

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT
CHAPTER 88:05**

W/C 158 of 2011

Between

CYNTHIA RAMSARAN

Residing at 84 Foster Road, Sangre Grande

Applicant

And

HOMES RESTAURANT LIMITED

Of No 50 Broadway Avenue, Arima

Respondent

Before: Commissioner Margaret Y Mohammed

Appearances:

Mr Ronald Singh instructed by Mr Shaheed Hosein for the Applicant

Ms Nesha Abiraj instructed by Ms Vashti Narinesingh for the Respondent

DECISION

Introduction

1. The applicant has applied to the Commissioner to determine the following issues in her favour: (a) whether she is a workman within the meaning of the Workmen's Compensation Act Chapter 88:05 ("the Act"); (b) whether an accident on July 31, 2010 arose out and in the course of her employment with the respondent; (c) whether the sum of \$47,923.20 or any part thereof which she has claimed as workmen's compensation is due and owing to her; and (d) whether the respondent is liable to pay any workmen's compensation.

2. The parties agreed that: (a) the applicant was employed with the respondent on July 31, 2010; (b) the applicant was a workman within the meaning of the Act; (c) one of the applicant's duties as General Assistant/Kitchen Assistant was to wash pots; (d) the respondent was notified by the applicant of the accident on July 31, 2010 and (e) the applicant's claim for workmen's compensation was made on June 17, 2011.
3. I have found that there was an accident involving the applicant during the course of her employment with the respondent on July 31, 2010. However, I was not persuaded that the injuries sustained by the applicant were caused by the accident. As a consequence the applicant's claim for workmen's compensation is dismissed with each party to bear its own costs of the application.

Did the accident of July 31, 2010 arise out or in the course of the applicant's employment?

4. There is no definition of the word "accident" within the meaning of the Act. In **Fenton v Thorley**¹ an accident was defined as "an unlooked for mishap or an untoward event, which is not expected or designed²".
5. It was not in dispute that one of the applicant's duties was to wash pots. The dispute is centered on how the accident occurred which is a question of fact for determination by the Commissioner. The applicant's pleaded case on the accident lies at paragraph 1 of her application which states "The cause of the injury occurred when the applicant during the performance of her duties attempted to lift a metal pot and, whilst doing so, the applicant immediately felt her right arm stiffen and she experienced immediate pain." I do not accept Counsel for the applicant's position that the pleading is not relevant to the evidence. In my view the applicant's pleaded facts are material in informing the respondent of the case it has to answer and to crystallize the issues for the Commissioner.

¹ [1903]AC 443

² Supra at page 448

6. In this case the applicant's evidence under cross-examination did not entirely support her pleaded claim. The applicant admitted that any pots she lifted were emptied of their contents and that any effort on her part in lifting pots was ordinary with little exertion. The applicant also admitted that she felt her right arm stiffen after washing a pot which slid into the sink. In my view the act of lifting a pot is different from washing a pot which then slides into a sink since the first involves an action of lifting and the second involves the opposite action since there is a downward movement. While these are material inconsistencies in the applicant's evidence on how the accident occurred it was not disputed that both actions were associated with the applicant's duties for which she was employed to perform i.e. to wash pots. In this regard, this applicant has persuaded me that on July 31, 2010 while washing pots she was involved in an accident in the course of her employment.

Did the accident result in the applicant's injuries?

7. Having examined the evidence, I have not been convinced that the applicant's injuries were caused by the events of July 31, 2010. I agree with counsel for the applicant that the respondent has a duty to state if it accepts or rejects the medical report of Dr Kumar dated February 8, 2011. However, this duty does not derogate from the applicant's responsibility to ensure that in presenting her case all the relevant evidence including the medical evidence is properly before the Commissioner. In this case, the applicant failed to do so. There was no medical evidence before me to support the applicant's injury claim since she failed to call Dr Kumar to give viva voce evidence on his examination and findings referred to in his report of February 8, 2011 and there was no hearsay notice to have the said report admitted into evidence. I have attached little weight to the applicant's evidence on her permanent partial disability assessment of 30% since it was not within her expertise or knowledge.
8. I agree with Counsel for the applicant that the Commissioner has the power to rectify matters where there is an error of procedure. Support for this proposition can be found in

Dependants of Dennis Forrester and Scott's Trading Limited ³ where Master Doyle stated:

“The Masters of the High Court are the Commissioners for Trinidad and Tobago(vide Section 31 (1) of the Workmen's Compensation Act) and, a Commissioner for Workmen's Compensation has all the powers of the High Court as referred to in Section 33 of the Workmen's Compensation Act (including punishing for contempt of Court). **In the exercise of his jurisdiction a Commissioner has the inherent jurisdiction to prevent an abuse of process when called upon to determine any proceedings before him.** In the authority of Re-Langton (1964) P. 163 Diplock L.J in considering the inherent jurisdiction of a Court had this to say:

“The Court's inherent jurisdiction to prevent abuse of its process attaches at the earliest moment at which an officer of the court is called on to exercise a judicial discretion...”

In my respectful view of the above stated principle applies to proceedings before the Commissioner for, where (as in this case), a Commissioner is called upon to determine proceedings concerning the distribution of compensation under the Workmen's Compensation Act **the Commissioner possesses that inherent jurisdiction to ensure that proceedings are properly constituted before him...(emphasis mine)**”

9. Having considered the medical report of February 8, 2011 I do not share counsel for the applicant's position that this is an appropriate case for the trial to be re-open and for Dr Kumar to be summoned to court to give viva voce evidence. In my view, this would serve no useful purpose. The medical report on the face of it is inadequate in supporting the applicant's claim. The applicant was injured in July 31, 2010 but the first time Dr Kumar examined her was in January 24, 2011 some 6 months after the accident. The applicant was diagnosed with “right shoulder calcific supraspinatus tendinitis with tear and bursitis” which has led to “a frozen and stiff shoulder⁴”. Dr Kumar stated that “ This

³ WC 300 of 1996 at page 5 Decision of Master Doyle

⁴ Paragraph 7 of the Report of Dr Anil Kumar dated January 24, 2011

condition was caused by aging, repeated work, related minor trauma over a period of years and worsened by her diabetes⁵”. At best there is nothing in this report to link the applicant’s injury to the accident of July 31, 2010. Further, there is no evidence from the applicant that she was examined by Dr Kumar subsequent to this report.

Whether the sum of \$47,923.20 or any part thereof claimed as workmen’s compensation is due and owing to the applicant and whether the respondent is liable to pay it?

10. Having found that there is no nexus between the accident and the injury sustained by the applicant I have no alternative but to find that there is no workmen’s compensation due and owing to the applicant by the respondent.

Should the applicant pay the costs of her failed application?

11. I accept that this respondent has incurred costs in defending this application brought by the applicant. However it is undisputed that this applicant is of limited means. In my view this is an appropriate case or each party to bear its own costs of this application and I so order.

Order

12. The application filed September 23, 2011 is dismissed. Each party to bear its own costs of this application.

Dated this 27th day of September, 2012

Margaret Y Mohammed
Master (Ag) and
Commissioner for Workmen’s
Compensation

⁵ Supra