Alexander v Gorey & Cole Holdings Pty Ltd [2002] NTCA 7

PARTIES:	RICHARD ALEXANDER
	v
	GOREY & COLE HOLDINGS PTY LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP10 2001
DELIVERED:	2 October 2002
HEARING DATES:	19 March & 17 August 2002
JUDGMENT OF:	MARTIN CJ, MILDREN & BAILEY JJ

CATCHWORDS:

Appeal – *Work Health Act* – application for weekly benefits – whether proper that benefits be cancelled – Appeal by worker – invalid notice served cancelling payments – separate application by employer to cease payments under s 69(2) - failure to participate in workplace based return to work program – whether employee's application should have been dismissed - whether order cancelling payments can be retrospective – employee's application successful

Statutes:

Work Health Act ss 53, 64, 65, 69, 75B, 82, 83, 85. 88, 89, 94, 104, 107, 109, 178

Workmen's Compensation Act 1923 (UK) s 14

Cases:

Anchor Donaldson Ltd v Crossland [1929] AC 297, referred to.

Carlsen v AAT Kings Tours Pty Ltd (1998) 8 NTLR 114 at 118-119, referred to.

Disability Services of Central Australia v Regan (1998) 8 NTLR 73 at 76, applied.
Ocean Coal Company Ltd v Davies [1927] AC 271, followed.
Maddalozzo v Maddick (1992) 84 NTR 27; 108 FLR 159, referred to.
Morrissey v Conaust Ltd (1991) 1 NTLR 183 at 189, followed.
Schell v Northern Territory Football League (1995) 5 NTLR at 6, referred to.
Western Australian Coastal Shipping Commission v Wallner (1980) 144 CLR 110 at 113, referred to.
Works Social Club – Katherine Inc. v Rozycki (1998) 143 FLR 224 at 227, referred to.

REPRESENTATION:

Counsel:

Appellant:	JB Waters QC
Respondent:	PM Barr

Solicitors:

Appellant:	Caroline Scicluna
Respondent:	Hunt & Hunt

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Alexander v Gorey & Cole Holdings Pty Ltd [2002] NTCA 7
No. AP10 of 2001

BETWEEN:

RICHARD ALEXANDER
Appellant

AND:

GOREY & COLE HOLDINGS PTY LTD
Respondent

CORAM: MARTIN CJ, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 2 October 2002)

THE COURT:

[1] The appellant commenced employment with the respondent in July 1993. He was employed as a driller's offsider. In August 1993, the appellant sustained an injury to his lower back whilst in the course of his employment with the respondent. The appellant made a claim for compensation in accordance with the provisions of the *Work Health Act* (the Act) in September 1993. The appellant's claim was accepted by the respondent and the appellant was paid compensation on the basis that he was totally unfit for any employment.

[2] On 6 May 1997, the appellant recommenced employment with the respondent under a workplace based return to work program established pursuant to s 75B of the Act. On 27 May 1997, the appellant advised the respondent's representative that he would not continue with that program. On the same day, the employer's insurer served on the appellant a Form 5 Notice in purported compliance with s 69(1)(a) of the Act, cancelling the appellant's weekly benefits on the basis that the appellant was no longer totally incapacitated for work as the result of his injury, and on the further basis that the appellant had unreasonably failed to participate in the work based return to work program which would have enabled him to return to fulltime duties.

[3] Thereafter, the appellant commenced proceedings in the Work Health Court (proceeding No 9714757) appealing the respondent's decision to cancel his benefit. The respondent filed an answer to the worker's appeal as well as a "cross–application" in which the respondent sought an order that the appellant ceased to be totally incapacitated for work since at least May 1996, a declaration that the service of the Form 5 Notice "was a valid cessation of weekly payments" and an order to the effect that the appellant ceased to be entitled to payments of compensation "at least at the time of service of the Form 5 Notice dated 27 May 1997".

[4] On 19 April 1999, the appellant's application was amended but did not raise any new issues. On 2 June 1998, the respondent filed an amended answer and an amended cross–application. In the amended answer and proposed

amended cross–application, the respondent sought to raise the failure of the appellant to participate in the workplace based return to work program and the deeming provisions of s 75B(2) of the Act. The learned Magistrate refused to allow the proposed amended answer and cross–claim with the result that the original answer and cross–claim remained on foot. It is to be noted that prior to 1 August 1999 the Work Health Court's Rules did not permit the filing of a cross–claim.

[5] On 4 June 1999, the respondent lodged a separate application of its own in the Work Health Court in which the subject of the failure to participate in the workplace based return to work claim was addressed. That application was purportedly filed in proceeding No. 9714757.

[6] On 15 June 1999 the hearing of the appellant's appeal in proceeding No 9714757 commenced. The Court disallowed the respondent's cross–claim and refused to hear the respondent's claim purportedly filed in the same proceedings. The hearing of the appellant's appeal continued until 17 June 1999 when it was adjourned on the application of counsel for the respondent due to the late discovery of the appellant's diary for 1997.

[7] On 14 July 1999, the respondent lodged a second application in proceeding No 9916566. In this application the respondent raised again the question of the workplace based return to work program and reliance was placed upon s 75B(2) of the Act. The relief sought in that proceeding was as follows:

18. The employer seeks a ruling under s 104(1) *Work Health Act* read with s 94(1)(a) *Work Health Act* to the effect that the worker is deemed by s 75B(2) *Work Health Act* to be able to undertake permanent light duties employment with the employer earning not less than $500.00 per week, on the ground that he unreasonably failed to participate in the workplace based return to work program provided by the respondent.

19. The employer seeks a further ruling under s 104(1) *Work Health Act* read with s 94(1)(a) *Work Health Act* to the effect that the cancellation of compensation pleaded in paragraph 17 hereof was valid.

20. In the alternative to paragraph 19 hereof, the employer seeks an order under s 104(1) *Work Health Act* read with s 94(1)(a) *Work Health Act* for cancellation or reduction of the worker's compensation for the purposes of s 69(1)(d) *Work Health Act.*

21. Further, or in the alternative, the employer seeks a ruling as to the extent of the worker's incapacity (if any) from 10 June 1997 to the present and ongoing and consequential orders as to cancellation or reduction as the case may be of compensation payable to the worker.

[8] On 27 October 1999, the appellant filed an answer to proceeding No 916566. In addition to joining issue with the substantive allegations of fact raised in the Statement of Claim the appellant pleaded:

13. The Worker denies that the Employer is entitled to the relief claimed at paragraphs 18, 19, 20 and 21 of the Statement of Claim and in particular, in the absence of the Employer's compliance with section 69 of the Work Health Act.

14. The Worker says that he, at all times, has been totally incapacitated for work as defined in section 65 of the Act. Should that not be found to be so, then the Worker alleges that he has been partially incapacitated from some time prior to May 1997 and that such partial incapacity rendered him, by virtue of the factors as set out in section 68 of the Work Health Act, totally incapacitated.

15. The Worker further says that in the event that the Employer is entitled to bring this further Application (which is denied) that any orders that could be made would be subject to the Employer's obligation to comply with the provisions of section 69(1) of the Work Health Act and in any event, could not apply retrospectively to payments made to the Worker or to which he would otherwise be entitled.

16. The Worker seeks that the Application be dismissed and the Employer pay his costs of and incidental to these proceedings.

[9] On 27 October 1999, the Work Health Court ordered that proceedings 9714757 and 9916566 be "joined and heard at the same time".

[10] The hearing of both matters commenced, or recommenced, in the Work Health Court on 6 December 1999. It appears that by consent of the parties, the evidence of the witnesses previously given in proceeding 9714757 was treated as if it had been given in respect of both proceedings. At the conclusion of the hearing, the learned Magistrate reserved her decisions.

[11] On 29 September 2000, the learned Magistrate pronounced judgment in both matters and published separate reasons for decision. In relation to the appellant's appeal in proceeding 9714757, her Worship found that the employer had established that it was entitled to cancel the appellant's weekly compensation payments because:

(a) she found that, despite his disabilities, the appellant was capable of earning more than $420 per week ($412.50 was the indexed normal weekly earnings of the appellant as at the relevant date) in employment with another employer during the period 6 August to 15 August 1997;

that he was capable of doing that work on a permanent basis and that his reason for leaving it was because of a conflict with his new employers "as regards the conditions of employment and the hours he was working rather than any physical difficulty …". These findings were based on the appellant's 1997 diary which had not been disclosed to the respondent until the hearing in June 1999.

(b) she found that the appellant failed to participate in the return to work program; that his failure was unreasonable and that s 75B(2) of the Act deemed him to be capable of undertaking the potential employment which the program had in mind for him. Her Worship held that the Form 5 Notice was validly given and therefore she dismissed the appeal.

[12] In relation to the employer's application in proceeding 9916566, her Worship referred to her findings in relation to proceeding 9714757. As to the findings relating to the diary, she said that she was satisfied that the appellant was not totally incapacitated. There is no finding as to the level of the worker's partial incapacity (if any). Further, the learned Magistrate found that by reason of the worker's unreasonable cessation in participating in the workplace based return to work program, the compensation payable to the appellant was nil.

[13] It does not appear whether or not there were any orders taken out by the Registrar of the Work Health Court following the judgments delivered by

her Worship, but it is asserted that they were not and the respondent did not deny this assertion.

[14] On 15 November 2000, a consent order relating to the costs of the proceedings in the Work Health Court was made as follows:

> 1. In relation to proceedings numbered 9714757 the worker to pay the employer's costs of and incidental to the proceeding to be agreed or taxed.
>
> 2. In relation to proceedings numbered 9916566 the parties bear their own costs.

[15] The appellant appealed to the Supreme Court from both decisions given by the learned Magistrate. Although there were a large number of grounds at the hearing of the appeal, as best as we can deduce from the judgment appealed from, the grounds were limited to the following (which we have paraphrased):

1. As to proceeding 9714757 the learned Magistrate erred in finding that the Form 5 Notice was valid.

2. As to proceeding 9916566:

    a. the learned Magistrate should have found that the onus of proving the level of partial incapacity rested on the employer (including the amount to which the compensation should be reduced).

    b. That the order "cancelling" the payments of weekly payments could operate only from the date of the order, i.e. 29 September 2000.

[16] Riley J found that the Form 5 Notice did not comply with s 69 of the Act and was not effective to permit the cancellation of weekly payments in June 1997. In effect, his Honour upheld the appeal in relation to proceeding 9714757. However, his Honour also found that in proceeding 9916566, the onus fell upon the appellant to establish the level of the appellant's partial incapacity; that the finding of her Worship in deciding in those proceedings that the appellant was caught by the deeming provisions of s 75B(2) and that the compensation payable was nil, related back to the time when the Court was satisfied that the appellant's entitlement to weekly compensation ceased and that the Court had power to so order. Accordingly, his Honour dismissed the appeal and invited the parties to make submissions as to costs.

[17] After hearing the parties, his Honour ordered the appellant to pay the costs of the appeal as well as the costs of both proceeding 9714757 and 9916566 in the Work Health Court. It is apparent that his Honour was not informed of the consent order as to costs made on 15 November 2000.

[18] The appellant has appealed to this Court on a number of grounds, not all of which were pursued on the hearing of the appeal. We note for the record that no notice of contention was given by the respondent.

Did the order of the learned Magistrate in proceeding 9916566 relate back to a time earlier than the date of judgment?

[19] The contention of the appellant was that the order (which had not been taken out) was not, in its terms, an order that related back to a time earlier than

the date of judgment. Notwithstanding the spirited argument of counsel for the apellant, the question of whether or not this was a possible outcome was plainly raised by the appellant's pleading in paragraph 15 of the Answer. There is no discussion of this issue by the learned Magistrate in her reasons for judgments. That is not surprising given her Worship's decision in proceeding 9714757. The effect of the latter decision was that the respondent was entitled to cancel the worker's weekly payments following due service of the Form 5 Notice and it was not in contention that the respondent had paid compensation during the fourteen day period following the service of the Notice, as required by s 69(1)(a) of the Act.

[20] Riley J drew the inference that, because her Worship found that the compensation payable was nil, her Worship must have found that the respondent was entitled to cancel payments of compensation at the stage that compensation was in fact cancelled. However, the finding that the compensation payable was nil was inevitable given the finding she made in proceeding 9714757.

[21] We consider that it would have been erroneous to conclude that that is what her Worship intended. Clearly her order did not address the point because it was unnecessary for her to do so. Nevertheless, the matter was addressed by Riley J in the light of his Honour's decision that the worker's appeal should not have been dismissed. His Honour found that such an order can relate back to the date when the Court is satisfied that the entitlement to weekly

compensation ceased. It is necessary to see if his Honour was right in the conclusion he reached that the order could relate back in time.

Can an order cancelling payments relate back to a time earlier than the date of the order?

[22] This may seem to be a strange question to be asked. It is usual for courts to decide questions by reference to a state of facts existing well before the date of any order consequential upon a contested hearing. It is not unusual for courts to make orders having effect from a time earlier than the date of judgment, or even earlier than the date of commencement of proceedings and relating back to the day following the date of the injury: see for example, the discussion in *Works Social Club – Katherine Inc. v Rozycki* (1998) 143 FLR 224 at 227. However, in this case, the appellant relies upon the provisions of the statutory scheme providing for workers' entitlements to compensation. Mr Waters QC, for the appellant, submitted that on the true construction of the Act, an order cancelling payments could only be made effective from the date of the order, or the date of the hearing.

[23] The scheme of the Act is that, where a worker suffers an injury arising out of or in the course of his employment that results in or materially contributes to his impairment or incapacity, there is payable such compensation as is prescribed: see s 53. The right to weekly compensation depends upon the worker establishing that his lost earning capacity resulted in loss of income: see ss 64 and 65 of the Act. Before a worker becomes entitled to any compensation, notice of the injury is required to be given as

soon as practicable to the worker's employer in accordance with s 80. The requirement to give such notice is a condition precedent to the right to compensation: see *Maddalozzo v Maddick* (1992) 84 NTR 27; 108 FLR 159. Before any compensation becomes due and payable, the worker must lodge a claim for compensation with his employer in accordance with ss 82 and 83 and wait until the employer has either accepted or deferred liability under s 85 and three working days have passed since the date of either acceptance or deferral of the claim: see *Work Social Club – Katherine v Rozzycki, supra,* at 236–7. In the case of a deferred claim, although payments of weekly compensation are required to be made within three working days of the decision to defer the claim, the payments are made on a without prejudice basis, are required to be continued until the employer rejects the claim and are irrecoverable by the employer, even if the employer is not liable under the Act to pay compensation: see s 85(7). At the relevant time, the Act contemplated that the employee could commence proceedings for compensation in the Work Health Court within 28 days after receiving notice of the fact that the claim was disputed: see ss 85(8) and 104(3).

[24] However, once the claim was accepted, s 69 of the Act provided the procedure for reducing or cancelling weekly payments. At the relevant time, that section provided as follows:

> 69. CANCELLATION OR REDUCTION OF COMPENSATION
>
> (1) Subject to this Subdivision, as amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given –

(a) 14 days notice of the intention to cancel or reduce the compensation and, where the compensation is to be reduced, the amount to which it is to be reduced; and

(b) a statement in the prescribed form setting out the reasons for the proposed cancellation or reduction and indicating that the worker has a right to appeal against the decision to cancel or reduce the compensation.

(2) Subsection (1) does not apply where –

(a) the person receiving the compensation returns to work or dies;

(aa) the person receiving the compensation fails to provide to his employer a certificate under section 91A within 14 days after being requested to do so in writing by his employer;

(b) the prescribed certificate referred to in section 82 specifies that the person receiving the compensation is fit for work on a particular date, being not longer than 4 weeks after the date of the injury in respect of which the claim was made, and the person fails to return to work on that date or to provide his employer on or before that date with another medical certificate as to his incapacity for work;

(c) the payments of compensation were obtained by fraud of the person receiving them or by other unlawful means; or

(d) the Court orders the cancellation or reduction of the compensation;

(3) Where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the statement under subsection (1) shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work.

(4) For the purposes of subsection (1) (b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to

understand fully why the amount of compensation is being cancelled or reduced.

[25] Section 69 has been considered by this Court as well as by single Judges on numerous occasions, but none of those decisions have directly dealt with the point Mr Waters QC now agitates. It is clear that s 69 contemplates two situations. The first situation is where fourteen days' notice of cancellation or reduction must be given: see s 69(1). The second situation is where no such notice is required: see s 69(2). Riley J considered that, unlike s 69(1), s 69(2)(d) contained no provision that suggested relief can only be granted from the date of judgment and that there was no other section of the Act which suggested that the Court's power was so limited.

[26] However, Mr Water's argument focussed on a different consideration. In his submission, until the Court ordered otherwise or the respondent validly cancelled his compensation by notice, the appellant had an absolute right to the payments of weekly compensation. In other words, the answer to the question depended upon the nature of the appellant's right to compensation.

[27] There are a number of provisions of the Act which provide guidance as to the legislature's intent. In this case, the respondent had originally accepted liability for the appellant's claim and had made payments of weekly compensation under s 85(1)(a). If payments are required to be made in circumstances where the employer has deferred accepting liability, s 85(7)(d) specifically provides that the payments are irrecoverable.

[28] Section 107(2)(c) of the Act (in the form in which it was at the relevant time) enabled the Work Health Court to order interim payments and s 94(1)(aa) specifically empowered the Court to order the repayment of all or part of the compensation paid under an interim determination. There is no other provision of the Act enabling the Court to order repayment of compensation to which the worker had an entitlement. The Act is silent about the status of payments made once liability has been accepted. Although s 69(2) does not say that the Court cannot order the cancellation or reduction of payments at a time prior to the date of the Court's order, nor does it say that it cannot.

[29] It has previously been held by this Court that s 69 is a purely procedural provision: see *Morrissey v Conaust Ltd* (1991) 1 NTLR 183 at 189. This would suggest that s 69 does not confer upon a worker a right to continue to receive weekly payments, except as specifically provided for by s 69 itself, beyond that period of time when the worker ceases to be incapacitated, or the incapacity is no longer causing financial loss such as to entitle the worker to weekly compensation.

[30] A provision similar to s 69 was considered by the House of Lords in *Ocean Coal Company Ltd v Davies* [1927] AC 271. In that case s 14 of the *Workmen's Compensation Act*, 1923 (UK), provided that an employer was not entitled, otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in certain circumstances, none of which applied to the facts of that case. The worker had contracted a disease

in the course of his employment resulting in financial loss to the worker. The employer admitted liability and commenced making weekly payments. Subsequently, the employer served a request for arbitration on the ground that the worker had made a full recovery. The worker admitted that he had recovered, but claimed that he was entitled to continue to receive weekly payments until the arbitrator made an award terminating them. The arbitrator held that the worker was entitled to payments until the date of the award. The Court of Appeal upheld the award. The House of Lords allowed the appeal, holding that the arbitrator had no jurisdiction under s 14 to award any payments after incapacity ceased and that he ought to have made a retrospective award terminating the weekly payments as from the date of the worker's recovery. Notwithstanding that there are differences in the wording of s 14 of the *Workmen's Compensation Act 1923*, we are persuaded by the reasoning in that case that, once entitlement to a weekly payment has ceased, there is no absolute right to continue to receive such payments which are provisional only, even though the employer may be obliged to continue to pay them if the employer does not invoke (or does not successfully invoke) the machinery provided by s 69(1) and that the Work Health Court can order in proceedings brought under s 69(2) that the right to receive the payments ceased at the date upon which incapacity ceased, or the date upon which the incapacity resulted in a reduction or diminution of incapacity: see also the discussion in *Anchor Donaldson Ltd v Crossland* [1929] AC 297; *Western Australian Coastal Shipping Commission v Wallner*

(1980) 144 CLR 110 at 113-114; *Carlsen v AAT Kings Tours Pty Ltd* (1998) 8 NTLR 114 at 118-119. It is not necessary to comment upon whether any payments made by an employer after incapacity has ceased are subsequently recoverable by the employer. That question does not arise in this case. In our opinion, an employer may cease or reduce payments either upon notice under s 69(1) or by seeking an order of the Court under s 69(2): see *Schell v Northern Territory Football League* (1995) 5 NTLR at 6; *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73 at 76. These are not alternative remedies requiring the employer to elect between serving a notice under s 69(1) or bringing a substantive application under s 69(2). As was made plain in *Disability Services of Central Australia v Regan, supra,* at 79:

> An employer who has served a s 69 notice, may subsequently decide after the employee has appealed, that the issues to be decided upon the appeal are too narrowly confined. At present, if the employer is in this position, the employer can bring its own substantive application and apply to have the two applications heard together.

This is what happened in this case.

[31] Mr Waters QC urged upon us that the issue of the entitlement to cancel the weekly payments based on the grounds set out in the s 69(1) notice could not be agitated again in separate proceedings. He submitted that the decision in the appeal proceedings (in respect of which the appellant was ultimately successful) created a *res judicata* in the appellant's favour, or that fairness should preclude that issue from being determined against him in the

employer's application. There would be force in this argument if the appellant had succeeded on the merits, but he did not do so. The appellant succeeded only because the employer failed to serve a notice strictly in accordance with the terms of the Act. The merits were decided in the respondent's favour. Neither the principles of *res judicata* nor any notion of fairness requires the result for which the appellant contends.

[32] Mr Waters QC submitted that the result, if the appeal is dismissed, would be to weaken s 69, which was enacted for the benefit of workers. Employers could stop payments, ignore s 69(1) and seek orders under s 69(2). This argument cannot be accepted. If an employer stopped payments without giving a notice under s 69(1) when such a notice was required by the Act, the employer would have committed an offence: see ss 88(1) and 178 of the Act. The worker could have immediately sought interim benefits under s 107(2)(c) of the Act as it then stood. The effect of s 69(1) is that the worker would have been entitled to such an order: see *The Western Australian Coastal Shipping Commission v Wallner, supra.* If ultimately the employer failed at the hearing brought at the instance of the employer, the worker may have been entitled to interest by force of s 89 of the Act as well as remedies under s 109 of the Act.

Onus of Proof

[33] We should briefly mention an argument put to the Court on the question of onus of proof. In this case, no question of who bore the onus of proof arose

as, on the facts as found, there was no continuing right to receive any compensation even if the worker was partially incapacitated.

What orders should now be made?

[34] Technically, the findings of Riley J should have resulted in the appeal against the learned Magistrate's decision in proceeding No 9714757 being allowed, even though there are no practical consequences in the result.

[35] We order as follows:

1. That the appeal from the Work Health Court in relation to proceeding 9714757 be allowed and the order of that Court of 29 September 2000 be set aside.

2. That the appeal in relation to proceeding 9916566 be dismissed.

Costs

[36] Although the appellant has been partly successful in this appeal, the level of success is so miniscule that the real winner is the respondent. So far as the appeal to this Court is concerned, we order that the appellant pay the respondent's costs to be taxed. So far as the costs in the Work Health Court are concerned, they were the subject of a consent order made between the parties. That order was not brought to the attention of Riley J and we set aside the orders for costs he made in respect thereof. We think justice will best be done if the consent order in the Work Health Court is not disturbed. We would not otherwise disturb the costs order made by Riley J.

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