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Is a parking patrol officer an exempt worker?

Mahal v The State of New South Wales (No 3) [2018] NSWWCCPD 30

The Presidential Division of the Workers Compensation Commission recently heard an Appeal by Inderjit Mahal, the Appellant, against the first instance decision of an Arbitrator. That Appeal primarily concerned the interpretation of a 'police officer' in the context of Schedule 6 Part 19H Clause 25 of the *Workers Compensation Act 1987* (NSW) ("1987 Act").

Material Facts

At all relevant times the Appellant was employed by the New South Wales Police Force as a Parking Patrol Officer. She suffered career ending injuries to her cervical and lumbar spine, bilateral upper extremities, and bilateral lower extremities on 1 December 2000 (deemed date of injury) as a consequence of the nature and conditions of her employment.

In 2016, the Appellant brought a further claim for lump sum compensation, weekly benefits, and medical expenses. Though the Appellant pursued her lump sum claim under the now repealed Table of Disabilities, she also sought a Whole Person Impairment assessment for the purpose of establishing an ongoing entitlement to weekly benefits. The Appellant's claim was referred to an AMS who assessed only 7% Whole Person Impairment.

Sections 39 of the 1987 Act limits an injured worker's entitlement to weekly benefits to 260 cumulative weeks unless he/she has greater than 20% WPI. Her ongoing weekly benefits were consequently terminated at the expiration of the 260 week period.

The Appellant subsequently made an Application to the Workers Compensation Commission claiming continuing weekly benefits on the basis that, as a 'police officer', she was exempt from the operation of Section 39 of the 1987 Act. Schedule 6 Part 19H Clause 25 provides that the 2012 Amendments do not apply to police officers, paramedics, or firefighters. Arbitrator determined that the Appellant did not satisfy the applicable definition of a 'police officer' contained in the Section 21 of the *Interpretation Act 1987* (NSW). It followed that the Appellant was not an exempt worker and her claim failed.

The Appellant Appealed against that decision, arguing that the Arbitrator erred by applying the wrong statutory definition of a 'police officer' and by incorrectly interpreting the relevant case law. The Appellant also raised issue with the Respondent opposing his alleged 'police officer' status in circumstances where it had not previously done so.

The Appeal

Pursuant to Schedule 1 of the 1998 Act, persons who contribute to the Police Superannuation Fund under the *Police Regulation (Superannuation) Act 1906* (NSW) are exempt from the definition of a 'worker' in the context of the NSW workers compensation scheme. On the basis that the 1998 Act employs a definition derived from the *Police Regulation (Superannuation) Act*, the Appellant submitted that it was not intended for the 1998 Act to import the definition contained in the *Interpretation Act.* Further, she argued that the workers compensation legislation is remedial and beneficial in nature and therefore the most beneficial definition should be preferred.

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Acting President Snell rejected the Appellant's submissions in that respect. Firstly, he found that Schedule 1 of the 1998 Act relates to deemed workers and is in no way relevant to the Appellant's argument or situation. Further, pursuant to Section 1A of the *Police Regulation (Superannuation) Act*, the Police Superannuation Fund established under the Act is closed to members of the NSW Police Force who became members on or after 1 April 1998. The Appellant became a parking patrol officer almost a decade after that time. Additionally, the Respondent led evidence that it made superannuation contributions on behalf of the Appellant to First State Super Fund. Pursuant to Section 5 of the *Interpretation Act*, its provisions apply to any Act or instrument except in so far as a contrary intention appears in the Act or instrument concerned. Acting President Snell found that neither the 1987 or 1998 Acts indicate a contrary intention so as to displace the statutory meaning of a 'police officer' established in the *Interpretation Act*.

The Appellant relied on the decisions in *New South Wales v Chapman-Davis* [2016] NSWCA 30 and *State of New South Wales v Stockwell* [2017] NSWCA 30. In light of those authorities she contended that the specific nature of her employment was indicative of the fact that she was a 'police officer'. The Appellant adduced evidence relating to her standard issue uniform, equipment, training, and her routine duties. Acting President Snell disagreed with the Appellant, stating that those authorities placed focus on the particular designation or status of the worker and not the characteristics or functional aspects of his/her work. The fact that the Appellant had not taken an oath or affirmation and did not hold a police rank in compliance with the *Police Act 1990* (NSW) was generally inconsistent with her being a 'police officer'. It was therefore determined that the Appellant was never classified as or held the status of a 'police officer'.

The Appellant argued that the Arbitrator erred in relying on *Muscat v Parramatta City Council [2014]* NSWWCC 406. The Appellant argued that that decision was not applicable to his situation as it involved a worker employed as a ranger by the Council. In that matter the worker did not argue that he was a 'police officer', but rather that he was entitled to the advantages of being a 'police officer' under the *Police (Special Provisions) Act 1901* (NSW) ("1901 Act"). In any event, the worker was unable to bring himself within the definition of a 'police officer' under the *Interpretation Act* and therefore the application of 1901 Act did not modify his entitlement to workers compensation. Though not factually similar, Acting President Snell was satisfied that Arbitrator's reasoning correctly followed the decision in *Muscat*.

By virtue of the Respondent's failure to oppose the Appellant's 'police officer' status in the previous proceedings, the Appellant asserted that the Respondent ought to be estopped from now doing so. The Appellant referred to his various pre-2012 and post-2012 workers compensation claims in which his employer was identified as the NSW Police Service and he was treated as a police officer. Acting President Snell stated that the Appellant's alleged 'police officer' status was not in issue in those prior proceedings and therefore the Respondent's silence on the issue bore no relevance on the current proceedings.

Implications

This decision provides clear-cut authority on the statutory definition of a 'police officer' for the purposes of Schedule 6 Part 19H Clause 25 of the 1987 Act. 'Police officer' is defined in Section 21 of the *Interpretation Act*, which imports the definition in Section 3 of the *Police Act*. An alleged 'police officer' is only exempt from the operation of the 2012 Amendments if he/she satisfies that statutory definition. In determining whether a worker is in fact a 'police officer', weight is to be given to his/her particular designation or status. Also of importance, Acting President Snell determined that a party's silence on an issue that is not in dispute cannot be held as an admission of fact in future proceedings.

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