

Case Law Update – the Latest Position on Total and Permanent Disablement

Trustees will be interested in a recent decision of the Supreme Court of New South Wales, *Manglicmot v Commonwealth Bank Officers Superannuation Corporation*, which provides a good summary of the key issues trustees need to keep in mind when considering Total and Permanent Disablement (TPD) claims. Two issues of particular relevance discussed by the Court were:

1. the duties of trustees when entering into a new policy for life insurance; and
2. the ability of trustees to imply "part time" work as constituting "work" when declining a TPD claim

This case also discusses the general obligations of superannuation trustees and highlights the importance of trustees acting in good faith. In the case the plaintiff, a former employee of the Commonwealth Bank of Australia (Bank), made a claim against the defendant, the Commonwealth Bank Officers Superannuation Corporation (Trustee), as trustee of the Commonwealth Bank Officers Superannuation Fund (Fund). The plaintiff claimed that the Trustee breached duties owed to him as a member of the fund, and that as a result he suffered loss and damage.

Facts

The plaintiff was employed as a bank teller and began full time work with the Bank in 1998. The plaintiff was a member of the Fund. The Fund provided the usual benefits of a staff superannuation scheme, including a benefit on Total and Permanent Disablement. The TPD benefit was the member's accrued benefit in the Fund and a supplementary benefit, as insured.

The plaintiff sustained various injuries in 2000; an injury at work in January, a motor accident injury in July, and a further injury at work in October. As a result he was absent from work for large parts of the year, the longest being two and a half months. The pain and disability rendered the plaintiff incapable of working more than 15 hours a week as a teller or in any other banking work. He continued to work part time until 2003 when the branch he was working in closed and he accepted redundancy. The plaintiff made a TPD claim to the Trustee on the basis that he was unable to work more than 15 hours a week. The claim was referred to the Fund insurer, Commlnsure Pty Limited (Commlnsure).

Commlnsure declined the plaintiff's claim for the TPD benefit. Reasons for this included:

1. "Discrepancies between the surveillance video/report and medical reports. Mr Manglicmot was seen shopping, carrying shopping bags and driving, for example, without any signs of hesitation or demonstration of discomfort."
2. Mr Manglicmot accepted redundancy; he did not cease work due to an inability to carry out his duties.
3. The balance of evidence suggested Mr Manglicmot had a capacity to return to work in his usual occupation.

The plaintiff's claim

Part way through 2003 the defendant, in the face of a 130 percent rise in premiums, changed its life insurance provider from Hannover Life Re of Australasia Limited (Hannover) to Commlnsure. The plaintiff alleged that this constituted a breach of the Trustee's duties, as the terms of the new policy changed and restricted coverage such that the plaintiff was not able to recover the benefit (approximately \$120,000) that he would have had the previous policy still been in place. He claimed he had suffered loss and damage as a consequence of the Trustee's decision to enter into the new contract with Commlnsure.

The policies

The Hannover TPD policy, which was in place until 30 June 2003, required the person to be "...unable ever to engage in or work for reward in any occupation or work which he or she is reasonably capable of performing by reason of education, training or experience."

The Commlnsure TPD policy, applying to claims after that date, required that "the member will not ever be able to resume any occupation, whether or not for reward." Occupation was defined as "...an occupation that the person can perform, on a full time or part time basis..."

The agreement between Commlnsure and the Trustee also contained a term that the new contract would match or better the current terms and conditions in the Hannover contract. The Trustee instructed its solicitors to check that there were no gaps in this respect.

Trustee's duties

The Trustee accepted that:

1. It owes its members a duty to act in the members' best interests;
2. It owes a duty to act impartially, excluding from consideration matters which are irrelevant and giving proper consideration to matters which are relevant;
3. It owes members of the Fund a duty to exercise reasonable care in managing the Funds affairs;
4. It must act honestly and in good faith;
5. It must take an informed view of whether or not to exercise its discretion and not act irresponsibly, capriciously or wantonly; and
6. It must exercise its power with due consideration for the purpose for which the power was conferred and not for some ulterior purpose.

Reasons

The plaintiff did not dispute that the Trustee was empowered by the trust deed to enter into the contract with Commlnsure. The Trustee could exercise this power in its absolute discretion, and although it was not bound to give reasons for entering the contract with Commlnsure, the Trustee did in fact do so.

Where no reasons are given the test was recognised as being whether there has been a failure by the Trustee to act "with an absence of indirect motive, with honesty of intention, and with a fair consideration of issues." As the Trustee provided reasons for the decision, the question became whether a different test should be used.

After a comprehensive summary of the case law on point, the Court came to the view that the test is the same, commenting "when reasons are provided, the determination of whether breach has occurred may well be made easier, but this does not alter the test." Rein J described it as "undesirable that the Trustees be discouraged from giving reasons for a decision when asked, for fear that the provision of reasons would lead to a more expansive power of review than if they gave no reason."

Where reasons have been provided the Court said it could have regard to those reasons in forming a view as to whether the Trustee has:

1. Acted for an indirect motive;
2. Acted without honesty of intention;
3. Acted without a fair or real and genuine consideration of whether and how the discretion should be exercised; and
4. Acted for a purpose beyond that for which the power and discretion were bestowed.

This case is notable for applying the same test when considering the exercise of the Trustee's discretion whether the Trustee gave reasons or not.

On the facts the Court found nothing to indicate that the Trustee's decision to enter into the contract with Commlnsure was "not exercised in good faith, or ... upon a fair or real and genuine consideration, or ... exercised for the purposes for which the power was conferred."

The Trustee was bound to consider not only the benefits of a particular policy, but also the premiums payable on that policy, and the Commlnsure policy was significantly less onerous in this respect. The Trustee also obtained an assurance that the Hannover terms would be matched or bettered, and sought advice from a reputable firm of solicitors to that effect.

The Court concluded that the Trustee had not breached any duty owed to the plaintiff under the general law.

The difference in TPD policies

After concluding that the Trustee entering the contract with Commlnsure did not constitute any breach of duty, the Court went on to consider the relevance of capacity for part time employment to TPD claims.

The plaintiff argued that the ability to work part time was not a bar to recovery of a TPD benefit under the Hannover policy ("...unable ever to engage in any work for reward"), but was under the Commlnsure policy ("...will not ever be able to resume any occupation", "occupation" defined as "...an occupation that the person can perform, on a full time or part time basis").

After reviewing the authorities the Court concluded on this point there was no reason to read the Hannover TPD policy as *necessarily* meaning full time work only. Justification for this conclusion included that the word "any" qualifies the word "work" and the phrase is defined as being "*total* and permanent disability".

Additionally, several of the judgments put forward by the plaintiff in support of his argument concerned different TPD definitions, and it was noted that cases considering one form of

words in a policy should not be seen as a precedent for construing another form of words in another policy, unless those words are identical or differ only in immaterial details.

There was a "prospect" the words "full time" would have been implied into the Hannover policy had the question arisen but it was "not clear that they would have been." A determinative decision on this point was not necessary given the finding that the Trustee's decision to change to CommInsure was made in good faith and with the interests of its members in mind. The ability to work "full time" has been implied into recent Superannuation Complaints Tribunal decisions.¹

Causation

On the point of causation the Court noted in addition to the plaintiff establishing that the words "full time" should be read into the Hannover TPD policy, the plaintiff would have also had to demonstrate he would have been able to recover under the CommInsure TPD policy had it been substantially the same as the Hannover TPD policy.

On the facts the Court found that the plaintiff would not have recovered under the CommInsure TPD policy even if it had not contained the words "part time". Amongst other factors, the CommInsure TPD policy (like the Hannover TPD policy) required in the definition of TPD for the plaintiff to have been absent from work for six months before prior to the date he accepted redundancy. This was not the case.

The plaintiff's claim would therefore have failed due to the lack of causation even if he had succeeded in establishing a breach of duty on behalf of the Trustee.

Conclusion

A recent line of Australian authority indicates a trend toward implying a requirement that the person be unsuitable only for full time work to be TPD, making it easier for those still able to work part time to claim a TPD benefit. *Manglicmot v Commonwealth Bank Officers Superannuation Corporation* moves away from this line of cases, concluding there was no reason to necessarily imply the words "full time" into the definition, particularly as the policy in question required that the person be unsuitable for "any work" and that the benefit was for "total and permanent disability".

Australian case law is not binding in New Zealand, but Australian superannuation case law is persuasive in the New Zealand courts.

¹ Specifically D09-10/026 [SCTA] 3 "Nor is the Complainant's capacity to work part-time (if any) relevant. This is because, as the Complainant was working full-time with the Employer before she became disabled, the relevant test is for full-time, not part-time work (*Chammas v Harwood Nominees Pty Ltd* (1993) 7 ANZ Ins Cas 61-175; *Smith v Club Plus Superannuation Ptd Ltd* [2004] FCA 1519). " The TPD definition in question was "disablement of a degree which ... render[s] the member unlikely every to be able to work again". and D09-10/057 [SCTA] 29: "it is appropriate ... to assess likelihood of capacity to work in the future on the balance of probabilities. It is also appropriate that the capacity of the Complainant to work be assessed on the basis of full time work." The TPD definition in question was "continuously and totally unable to engage in his or her regular occupation" and "is unlikely to ever again be capable of performing and gainful occupation or work".