

## 1998 FEDERAL COURT DECISIONS OF INTEREST

[1998] 88 FCA

**SUTCLIFFE v. GMH**

Von Doussa J

Date :19 February 1998

Jurisdiction: FCA

Type: J

WCAT file No.: N/A

Decision maker: Exempt employer

Applicant: Exempt employer

Respondent: Worker

Employer: General Motors-Holden's Automotive Ltd

Worker: Timothy Warren Sutcliffe

Unreported in print; available online at [www.austlii.edu.au/au/cases/cth/federal\\_ct/1998/88.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/88.html)

Appeal from Industrial Registrar Farrell, 274/97

- termination of employment
- whether employer had valid reason for termination of worker's employment
- worker dismissed for alleged serious and wilful misconduct in connection with a workers compensation claim
- worker partially incapacitated by compensable disability
- extent of residual ability to perform work
- worker's marriage had failed and worker had sought assistance of exempt employer in removals
- exempt employer's response was to refuse and to arrange surveillance
- after surveillance, employer had dismissed worker for serious and wilful misconduct
- prosecution also on foot
- principles for adjourning civil proceedings while prosecution underway

"Not uncommonly both civil and criminal proceedings may arise from the same factual situation. Where this occurs, the defendant in the criminal proceedings may also be a defendant in the civil proceedings. In this situation the court seized of the civil proceedings sometimes exercises a discretionary power to order a stay until the criminal proceedings are completed. A comprehensive statement of the considerations that may be relevant to the exercise of that power was given by Wooten J in *McMahon v. Gould* (1982) 7 ACLR 202. The guidelines enunciated by his Honour have been approved in a number of a later decisions in this Court: see *State of Western Australia v. Bond Corporation* (1992) 114 ALR 275 at 296.

"Where it is the defendant in the contemporaneous criminal proceedings who applies for a stay, prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court, and the burden is on the defendant seeking a stay to show that it is just and convenient that the plaintiff's ordinary right should be interfered with. An important factor is the defendant's so called 'right of silence' which applies in the criminal jurisdiction. That right might be impaired if the defendant is required to disclose his grounds of defence, or to break his silence before being called upon to answer the charges against him in the criminal jurisdiction. Another factor is the possible burden on the defendant of preparing for two sets of proceedings concurrently.

...

"There is another unusual feature in the facts of this case, although as the complaint had not then been laid in the Magistrates Court, this may not have been apparent at the time the Judicial Registrar considered the application. Normally, where civil and criminal proceedings arise out of the same factual situation, there will not be an identity of parties in the two proceedings. The prosecutor will not be one of the parties in the civil proceedings. No issue of res judicata or issue estoppel could arise. In the present case however, the description of Mr Weinel as complainant in the Magistrates Court proceedings, and his involvement as authorised officer for GMH in the Industrial Relations Court proceedings, indicates that in reality there is a commonality of interest between the parties such that a judicial determination directly involving an issue of fact or law in one action would dispose of the issue once and for all: see *Blair v. Curran* (1939) 62 CLR 464 at 531 and *Ramsay v. Pigram* (1968) 118 CLR 271 at 279. The differing onuses of proof applying in the civil and the criminal jurisdictions could give rise to a factor important in the exercise of the discretion to stay the proceedings. However, in the present case Mr Sutcliffe indicated that he was prepared to have the veracity of his version of events decided in the civil proceedings where the onus on GMH would be to establish the valid reason for his dismissal on the balance of probabilities (whereas in the criminal

proceedings allegations made against Mr Sutcliffe would have to be proved beyond reasonable doubt). Any issue arising from the different onuses of proof could not warrant granting GMH a stay of the criminal proceedings.”

- whether a worker guilty of serious and wilful misconduct requires examination not only of his actions but his mental processes relative to them

“The question whether an employee has been guilty of serious and wilful misconduct requires an examination not only of his actions but also of his mental processes relative to them. The misconduct must be conduct so seriously in breach of the contract of employment that by standards of fairness and justice the employer should not be bound to continue the employment. The conduct must also have the quality that it is ‘wilful’, that is it must amount to a deliberate flouting of the essential contractual conditions: see *North v. Television Corporation* (1976) 11 ALR 599, *Gooley v. Westpac* (1995) 59 IR 262 at 269 and *Bartucciottto v. Euro Printing*, von Doussa J, unreported, IRCA 72/96, 21 February 1996 at 17-18.”

- worker not expected to expend all capacity for work in performance of duties in priority to all personal and domestic demands

“The first formulation of the GMH case depends on the proposition that if a partially incapacitated employee on a given day has the capacity to perform activities consistent with the requirements of his or her work duties, the employee should expend that capacity in the performance of work duties in priority to all personal and domestic demands. This proposition does not withstand testing, and in my view is wrong.

“Normal healthy employees in full time employment can be expected to have and to exercise a capacity for physical activity which considerably exceeds that required in the ordinary hours of a full time contract of employment. At the least, in addition to employment, activities will involve those customarily pursued in day to day living - the domestic requirements of keeping house, shopping, maintaining a place of abode, and often caring for children. Additional activities may also include such things as exercising pets, engaging in sporting activities and engaging in overtime or additional paid remuneration. The minimum domestic requirements of many employees, particularly those required to maintain a domestic environment and care for children, are considerable.

“If such an employee is injured, he or she is still required to fulfil the domestic requirements of the kind mentioned or at least many of them. It is common place for employees to be certified as totally incapacitated for work, yet for them to have the capacity to attend to essential household duties. If an employee before injury participated in sporting and other plainly optional pleasure activities, after injury he or she would reasonably be expected to first use a residual partial capacity for activity in whatever rehabilitative or light work duties that are offered by the employer before enjoying optional pleasure activities. However, activities that are reasonably necessary and required by that person's established lifestyle stand in quite a different position. Take a single supporting parent who suffers a work related injury as an example. The necessary domestic activities of such a person are likely to require physical activity for, say, three hours per day on such matters as bathing, dressing, preparing meals, shopping, cleaning, and so on. In this situation, when these reasonably necessary duties are fulfilled the injured employee might have no remaining capacity to engage in paid work. In my opinion that person would be totally incapacitated for work within the meaning of the *Workers Rehabilitation and Compensation Act*.

“The notion that under the *Workers Rehabilitation and Compensation Act* partial incapacity for work is to be assessed having regard only to the objective extent of the physical capabilities of an employee has been rejected both at first instance and on appeal by the Supreme Court of South Australia: see *Workers Rehabilitation and Compensation Corporation v. James* (1991) 56 SASR 414, and on appeal (1992) 57 SASR 365. The legislation does not disregard the ‘normal life’ requirements of an employee: cf *Workers Rehabilitation and Compensation Corporation v. Phillips* (1991) 56 SASR 72 per King CJ at 74, with whom Millhouse J agreed. What activities carried out by a particular employee are part of that person's necessary domestic activities is a matter for judgment having regard to that person's established lifestyle and community standards. I respectfully agree with the test formulated by Mullighan J in *James*' case at first instance at 425, and approved by the members of the Full Court at 377 and 385:

“It is the concept of reasonableness which is the safeguard.”

“As Mullighan J observed at 425, it would make nonsense of the legislation if genuine and proper reasons relating to the personal situation of an employee were of no relevance.

“The law does not require a disabled employee to abandon the performance of reasonably necessary domestic activities, for example by hiring domestic assistance, or searching out gratuitous services from family or friends, so that whatever limited capacity for activity remains can be devoted exclusively to light work provided by the employer.

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“In the present case, had Mr Sutcliffe not been injured at all he would have had the capacity to clear out his house, and to continue at work. Even after the injury in early 1996, had the aggravation injury on 22 August 1996 not happened, Mr Sutcliffe would have had sufficient residual capacity for activity to perform his domestic duties, to engage in certain pleasure pursuits (including riding a motor bike) and to perform the alternative duties that were provided for him by GMH. But for the aggravation on 22 August 1996 he may well have had the capacity to attend the afternoon four hour shifts for which he was rostered, and also to have performed the house clearing activities. It would certainly have been reasonable for him to attempt to do so. Had he followed this course, the moving activities during the day may have aggravated the underlying back condition so that he suffered pain which prevented him from attending work later in the day. In this situation I consider he would have been totally incapacitated from performing his light duties at GMH on those days. In my opinion, the house clearing activities performed by Mr Sutcliffe on 3-6 September 1996 were of a reasonably necessary kind. He would have been able to perform them without difficulty but for his injuries. As it was, and probably because of the aggravation on 22 August 1996, the house clearing activities exhausted his limited capacity for activity on the days in question. In my view the evidence fails to establish that Mr Sutcliffe was not totally incapacitated for work on those days, having regard to his medical condition and his personal circumstances. As I understand the evidence of both Dr Cheung and Mr Osti, this is the point they were endeavouring to make when it was suggested to them that the films showed that Mr Sutcliffe was not totally incapacitated.”

- worker not given proper opportunity to defend himself before dismissal
- insufficient attempt made to investigate situation before decision to dismiss made