
TRANSCRIPT OF PROCEEDINGS

MAGISTRATES' COURT

CIVIL JURISDICTION

MELBOURNE

FRIDAY 25 AUGUST 2017

BEFORE MR J. O'BRIEN, MAGISTRATE

GARRY DIBELLA

Applicant

- and -

PACIFIC BRANDS PTY LTD

Respondent

MS ZHU appeared on behalf of the Applicant.

MR MILES appeared on behalf of the Respondent.

J U D G M E N T

HIS HONOUR: This is a claim for replacement hearing aids. The plaintiff is now aged 57 years and is retired. He had been employed in an apparel factory as a mechanic for many years. He had commenced as an apprentice with Red Robin Socks, working in Lygon Street, North Carlton. In 2001 the business was taken over by Pacific Brands. He worked in a big factory where there were some 200-odd machines. He wore hearing protection but nevertheless sustained injury by way of industrial hearing loss. He was made redundant in 2009.

He made a claim against the defendant and by notice dated 31 December 2010 the defendant's claims agent, QBE, accepted liability for medical and like expenses, including the provision of hearing aids. I was told that QBE had since then maintained that acceptance and paid further medical and like expenses for the maintenance of those hearing aids and replacement batteries et cetera. A bundle of ten accounts for these services was tendered, together with a list that had been put together summarising those accounts, and that was Exhibit A. The most recent of those accounts in this bundle was dated 12 August 2015. Presumably QBE was complying with its obligations under the *Accident Compensation Act*, see s.5 of the definition section under the definition of "Medical Service", item (ba) at p.22 of reprint No.19 of the *Accident Compensation Act* to which I shall refer later in more detail. He also made a s.98 claim in respect of his hearing loss and received a lump sum of money representing

1 a loss of 14.6 per cent.

2 Mr Dibella gave evidence that following his
3 redundancy in 2009 he obtained employment with a much
4 smaller employer called Bulleen Screens which only had a
5 few noisy machines. He said he spent most of his working
6 day in the office and on average spent only about one hour
7 of an eight hour day on the factory floor. He said that
8 he wore hearing protection there. He finally retired
9 in April 2017.

10 He said that he went for an annual check-up each
11 year, which was paid for by QBE, and sometime in April
12 2016 an audiologist told him that he should get
13 replacement hearing aids. He made a request of QBE for
14 payment for these but this request was rejected by QBE by
15 notice dated 27 May 2016, asserting that his hearing had
16 deteriorated. He was then employed by Bulleen Screens and
17 citing ss.88(3) and (4) of the *Accident Compensation Act*
18 placing the responsibility now on Bulleen Screens as the
19 last employer in point of time.

20 Certainly these sections would apply to claims for
21 hearing loss where there had been more than one relevant
22 employer and no previous claim, or a subsequent claim
23 where there had been more than one employer since an
24 earlier claim had been made. In a case such as this,
25 where there has been an earlier claim accepted and a lump
26 sum payment made and medical and like expenses paid, but
27 only one subsequent employer, it seems to me that this is
28 simply a new claim to be calculated in the normal way from
29 which any earlier lump sum payment would be deducted,
30 pursuant to the provisions of s.98C(9A). However, this
31 only applies to 98 and 98C claims and does not impact upon

1 the obligation of the defendant in the admitted claim to
2 continue to meet its obligations for ongoing medical and
3 like expenses. It seems to me that any potential claim
4 for additional compensation for hearing loss under either
5 s.98 or s.98C or E, or the rare situation where weekly
6 payments may be involved, does not exculpate the defendant
7 from honouring its obligations under the original claim
8 for ongoing medical and like expenses.

9 This brings us to the definition section, which
10 I referred to earlier, of the *Accident Compensation Act*
11 s.5, definition of "medical service" and again I refer to
12 the page that I referred to earlier, p.22 of reprint 19,
13 where "medical service" (ba) provides - and I did not
14 bring the Act with me - but from memory it provides for
15 the repair and replacement of hearing aids and as far as
16 I am concerned, in accordance with that obligation, it is
17 still the responsibility of the defendant for the ongoing
18 maintenance and replacement of the plaintiff's hearing
19 aids, and in the terms of this case that is replacement.

20 So, I order that the defendant pay the medical and
21 like expenses of the plaintiff being for the replacement
22 hearing aids being a medical service pursuant s.5, under
23 the definition "medical service" (ba).

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1 MR MILES: If Your Honour please.

2 HIS HONOUR: I am just a bit unsure as to what the actual cost
3 is. There was an amount of some \$2,500 mentioned but
4 I don't know whether that is the correct cost. Perhaps if
5 I leave the Bench you two could have a look at that so
6 that I can determine the appropriate scale of costs.

7 MR MILES: I thought it was less than \$5,000, in which - - -

8 HIS HONOUR: Yes, I thought it was about \$2,500, which means
9 the cost would be on Scale B.

10 MR MILES: Scale B, yes.

11 MS ZHU: That is correct.

12 HIS HONOUR: All right. In that case, I will make that order
13 in respect of the medical and like expenses and I will
14 order that the defendant pay the plaintiff's costs,
15 including any reserve costs, on Scale B. The hearing only
16 went for a fairly short time so there's no refreshers.

17 MR MILES: No.

18 HIS HONOUR: But I'll certify for counsel to hear reserve
19 judgment. I will hand back the relevant documents that
20 were given to me by the parties. I will write that formal
21 order on the file and I'll bring it back and give it to my
22 clerk.

23 MR MILES: Thank you, Your Honour.

24 HIS HONOUR: All right, I will leave the Bench for a few
25 minutes while I do that. You will be around for a while
26 longer, Mr Miles.

27 MR MILES: Until at least 12 o'clock.

28 HIS HONOUR: You won't mind waiting
29 (End of recording.)