



**Employment
Relations Tribunal**

Interlocutory Decision

Title of Matter: LABOUR OFFICER on behalf of Maqbool Mumtaz Ali (Applicant)
v
Kilavata Carriers Ltd (Respondent)

Section: Section 8 *Workmen's Compensation Act 1964*

Subject: Compensation in case of permanent partial incapacity

Matter Number(s): ERT WC 74 of 2018

Appearances: Ms Kadavu, for the Labour Office
Ms V Kirti, Reddy and Nadan, for the Respondent Employer

Date of Hearing: Preliminary threshold hearing on papers

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 25 November 2019

KEYWORDS: Section 8 *Workmen's Compensation Act 1964*; Section 5 Serious and Wilful Misconduct.

CASES CITED:

Barnes v. Nunnery Colliery Co., Ltd [1911] UKHL 688 (11 December 1911)
Daily v John Watson Limited [1900] SLR 37_782
Johnson v Marshall, Sons and Co Limited 43 SLR 888, [1906] UKHL 888
Lewis v Great Western Railway Co (1877) 3 QBD 195
State v Ali [2014] FJMC 145; Traffic Case 45.2014 (13 October 2014).

Background

[1] The Applicant has made an application for worker's compensation in accordance with Section 8 of the *Workmen's Compensation Act 1964*. The application filed on 30 August 2018, claims that on 3 August 2013 that the Worker, suffered an injury by accident, whilst driving a heavy vehicle on behalf of the Respondent Employer, when he was involved in a motor vehicle collision. The result of the vehicle accident was that the Worker suffered the loss of one leg, as it was amputated. It is worth stating at the outset, that arising out of that vehicle accident, the Worker was subsequently charged and convicted of dangerous driving

contrary to Section 98(1) and 114 of the *Land Transport Act 1998*, where he was issued with a 3 month suspended custodial sentence and was disqualified in driving for six months.

Threshold Issue

[2] As a threshold issue, the Respondent Employer raises the defence to the claim, that the Employer is not liable for compensation where it can be proved that the injury to the Worker was attributable to his serious and wilful misconduct¹. As a result, the parties were asked to provide submissions on this jurisdictional point. Put simply, can it be said that a person who has been found by a court to be guilty of dangerous driving, rely on that finding to support the claim that he too is guilty of serious and wilful misconduct.

What Constitutes Dangerous Driving?

[3] The starting point for the analysis is what constitutes 'reckless or dangerous driving' for the purposes of Section 98(1) of the *Land Transport Act 1998*. The Act provides:

Any person who drives a motor vehicle on a public street recklessly, or at a speed on in a manner which is dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the public street and the amount of traffic which is actually at the time of which might reasonably be expected to be on the public street, commits an offence and, subject to subsections (2) and (3), is liable upon conviction to the prescribed penalty.

[4] The case was dealt with by my learned brother Magistrate in *State v Ali*,² in which Lakshman RM found that the Worker was driving at a high speed and could not stop his vehicle, thereby running into the back of another vehicle travelling in the same direction. His Worship found that the Worker had driven dangerously and caused the accident. At issue now, is whether or not those findings, or at least the factual backdrop that gives rise to those findings, establishes that the Worker was guilty of serious and wilful misconduct.

What is Serious and Wilful Misconduct?

[5] The expression "serious and wilful misconduct" is not defined within the *Workmen's Compensation Act 1964*, yet the use of the word "and" is suggestive that the misconduct so described must have two elements to it; that it is both serious and wilful. The question that needs to be asked, is whether driving a loaded vehicle at a high speed was serious and wilful misconduct. And it is here, where the decision of the learned Magistrate is not all that assisting. For present purposes, the critical element to this expression, is that of the conduct being wilful. In *Johnson v Marshall, Sons and Co Limited*,³ the Lord Chancellor (Loreburn) stated when considering a comparable question under the *Workmen's Compensation Act 1897*:

That the burden of proving this was on the employers is beyond question. We are not dealing with negligence, but with something far beyond it, and we are applying a remedial statute. I can perceive no evidence of serious and wilful misconduct. No doubt it was misconduct to enter the lift when not in charge of a load, for that was a disobedience of orders lawfully given. It was "wilful" in the sense that the man presumably entered of his own accord, but the word "wilful," I think, imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment.

¹ See Section 5(1) (b) of the *Workmen's Compensation Act 1964*.

² [2014] FJMC 145; Traffic Case 45.2014 (13 October 2014).

³ 43 SLR 888, [1906] UKHL 888

[6] In the latter case of *Barnes v. Nunnery Colliery Co. Ltd*,⁴ Lord Aitkinson observed:

In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he is employed to do may well—and in most cases would rightly be held to be a risk incidental to the employment. Not so in the other case.

[7] This ascertainment of whether not on the subject occasion now before the Tribunal, the injury to the Worker is attributable to the serious and wilful misconduct of the Worker, is a question of law⁵. Yet, there is no evidence whatsoever at this point, that supports the position of the Employer in relation to relevant facts that must be considered. There is no evidence before the Tribunal as to what speed the vehicle was driving at the relevant time, nor any evidence as to the wilfulness of the conduct. That is, to use the words of Cotton LJ and Brett LJ in *Lewis v Great Western Railway Co*⁶ that the wilful misconduct,

must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit, and it involves the knowledge of the person that the thing which he is doing is wrong

[8] The arguments advanced within the *Preliminary Submissions on Behalf of the Employer* filed on 21 October 2019, do not establish such conduct and on that basis, the preliminary jurisdictional objection must fail. Whether as a result of the substantive hearing, a different conclusion may be available, is unable to be ascertained at this point in time. The matter will proceed for trial and will be relisted for scheduling only, on 11 December 2019 at 9.00am.

Decision

[9] The interlocutory application by the Employer is dismissed.



Mr Andrew J See
Resident Magistrate

⁴ [1911] UKHL 688 (11 December 1911)

⁵ See *Daily v John Watson Limited* [1900] SLR 37_782

⁶ (1877) 3 QBD 195 at 213