

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 2396/20
Applicant: AMAL GALAL
Respondent: UNIVERSITY OF NEW SOUTH WALES
Date of Determination: 14 August 2020
Citation: [2020] NSWCC 275

The Commission determines:

1. The applicant was not a worker pursuant to section 4 of the *Workers Compensation Act 1987*; or a deemed worker under Schedule 1, Clause 2 of the *Workplace Injury Management and Workers Compensation Act 1998* at the time of injury.
2. Award in favour of the respondent.

A brief statement is attached setting out the Commission's reasons for the determination.

Ross Bell
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Galal (applicant) was born in Egypt in 1995 and migrated to Australia in 2000. After her Higher School Certificate in 2013, she completed a Bachelor of Medical Science in 2016 as well as a Bachelor of Science (Honours) in 2017. She worked for the University of New South Wales (respondent) as a casual worker for a time in 2017 and was offered a place in the PhD program in November 2017. She was then granted a Commonwealth scholarship stipend to cover living expenses for the period of the PhD study which commenced on 12 February 2018.
2. On 9 May 2018, she was injecting a virus into the tail of a laboratory mouse as part of her research course when the syringe failed to find a vein and the viral fluid sprayed into her face. She washed her face and continued but the same thing occurred again. She put on some goggles, but the same incident occurred a third time, and the fluid sprayed onto her face including her lips and mouth. She has subsequently suffered debilitating symptoms, possibly of chronic fatigue syndrome, because of which her PhD course was eventually terminated when attempts to return to it failed.

THE APPLICATION

3. This Application to Resolve a Dispute is in respect of a claim for injury on 9 May 2018 and payments of weekly compensation. The insurer denied the claim in a notice issued under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 16 May 2019.

ISSUES FOR DETERMINATION

4. The following issues remain in dispute:
 - (a) Was Ms Galal a worker for the purposes of s 4 of the *Workers Compensation Act 1987* (the 1987 Act)?
 - (b) In the alternative, was Ms Galal a deemed worker under Schedule 1 of the 1998 Act?
 - (c) If so, is any incapacity the result of the work injury?
 - (d) If so, is Ms Galal partially or totally incapacitated and, if so, what is her entitlement to weekly compensation?

PROCEDURE BEFORE THE COMMISSION

5. The parties attended a conciliation conference and arbitration hearing on 16 July 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

SUBMISSIONS

Applicant

6. In summary, it is submitted for Ms Galal that her relationship with the University as a PhD student was one of worker and employer. This is established by the stipend she was receiving under a scholarship being subject to satisfactory progress, and the offer of the scholarship being contingent on Ms Galal performing research at the University. The funding was paid from the time the study began and was linked to Ms Galal performing the tasks of a research student. The documents setting out the payment of the stipend indicate a contract with the University requiring Ms Galal to perform tasks of research of benefit to the University for which she was to receive the scholarship. Ms Galal's research could attract funding, so she should be taken as performing work from which the University makes money.
7. The indicia used to establish whether someone is a worker as discussed in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1 (*Stevens*) only require an element of control and direction, and this is established by the statement of Ms Law that the PhD requires completion of research in the chosen field of study which is controlled by the University. Access to the scholarship is also controlled by the University and not a third party. The University also controls who is a full-time student, and if a student is part-time the scholarship becomes part-time, with a minimum 35 hours per week required to maintain payment. The student may work more than 35 hours but will not necessarily be paid more.
8. Control is also indicated by the selection of the topic for research being discussed and agreed with a student's supervisors. Time and progress are also monitored by the supervisors who are university staff. If progress is unsatisfactory the course can be terminated, and the scholarship ended.
9. The indicium of taxation payments is irrelevant in this case for establishing "worker" as the scholarship is from the Commonwealth and therefore not subject to tax.
10. Ms Law calls the scholarship an "award", and it is subject to various types of leave including sick, annual, carers', parental, and unpaid leave which are hallmarks of employee conditions as is the obligation to perform 35 hours per week. The respondent submits there are no leave provisions, but they are set out in the University documents.
11. The after-hours approval form mentions office "work", and "work" to be undertaken, which contradicts the respondent's submission.
12. Ms Law says the University did not direct what research Ms Galal did, but there was heavy supervision and control over what Ms Galal did and how it was done. There was a high level of control given the high level of the work being done.
13. Applications for candidature are assessed to ensure the correct facilities and specialist equipment are available. All of this is provided by the University and no tools are provided by the student. This makes it like factory work with a similar degree of control, provision of equipment, required hours, and leave entitlements.
14. Ms Galal describes in her statement the terms of engagement as to supervision, payments fortnightly, and the pay records. Ms Galal worked as a casual at the University in 2017 and the accounting system used is the same for the payments when she worked as a casual before commencing the PhD program of study and the payment of the scholarship stipend.
15. Ms Galal says the University stipulated that it retained the rights over the intellectual property associated with her research, and there is nothing to contradict this statement. Therefore, the conclusion is that the applicant was paid by the University for minimum weekly hours to produce something the university kept, with the financial risk falling on the University with no down side for the worker, so there is a contract of service.

16. It is immaterial that other students attended the course without a scholarship. The applicant received the stipend so is not in the same position as other students who did not.
17. The letter of offer of 29 November 2017 is under the letterhead of the University so it is that institution that made the final offer. It is immaterial where the money comes from, but it is about the nature of the arrangement.
18. Alternatively, Ms Galal satisfies Schedule 1, Clause 2 of the 1998 Act as a deemed worker. The work was not incidental to a trade or business, but this is a “one off” matter. Ms Galal had to do the work of research at the University personally, so qualifies as a deemed worker, if not a worker.
19. There is no dispute as to injury, but only as to capacity. Ms Galal sets out the symptoms in her statement including the chronic fatigue syndrome (CFS). The medical evidence supports Ms Galal with Dr Ryder saying that recovery from CFS can take five years, so there is no work capacity. There is no evidence of any change since Dr Ryder’s report of January 2020.

Respondent

20. The applicant is a student, not a worker. Students pay the University to get an education, and some receive a scholarship, while others are enrolled without a scholarship. In the absence of a scholarship there would be no dispute, and the applicant would be taken as a student.
21. Superimposed on that situation is a scholarship to defray the costs of tuition and a stipend to cover living costs while studying. There was no contract under which the University required anything specific from the applicant. The reason for a contract of enrolment is for the student to obtain a degree, and that is why the applicant carried out the activities.
22. The activities outlined by the applicant about the laboratory activities are like those of any degree student, with those requirements being met to obtain the PhD degree.
23. There is no contract of service because there is no service provided by the applicant as a student. Her work was not of benefit to the University. While the ultimate copyright may be owned by the University, the work was being done towards the degree which does not place the applicant under the definition of “worker”.
24. The indicia are not sufficient to establish a contract of service. The contract for the scholarship is about managing the award of the scholarship, but this is not the basic agreement, which is of student/teacher.
25. The applicant was obliged to pass examinations and carry out her research satisfactorily but there were no set hours and she “ran her own race”. Students without scholarships were still supervised so the situation was not about work and control. The University provided resources and the applicant could avail herself of those.
26. Casual work done for the University by the applicant before she began her PhD course, but this is not part of this claim. There is a big difference between the previous casual work and the scholarship, with tax not taken out of the stipend by the University.
27. The leave referred to by Ms Galal is not leave in the normal work sense.
28. The letter of offer of the University is about admission of the applicant into study as a research candidate. The letter also mentions the scholarship which she was offered later, so the scholarship is totally separate to admission to the course of study and is a benefit paid by the Australian Government.

29. The examples the applicant referred to in submissions in support of a finding of “worker” were about the course of study and applied to non-scholarship holders as well. The way to approach this dispute is to leave aside the scholarship, and it is then clear that there would be no way the applicant could be claiming to be a worker.
30. Ms Law in her statement says what the whole PhD program is, and it is all to the benefit of the applicant, who would at completion hold herself out as being capable of original research. Ms Law also addresses the purpose of the scholarship, which is to assist with costs that other students must pay.
31. Nothing turns on the conditional offer which was just to ensure that the pre-requisites to enrolment were met.
32. Ms Law explains how a student might achieve a scholarship. She says the amount of \$27,500-per year for 3.5 years is to assist the student with living costs.
33. The website of the Commonwealth’s research scholarships sets out the reasons for these scholarships. All the University is doing is administering the Government’s scheme to ensure the student is getting the benefit.
34. There is a need to look at the relationship between the parties. The University provides services to students, usually for payment, but this is changed with the scholarship, but it is not changed to an employment relationship by any means.
35. The applicant was not a deemed worker because there was not a contract between the applicant and respondent to perform work, but to reach the standards necessary for the award of the degree. The stipend is to assist with living costs, so it is not a contract to perform work.
36. The whole purpose of Schedule 1 Clause 2 of the 1998 Act is to catch people who should in the circumstances be deemed to be workers. However, the applicant was not doing anything for a trade or business but was a student with no contract to perform work. The Clause is not meant to capture the situation of student and university. The applicant could not sublet her studies and the Clause does not meet the facts. The service provided is from the University to the applicant, not the other way round.
37. As to capacity Dr Lloyd suggests the worker can work at something, so she is not totally incapacitated.
38. The respondent does not accept the applicant’s figure for Pre-Injury Average Weekly Earnings because there was simply payment of a scholarship, not earnings. There is no sense in simply dividing the annual stipend by 52 weeks when it is to cover living costs from a government scheme.
39. The scholarship is merely a benefit for the worker and does not elevate the relationship to a contract of service.

EVIDENCE

40. The documents annexed to the Application and the Reply, plus documents with an Application to Admit Late Documents filed for the respondent on 13 July 2020 comprising investigation report with annexures have been considered.
41. There was no oral evidence adduced.

Ms Galal's statement

42. Ms Galal outlines the nature of her study as a PhD student in research having negotiated her subject matter with her University staff supervisors. She also describes the nature of the scholarship as she saw it. She also outlines the various elements of the research activity required to meet the course requirements.
43. Ms Galal states that she was granted a scholarship on condition that she perform her research at the University. This was paid fortnightly and no tax was deducted. She had two supervisors, with whom she was required to consult regularly on her progress. They could make suggestions as to the study and research although it was ultimately up to her as to what she "wrote about". The University provided the materials for her research and she was not required to work any set times. She says the University retained the intellectual property in her research.
44. Ms Galal says, "My contract was an agreement that I would engage in the research and work to create intellectual property for the University. In exchange, the University provided my scholarship payment."

Ms Law's statement

45. Ms Law explains the processes that applied to Ms Galal's enrolment and to the application and "award" of a Commonwealth Government scholarship. Ms Law refers to the enrolment and scholarship documents annexed to the investigation report which are consistent with her account.
46. Ms Law explains that a PhD requires completion of a piece of research demonstrating "a significant and original contribution to knowledge in the field of study" and that students can apply for scholarships as financial support during the period of study. She says, "The point of the scholarship is to provide assistance with the student's living costs, additional allowances and tuition fees."
47. Ms Law's records show that Ms Galal applied for a scholarship in 2017. She was made an offer of a place in the PhD course in December 2017 conditional on meeting the honours degree criteria through the final transcripts.
48. The University ensured that a scholarship recipient was a full-time student. Ms Galal declared she wanted the scholarship to start at the commencement of her studies on 12 February 2018. The form included the declaration that Ms Galal could not be a full-time employee of the University and hold a full-time scholarship. A part-time scholarship can only be held for carer or medical reasons and Ms Galal was full-time.
49. The Commencement of Study form included the agreement that a student could conduct "limited" paid work where the employment did not interfere with the student's research candidature, and a minimum of 35 hours per week study was maintained. While Ms Galal could have studied in excess of 35 hours per week the scholarship amount remained the same.
50. Ms Galal and her supervisors decided on the research topic and her progress was "tracked throughout her candidature towards the point of thesis submission."
51. The scholarship payments were fortnightly through the University's payment system. For this, there was no requirement for Ms Galal to provide any proof of eligibility for the scholarship, for example by submitting time sheets, as the time spent on course research was monitored by her supervisors and progress monitored through the Research Progress Review process. That process,

“... is a mechanism for tracking the ongoing progress of the HDR candidate from commencement to thesis submission. It only has an impact on receipt of the scholarship if a candidate is determined to have made unsatisfactory progress at multiple reviews, and had their candidature terminated ...”

52. Ms Law recounts that the Commonwealth Scholarship Guidelines (Research) covering the award of a scholarship provided for a period of sick leave and 20 days of recreation leave in each year to be negotiated with the supervisor. The stipend continued during these periods to assist with living expenses. The recreation leave was in lieu of the standard coursework term dates, with full-time candidates expected to work throughout the year except for the stipulated leave.
53. The University did not control what Ms Galal did each day. It was up to her in consultation with her supervisors as to how she went about her research. The supervisors had no control over the termination of scholarship payments, which continued unless the student discontinues studies, leaves Australia for reasons unconnected with study, requests suspension of the award, or changes status to part-time.
54. The scholarship did not include any payment for superannuation because the University did not see the scholarship holder as an employee.
55. All candidates could apply for a student ID card which gave access to the University laboratories, the library, and other resources. There was a two-hour introduction given by University staff including the Dean of Graduate Research to introduce candidates to processes such as the progress review process and to the resources available to them.
56. Applications by intending students were assessed prior to an admission offer to ensure the appropriate resources were available for a student's specific research area, as outlined in the Higher Degree Research Facilities & Resources Guidelines.

Enrolment and scholarship documentation

57. This material shows the distinction between the scholarship stipend for the costs of living and the enrolment in the PhD research program. Only the element of the scholarship for tuition and other fees is automatically available to all domestic students in the program. The stipend is a separate element of the scholarship involving a competitive process based on merit.

Issue – Was Ms Galal a worker or deemed worker at the time of injury? (s 4 1987 Act; Schedule 1 of the 1998 Act)

58. It is submitted for Ms Galal that the features of her arrangement with the University indicate not a student/university relationship, but one of worker/employer. The letter of offer for enrolment in the PhD in higher research was subject to satisfactory progress reviews and the letter offering the scholarship of 29 November 2017 was contingent on performing research at the University. It is submitted that this, together with the letter of 5 March 2018, tied the stipend to Ms Galal performing tasks as a research student with satisfactory progress and comprised an employment relationship.
59. It is also submitted for Ms Galal that the documents of offer and associated correspondence and forms establish a contract between the student and the University such that if Ms Galal performs the tasks of research then the payments continue.
60. It is submitted for Ms Galal that the indicia for “worker” from the relevant authorities, including *Stevens*, are applicable when considering whether someone doing a form of labour or industry is a “worker” for the purposes of the 1987 Act.

61. In my view, the evidence is that Ms Galal was a full-time student at the time of her injury. The “worker” indicia relied upon do not in my view assist in these circumstances because they are not relevant to the true nature of the relationship. The nature of the relationship between Ms Galal and the University was one in which she sought and was offered enrolment in the PhD program in her own interest using the laboratory facilities and other resources of the University as well as the expertise of the University’s academic supervisors. The indicia from the authorities relied upon for Ms Galal do not apply to this student/institution relationship in which Ms Galal enrolled in a course of study offered to gain the academic qualifications sought.
62. The fact that Ms Galal, after being offered enrolment in the University’s PhD course, then achieved a Commonwealth scholarship including a stipend to assist with living expenses does not alter her status from a student studying and researching for a PhD into a paid worker for the University.
63. It is submitted for Ms Galal that Ms Law in her statement calls the scholarship an “award” and the leave entitlements set out are consistent with a worker’s “award”. I do not accept this submission. In my view the term “award” in this context has its general meaning and simply refers to the giving of the scholarship, not to some form of industrial award. The types of “leave” set out in the scholarship documents are not leave from employment, but a set of protocols to deal with illness or breaks in study during which the student’s stipend may be continued.
64. That the stipend payments were made fortnightly does not make them a wage in return for service. This was merely the means for transfer of the Commonwealth Scholarship monies to the Ms Galal as recipient student as she studied.
65. The “control” element relied on for Ms Galal is not consistent with a work situation. The control is over the progress of the student through the program to ensure the academic standards are being met. The subject matter of the PhD research was negotiated, and progress had to be satisfactory, both for her continuation in the course toward the PhD and in her case for the continuation of the scholarship. This is not “control” in the sense of paid work for the University as part of a contract of service. The evidence is that the area of research is jointly agreed between the student and the University. There is no evidence that the University dictated the topic of research or the way Ms Galal conducted that research to lead to a financial or other beneficial outcome for the University.
66. It is apparent that students in the higher research area use the laboratories and equipment of the University and this is clearly a main offering by the University for students, as well as the academic expertise and knowledge accessed through academic supervision. This is not a worker being provided with tools by an employer in terms of the “worker” indicia but a student being provided with teaching and learning facilities like that provided by any educational institution. It is completely unlike “factory work”, contrary to the submission for Ms Galal.
67. It is submitted for Ms Galal that only an element of control and direction by the University is required to establish an employment relationship. There was a degree of control and direction of Ms Galal as a student in the PhD research program, but that control and direction was completely within the context of student activity and progress in a higher education setting. As noted above, the University did not dictate to Ms Galal the area of research for her course. This was a matter of negotiation involving no doubt such factors as the interest area of the student, the University’s resources available, time limitations, the relevance to the current world of academic research, and other factors. It seems that all of this applied to all students in such courses whether on a scholarship stipend for living expenses or not.

68. The retention of intellectual property rights referred to by Ms Galal in her statement are not detailed in the materials and in all likelihood such rights are reserved generally for all higher degree students, not only in regard to scholarship stipend recipients. This may well include property rights over knowledge of the University and staff to which students have access during study. This factor is not something that establishes a “worker” relationship with the University.
69. It is submitted for Ms Galal that it was the University that controlled who was a full-time student and who received a scholarship stipend, not a third party. It also required a minimum of 35 hours of study per week and this was also required for continuation of the stipend.
70. However, the hours of study required are the same for all students in the research PhD program. The enrolment and scholarship were only to continue while Ms Galal continued satisfactorily in the course, including the minimum hours per week. This is a feature of a higher degree student relationship with a teaching body, not of an employee.
71. The fact that the stipend was paid by the Commonwealth is a relevant factor here in my view. As Ms Galal submits, it was the University which chose who receives the scholarship stipend, but the money was provided by the Commonwealth for a specific purpose; that is, for allocation to some students after a competitive process to cover living expenses while studying. The money was transferred to the University to administer for this purpose, as the Commonwealth Guidelines verify. The University did not tie the grant of the stipend to the student doing work as directed by it for its benefit. There is nothing in the material which supports that conclusion. Ms Galal studied beside others not receiving the stipend. The grant of the stipend changed nothing about the relationship between the University and Ms Galal. It was a student/educational institution contract when she enrolled in the PhD course, and remained so when the offer of the scholarship stipend was accepted and beyond.
72. There must be an identifiable employment contract before there is employment. The contract must involve work done by a person under a contractual obligation to another party to whom the person delivers the work and skill of the “worker”. There must be a mutual intention to create legal relations in this regard, and there must be consideration in the form of a wage or remuneration in return for doing the work. There must also be the creation of an obligation on one party to provide work which is then undertaken by the other party.
73. The evidence falls short of establishing any of the above elements for the employment of Ms Galal by the University. The evidence is of Ms Galal as a PhD student using the educational facilities provided by her University.
74. There is nothing to support Ms Galal’s assertion of a contract created between the University and herself such that, “My contract was an agreement that I would engage in the research and work to create intellectual property for the University. In exchange, the University provided my scholarship payment.” On the contrary, in my view there was no contract of “employment” creating a mutual obligation for the University to provide work and for Ms Galal to perform work.
75. The High Court held in *Australian Woollen Mills Pty Ltd v Commonwealth* [1954] HCA 20, “[i]t is of the essence of a contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty”. Following that authority, Roche DP in *Secretary, Department of Family and Community Services v Bee* [2014] NSWCCPD 66 found there must be real consideration “for the agreement”.¹ Roche DP affirmed that,

¹ *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95.

“To prove a contract, it must be established that the ‘statement or announcement which is relied on as a promise was really offered as consideration for doing the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement’ (*Australian Woollen Mills* at 456). In other words, there must be a quid pro quo (‘one thing in exchange for another; something in exchange’ *Butterworths Concise Australian Legal Dictionary*, 3rd ed).”

76. The scholarship provided to Ms Galal by the Commonwealth Government and administered by the University was not consideration under a contract of employment on the above authorities. On the overwhelming weight of evidence, it was a stipend to help cover living expenses for a full-time PhD student.
77. The descriptions of the nature of her activity at the University in Ms Galal’s statement are couched in terms of employment,

“Subject Employment

9. On 12 February 2018, I commenced employment with the University of New South Wales. I was employed as a PhD Student/Researcher on a full-time basis working 40-60 hours per week. My gross average weekly earnings were \$550.

10. In my role, I was responsible for:

- a. Laboratory activities, including fine needle injections, pipetting, and transfer of fluids;
- b. Conducting experiments,
- c. Cleaning and maintenance of the laboratory,
- d. Processing, organising and summarising data; and
- e. General duties incidental to undertaking research and performing general laboratory duties.”

78. In my view, the representation above does not reflect the actual nature of the relationship with the University. There was no “employment” because there was no contract for this purpose, and the activities listed were not segregated responsibilities of a work “role”, but inherent in the conduct of Ms Galal’s own elite research and study over which she had significant control as a higher degree student seeking to attain a PhD.
79. For the above reasons, I find Ms Galal has not discharged the onus of proof to establish she was a worker for the purposes of the definition under s 4 of the 1987 Act at the time of her injury.

Issue – Deemed Worker

80. It is submitted for Ms Galal in the alternative that if it is found that she is Schedule 1, Clause 2 of the 1998 Act provides for circumstances in which a person can be deemed to be a worker in some circumstances, and that Ms Galal satisfies those criteria.
81. Schedule 1, Clause 2 of the 1998 Act provides,

“2 OTHER CONTRACTORS
(cf former Sch 1 cl 2)

(1) Where a contract--

- (a) to perform any work exceeding \$10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor’s own name, or under a business or firm name), or

is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor.

(3) A person excluded from the definition of "**worker**" in section 4 (1) because of paragraph (d) of that definition is not to be regarded as a worker under this clause."

82. I have already found that there was no contract between Ms Galal and the University to perform work. There was no work exceeding \$10 in value. Ms Galal was not carrying out work in a trade or business, but was a student, as found above. There was no intention to create legal relations, mutuality, or contractual consensus for employment between Ms Galal and the University.²

83. For these reasons I find that Ms Galal was not a deemed worker at the time of injury.

SUMMARY

84. Ms Galal was not a worker for the purposes of s 4 of the 1987 Act at the time of injury.

85. Ms Galal was not a worker deemed by Schedule 1, Clause 2 of the 1998 Act at the time of injury.

86. Ms Galal's claim for weekly compensation therefore fails and consideration of the issue of capacity is redundant.

87. There is to be an award for the respondent.

² See *Scerri v Cahill* (1995) 14 NSWCCR 389; *Lindeboom v Goodwin & Anor* (2000) 21 NSWCCR 297.