District Court will not have jurisdiction to hear an appeal.

Conversely, if you have been successful in the defence of a matter and there are no issues you wish to consider appealing, careful consideration should be given before requesting written reasons for the decision, bearing in mind that copies will be sent to all parties.

CAROL BROOKS JOHNSON –v- SHINE LAWYERS PTY LTD [2015] WADC 42

Whilst this case deals with an employment contract issue, it is of some interest as the Court was prepared to grant an order for security for costs. The purpose of an order for security for costs is to ensure that an award of costs can, at least in part, be satisfied in the event the defence succeeds.

The claimant, had been employed by Shine and after leaving their employment returned to the United Kingdom.

Security for costs is governed by Order 25 of the Rules of the Supreme Court.

Order 25 Rule 1, no order shall be made merely on the account of the poverty of the Plaintiff or the likely inability of the Plaintiff to pay any costs which may be awarded.

Order 25 Rule 2 gives the Court a discretion to order security for costs in a number of circumstances including circumstances in which the Plaintiff is ordinarily resident out of the jurisdiction, notwithstanding that he or she may be temporarily within the jurisdiction.

Order 25 Rule 3 sets considerations the Court is required to take into account:

- a) The prima facie merits of the claim;
- b) What property is available within the jurisdiction to satisfy any costs order against the Plaintiff;
- c) Whether the normal processes of the Court would be available within the jurisdiction for enforcement of any order for costs against the Plaintiff.

The decision to make or refuse to make an order for security for costs involves an exercise of the Court's discretion.

With respect to the merits of the claim the Principal Registrar concluded that the Plaintiff's case was not one which on its face looked weak. On the other hand, he also considered the defence had merit.

Within the Western Australian jurisdiction the claimant had a pension fund worth approximately \$30,000.00 that she could access but upon which tax would be levied leaving a balance of about \$19,000.00 which could be paid into a National Australia Bank account. She also had a savings account of \$1,000.00.

In the United Kingdom the claimant had a motor vehicle worth approximately \$20,000.00, \$4,000.00 in a savings account and ownership of a property with her husband valued at around \$965,000.00.

Even though the claimant had some assets within the jurisdiction the Principal Registrar doubted how accessible they would be to the Defendants and concluded that it was not inconceivable that monies held for the claimant by way of superannuation could not be accessed by a Judgment Creditor to satisfy a costs order.

The Registrar concluded that if the Defendant was successful they would be able to enforce a Judgment in the United Kingdom by virtue of the provisions of the *Foreign Judgments (Reciprocal Enforcement) Act 1933* (U.K.).

The Registrar decided to exercise his discretion in favour of the Defendant and made an order for security for costs. He was not prepared to make an order based upon a costs assessment of the Defendant in the sum of \$105,000.00. He was however prepared to make an order for \$20,000.00 which was his estimate of the costs the Defendant may incur if successful, in enforcing the Judgment in the United Kingdom.

In making the order the Principal Registrar was mindful that security for costs in the sum of \$20,000.00 would not bar the claimant from pursuing her action, or put her to an undue financial stress associated with having to sell her residence in circumstances where she had a claim in which, on the face of it, has merit:

Comment:

In circumstances where a claimant is resident out of the jurisdiction and has no assets within it, you may wish to give consideration to bringing an application for security for costs. The Court has a discretionary power to make such an order and in doing so must have regard to each of the factors referred to in Order 25. If the claimant has a strong claim in negligence and any impecuniosity is as a result of the work related injury, it may be difficult to persuade a Court that such an order should be made.

Nevertheless, in appropriate circumstances this is a matter worthy of consideration. If the claimant is not able or willing to make the payment for security for costs, the action will be stayed.

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