Alexander v Gorey & Cole Pty Ltd [2001] NTSC 74

PARTIES:	ALEXANDER, RICHARD
	v
	GOREY & COLE HOLDINGS PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDSICTION
FILE NO:	59 of 2000
DELIVERED:	17 August 2001
HEARING DATES:	19, 20 and 30 July 2001
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	J.B.Waters QC
Respondent:	P.M. Barr

Solicitors:

Appellant:	Caroline Scicluna and Associates
Respondent:	Hunt & Hunt

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

Alexander v Gorey & Cole Pty Ltd [2001] NTSC 74
No. 59 of 2000

BETWEEN:

RICHARD ALEXANDER
Appellant

AND:

GOREY & COLE HOLDINGS PTY LTD
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 17 August 2001)

[1] The appellant commenced employment with the respondent in July 1993. In August 1993 he suffered an injury at work and made a claim for compensation pursuant to the provisions of the *Work Health Act*. Liability was accepted by the employer and payments of compensation made. The appellant recommenced work with the respondent on 6 May 1997 and that was pursuant to a work place based return to work program established under s 75B of the *Work Health Act*.

[2] The appellant reported difficulties in fulfilling his duties under the return to work program and complained of a significant amount of lower back pain. There was agreement between the respondent and the appellant that certain

of his duties would be removed and that his hours of work would be reduced. On 27 May 1997 the appellant advised the representative of the respondent that he would not continue with the return to work program. On that day the respondent, through its insurer, sent a letter to the appellant in the following terms:

> "We refer to the above and advice from your employer, Gorey & Cole, that you failed to participate in a graduated return to work programme that had been approved by various specialists.
>
> As you have elected not to participate in alternative duties with your employer and therefore, have failed to meet your rehabilitation obligation we intend to terminate payment of weekly compensation. Benefits will cease fourteen (14) days from the date of this notice.
>
> We enclose a 'Notice of Decision and Rights of Appeal' form in order that our position is clear.
>
> All reasonable medical costs pertaining to your claim will still be met."

[3] Accompanying that letter was a document identified as a "Form 5" under the *Work Health Regulations*. That document was addressed to the appellant and included the following:

> "With regard to your claim for payment of benefits as prescribed under the *Work Health Act* you are hereby advised that your employer Gorey & Cole Drillers Pty Ltd acting on the advice of the Territory Insurance Office hereby:-
>
> > Cancels payment of weekly benefits to you pursuant to section 69 of the *Work Health Act*.
>
> The reasons for this decision are:-

(1) You are no longer totally incapacitated for work as a result of the injury (of) 28 August 1993.

(2) Enclosed with this Form 5 notice are copies of specialists medical reports which state that you are fit for full duties.

(3) Further and in the alternative you have unreasonably failed to participate in a work place based return to work program with the employer which would enable you to return to full time duties."

[4] The document went on to advise the appellant that he had a right to contest the decision and that any application must be made within 28 days of receipt of the notice.

[5] The appellant commenced proceedings in the Work Health Court (9714757) appealing against the decision of the respondent. That matter came before the Court in Alice Springs for determination in 1998 and 1999. Whilst that matter was under way the respondent commenced separate proceedings against the appellant (9916566) pursuant to s 104 of the *Work Health Act*. In those proceedings the respondent relied upon the same factual matters as applied in proceedings numbered 9714757 but sought separate relief. The relief sought included the following:

"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 work place 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(2)(d) *Work Health Act*".

[6] The two sets of proceedings continued together and on 29 September 2000 the learned Magistrate delivered separate reasons for decision in respect of each of those proceedings. At that time she dismissed the appeal of the appellant in proceedings 9714757. In proceedings 9916566 she found that she was "satisfied the worker is not totally incapacitated", that the worker unreasonably ceased to participate in a work place based return to work program and that he was deemed to be able to undertake the employment offered by the respondent pursuant to s 75B(2) of the *Work Health Act.* The appellant would have been paid $500-$700 per week for that work and, as that amount was in excess of his normal weekly earnings, her Worship found compensation payable to the appellant "is nil".

[7] The appellant has appealed from the decisions of the learned Magistrate in both matters. There were numerous grounds of appeal identified in various documents on the relevant court files however Mr Waters QC, who appeared on behalf of the appellant, indicated that only those grounds with which I now proceed to deal are pursued by the appellant.

Proceeding 9714757

[8] In this matter the only ground of appeal pursued by the appellant in argument was that the learned Magistrate erred in finding that:

> "The forwarding by the Appellant (on 27 May 1997) of a Form 5 Notice and accompanying letter of even date constituted compliance with s 69(1)(a) and s 75B(2) of the *Work Health Act* and erred in implicitly finding that forwarding the Notice and letter on that day constituted 14 days notice of intention to cancel weekly payments from 27 May 1997."

[9] The original notice of appeal contained additional grounds of appeal that the appellant did not address in writing or in submissions before me. The findings complained of were available to her Worship on the evidence before her. I see no basis for interference with those findings.

[10] In the proceedings before the learned Magistrate the respondent conceded that it could not rely upon grounds 1 and 2 set out in the Form 5 document and it relied solely upon ground 3 namely that the appellant had unreasonably failed to participate in the work place based return to work program.

[11] The complaints of the appellant regarding the notice issued pursuant to s 69 of the *Work Health Act* are focused upon three deficiencies said to have been involved in that process. In summary form those deficiencies are as follows.

[12] Firstly, the expression used in the Form 5 notice was that the appellant "unreasonably failed to participate in a work place based return to work program with the employer which would enable (him) to return to full time

duties". It was submitted that s 75B(2) of the Act referred to a return to work program which "could" enable the worker to "undertake more profitable employment" rather than the expressions in fact used.

[13] Secondly, the Form 5 document advised the appellant that the employer "hereby … cancels payment of weekly benefits to you pursuant to s 69 of the *Work Health Act*". Although it was accepted by the appellant that the payments were in fact continued for a further 14 days he submitted that the notice was defective because s 69(1)(a) required that he be given "14 days notice of the intention to cancel or reduce the compensation" rather than notice that cancellation was effected by delivery of the notice.

[14] Thirdly, the letter accompanying the notice advised the appellant that "benefits will cease fourteen (14) days from the date of this notice". That advice was inconsistent with what appeared in the Form 5 document and, in any event, was not in accordance with the requirements of s 69. That section required that cancellation could only occur when the worker "has been given" 14 days notice of intention to cancel. It was submitted that it could not be assumed, and it was not the case, that the appellant received the notice on the date the letter was sent. The letter was sent from Darwin to the Alice Springs Post Office and the evidence was that it was received on 29 May 1997.

[15] It was the submission of the appellant that strict compliance with the procedural requirements of s 69 of the *Work Health Act* was required.

[16] The operation of s 69 of the *Work Health Act* has been considered by the Supreme Court in *Collins Radio Constructors Inc v Day* (1997) 116 NTR 14 and, on appeal, (1998) 143 FLR 425. In that case the Court of Appeal upheld the judgment at first instance. At first instance Martin CJ raised the issue "whether or not strict compliance is required of the demands in subs(3) of s 69 of the *Work Health Act*." He considered the purpose of s 69 and made the following observations:

> "Section 69 is a provision by which an employer may peremptorily deprive a worker of the benefit of weekly compensation secured to the worker, either by acceptance of liability under s 85(2) or s 85(4) or by order of the Court under s 94. It operates so as to deprive the worker of the continuing receipt of compensation, without resort to agreement or any form of adjudication. The obvious intention of s 69 is to confer rights upon an employer to cancel payments provided that, in circumstances such as this, it discloses what it believes is a lawful reason to do so. It is an alternative method to achieving the result to that envisaged by s 69(2)(d), that is, by seeking an order of the Court cancelling the obligation to pay the compensation."

[17] Martin CJ went on to say:

> "The legislature was anxious to ensure that workers understood their rights by requiring them to be informed of the right of appeal (as it is called) and it must be taken to have been primarily concerned to ensure that a worker properly understood the basis upon which compensation was cancelled so as to assess the prospect of success on appeal."

[18] His Honour concluded:

> "In my opinion, the statutory requirements whereby an employer is able to unilaterally cancel a worker's continuing right to receive compensation constitutes such an interference with personal rights as to require strict compliance with the conditions attaching to it. Further, there are good reasons why, within the scheme of the Act

> designed to protect workers rights, the worker should obtain the information required and in the form required."

[19] When the matter came before the Court of Appeal that Court posed the question whether the requirement that "the certificates served upon the worker should indicate that the worker has ceased to be incapacitated for work is of such importance to the object of the statute as to disclose an intention that its complete non-observance should invalidate the action of the appellant in cancelling the respondent's weekly benefits." The Court observed that "it is clear beyond question that the requirements of s 69(3) as to the contents of the certificate may not be ignored". However the Court also stated that a form of words other than those prescribed by the subsection may amount to compliance with the subsection and that "we do not think it was the intention of the legislature that only the precise words chosen by the legislature, and no others conveying the same meaning, would suffice." The Court then went on to observe (at 431):

> "Moreover, there are patently other difficulties with the certificate in that: (a) it purports to cancel the payments forthwith, whereas s 69(1)(a) requires 14 days notice of an intention to cancel payments – in this respect, we note that the prescribed form in the regulations is defective in that the prescribed form does not correspond with the requirements of s 69(1)(a); (b) the reasons given for cancelling the benefits do not comply with s 69(4)."

[20] In the later case of *Ansett Australia v Van Nieuwmans* (1999) 9 NTLR 125 Mildren J (with whom Thomas and Bailey JJ agreed), said (at 135):

> "I note in addition, that both notices fail to comply with the strict provisions of s 69. Neither notice gives fourteen days notice of

> intention to cancel or reduce the compensation, but purport to reduce or cancel the compensation forthwith. This is fatal to the validity of the notices."

[21] In the present case the notice was in the same form. It advised the appellant that the payments of weekly benefits were "hereby" cancelled. The respondent submitted that the document had to be read with the accompanying letter which included the advice that "benefits will cease fourteen (14) days from the date of this notice". However the letter went on to advise the appellant that "we enclose a 'Notice of Decision and Rights of Appeal' form in order that our position is clear."

[22] Although the appellant was provided with conflicting advice in the letter and the notice as to when payments would cease, the letter made it clear that the notice was the document to be relied upon. Whether the appellant was left with competing and conflicting information or whether the notice was the document to be relied upon, there was no compliance with the requirements of s 69 of the *Work Health Act.*

[23] It was not in dispute that, notwithstanding the notice, payments of compensation in fact continued until 13 June 1997. A period of at least 14 days passed between the date the notice was given and the date that payments ceased. In those circumstances the respondent submitted that:

> " … the test is not how many days were stated in the letter indicating intention to cancel compensation, but rather how many days' notice of intention to cancel were given prior to cancellation. … The employer submits that the requirements of s 69(1)(a) were satisfied by:

(1) the letter stating intention to terminate weekly compensation, and by

(2) the payment of compensation for 14 days after the date of receipt of the letter.

> In terms of achievement of imputed statutory intention, the worker had notice to be able to commence his "appeal" in time in the proceeding below, and received his 2 weeks' compensation after being given notice of intention to cancel. There has been no disadvantage."

[24] In my opinion the correct interpretation of s 69 is not that suggested by the respondent. The section requires that an amount of compensation shall not be cancelled or reduced unless the worker has been given 14 days notice of intention to cancel or reduce the amount otherwise payable. The worker must be made aware that the cancellation or reduction will not take place for at least 14 days from the date upon which notice "has been given" to the worker. If the section is to be read as the respondent contends a worker would have no idea as to when payments were to cease. The worker would only know that there is an intention to cancel or reduce payments at some unspecified time. The purpose of the notice is to inform the worker of his rights including his entitlement to receive payments of compensation for the period of 14 days. The period during which payments will continue is information of importance to him. In any event, in this case, whether the payments continued or not the notice incorrectly informed the appellant that the payments were thereby cancelled.

[25] I do not accept the submission made by the respondent in this regard. The letter and the Form 5 Notice did not comply with the requirements of s 69 of the Act.

[26] The respondent further argued that the appellant should not now be permitted to raise this issue because he did not raise it in the Court below. It was submitted that the matter was not the subject of determination below and could not now be the subject of an appeal under s 116 of the *Work Health Act.*

[27] Section 116 permits an appeal against a "decision or determination on a question of law" to the Supreme Court. The matter raised in proceedings 9714757 was a challenge to the decision of the respondent to cancel payments of weekly benefits made under s 69 of the Act. Her Worship dismissed that appeal. However it is clear that the issue at trial was not the form of the notice and the timing of service but rather the substance of the grounds set out in the notice and, in particular, whether the appellant had "unreasonably failed to participate in a work place based return to work program with the employer which would enable (him) to return to full time duties".

[28] The respondent referred to the decision of Martin CJ in *Ansett Australia v Van Nieuwmans* (1998) 5 NTJ 2193 where his Honour declined to consider an argument presented by counsel for the employer that was raised for the first time in the course of the appeal. In so doing his Honour relied upon the

observation by the High Court in *University of Wollongong & Ors v Metwally (No.2)* (1985) 59 ALJR 481 where it was said (at 483):

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case has been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had (an) opportunity to do so."

[29] When the matter came before the Full Court, *Ansett Australia v Van Nieuwmans* (supra), Mildren J indicated that his Honour ought to have allowed the appellant to raise the point. Reference was made to the decision of the High Court in *Water Board v Moustakas* (1988) 180 CLR 491 where the majority (Mason CJ, Wilson, Brennan and Dawson JJ) said (at 497):

> "More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied."

[30] In the present case the argument presented on appeal had not been raised below but it is one where the relevant facts had been established beyond controversy and the point was one of construction. There was no prejudice to which the respondent could point and, in my view, it is appropriate to deal with the issue on appeal.

[31] In my opinion and for the reasons I have expressed the notice provided by the respondent to the appellant in May 1997 did not comply with s 69 of the

Work Health Act and was not effective to permit the respondent to cancel payments pursuant to the provisions of that section.

Proceedings 9916566

[32] The second set of proceedings (9916566) were heard at the same time as the proceedings in 9714757. Her Worship delivered judgment in both sets of proceedings on the one day. The reasons in proceedings 9916566 referred to the more detailed reasons delivered in proceedings 9714575 and it is clear that they were intended to be read together.

[33] Proceedings 9916566 included an application for relief made pursuant to s 104(1) read with s 94(1)(a) of the Act for cancellation or reduction of the worker's compensation for the purposes of s 69(2)(d) of the Act.

[34] For present purposes s 69 of the *Work Health Act* permits an employer to cancel or reduce payments being made pursuant to the Act in two ways. The employer may provide the worker with a notice that complies with s 69(1) and may thereby cancel or reduce payments without the agreement of the worker and without any form of adjudication. Alternatively it can rely upon the exception to s 69(1) created by s 69(2)(d) and proceed to obtain an order of the Court as to cancellation or reduction of compensation. In the present case the respondent has pursued both courses of action available to it.

[35] In her decision in proceedings 9714757 her Worship referred extensively to the diary of the appellant which was in evidence before her. Based upon the

information revealed in that diary she found that during the relevant period the appellant had undertaken work for another employer in relation to which he had been paid $644 gross for a week's work in August 1997. The rate of pay was expressed to be "$420 per week and extra incentive for number of dishes, or something". She noted it was "fairly heavy work" and was "far in excess" of what had been required of him in his return to work program with the respondent. She recorded that the reasons for the appellant leaving that employment were centred upon a conflict with his then employer rather than any physical difficulty with the work. She went on to say:

> "I therefore find on the evidence which is before me that the applicant was capable of earning $420 a week at that job despite the incapacity which the doctors have agreed that he does in fact suffer."

The unchallenged submission of the respondent was that as at this date the indexed normal weekly earnings of the appellant was $412.50 per week.

[36] In her decision in proceedings 9916566 her Worship referred to those findings and concluded "suffice to say I am satisfied the worker is not totally incapacitated." She concluded in those proceedings that the compensation payable to him was "nil".

[37] The appellant submits that once there was a finding of partial incapacity by her Worship the onus rested upon the respondent to establish the amount to which workers compensation entitlements should be reduced.

[38] Wherever the onus may have rested, on the findings of her Worship discussed above, her Worship was satisfied as to the extent of the entitlement of the appellant to compensation under the Act. That entitlement was succinctly expressed by her Worship as being "nil". There was an evidential basis for that finding and it was spelled out in the reasons for decision delivered by her Worship.

[39] Contrary to the submission of the appellant her Worship did not rely solely upon the deeming provisions of s 75B(2) of the Act for her conclusions. Whilst she did rely upon that section to reach the same conclusion she also reached it by the separate method of considering the evidence found in the diary kept by the appellant and making findings based upon the information contained therein.

[40] In any event in this case, where the respondent has satisfied the Court that the appellant is no longer totally incapacitated for work, the onus of establishing the level of partial incapacity to work rested upon the appellant. Once the respondent had established that the appellant was no longer totally incapacitated the onus rested upon the appellant in that regard: *Phillips v The Commonwealth* (1964) 110 CLR 347 at 351; *Barbaro v Leighton Contractors Pty Ltd* (1980) 30 ALR 123; *AAT King's Tours v Hughes* (1994) 99 NTR 33 at 38; *Ju Ju Nominees Pty Ltd v Carmichael* (1999) 9 NTLR 1 at 8. The appellant by his answer claimed that he was totally incapacitated for work and, if that was not so, then he was partially incapacitated and that partial incapacity rendered him totally incapacitated by virtue of the matters

contained in s 68 of the *Work Health Act*. There is no reason to distinguish between the approach adopted in the circumstances of the cases referred to above, where a statutory scheme of suspension was available, and that which should apply in the present case.

[41] In addition her Worship found that the appellant had "unreasonably ceased to participate in the workplace-based return to work program". She therefore concluded that he was "deemed to be able to undertake the employment offered by the respondent pursuant to s 75B(2) of the *Work Health Act"* and, therefore, "the compensation payable to him is nil". It followed, as her Worship found, that the respondent was entitled to cancel payments of compensation at the stage that compensation was in fact cancelled.

Retrospectivity

[42] The appellant contended that any cancellation ordered by the Court based upon the matters ventilated in proceedings 9916566 "can only apply from the date of such cancellation, at the earliest 29 September 2000" (being the date upon which judgment was delivered by the Work Health Court). The submission of the appellant was that if cessation or reduction was to be back dated beyond that date it would permit the respondent to achieve in the s 104 proceedings what it had failed to achieve by the issue of the notice under s 69 of the Act. It was submitted that, although the respondent had failed to comply with s 69 and had therefore cancelled payments in breach

of that section, it would be relieved of any consequences for so proceeding by operation of the order made pursuant to s 104 of the Act.

[43] In my view the Act permits the Court to give effect to a cancellation or reduction of compensation at any time the Court is satisfied that the entitlement to compensation had ceased or that a reduction was justified on the evidence before it. Each case must depend on its own facts. There is no provision in the Act that suggests the Court is limited as to the timing of the relief it can grant in proceedings of this kind commenced under s 104 of the Act. In particular s 69(2)(d) of the Act does not contain any provision that suggests relief can only be granted from the date of judgment. That subsection is expressed to be unaffected by the operation of s 69(1).

[44] In the event that an employer ceases payments in a manner not provided for in s 69(1) or (2) of the Act it remains liable for those payments. Where the employer then seeks an order under s 94 read with s 104 of the Act cancelling compensation payments the risk it runs is that upon failing to be relieved of the obligation to make payments beyond the date of actual cessation or reduction it will be also ordered to pay penalty interest and "punitive damages" pursuant to the provisions of s 109 of the Act. Further, upon cessation of payments by the employer, the worker is able to seek relief from the cancellation (or reduction) by claiming an interim determination.

[45] In my opinion her Worship was correct in concluding in proceeding 9916566 that “the employer was entitled to cancel the payments at the stage that they did.”

[46] The appeal is dismissed. I will hear the parties as to the orders to be made and as to costs.

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