MORRISSEY v CONAUST LTD

Court of Appeal of the Northern Territory of Australia

Asche CJ, Gallop and Angel JJ

8 and 17 May 1991 at Darwin

APPEAL - Work Health Act 1986, s.69 - proper construction - circumstances in which notice to be given by employer upon worker before cancellation or reduction of an amount of compensation

Cases applied:

Phillips v Commonwealth (1964) 110 CLR 347
Barbaro v Leighton Contractors (1980) 30 ALR 123
JH Constructions Pty Ltd v Phillip Davis (Asche CJ, unreported, 3 November 1989)
Sargood Bros v The Commonwealth (1910) 11 CLR 258

Cases followed:

Western Australian Coastal Shipping Commission and Anor v Wallner (1979) 26 ALR 591; (1980) 144 CLR 110
Davison v Totalization Administration Board (1988) 56 NTR 8
JH Constructions Pty Ltd v Phillip Davis (Asche CJ, unreported, 3 November 1989)

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IN THE COURT OF APPEAL OF THE
NORTHERN TERRITORY OF AUSTRALIA

No. AP4 of 1991

ON APPEAL from the Supreme Court
of the Northern Territory
SCC No. 220 of 1990

BETWEEN:

MAURICE JAMES MORRISSEY

Appellant

AND:

CONAUST LIMITED

Respondent

CORAM: ASCHE CJ, GALLOP AND ANGEL JJ

REASONS FOR JUDGMENT

(Delivered 17th May 1991)

ASCHE CJ:

I agree that the appeal be dismissed for the reasons given by Gallop J.

GALLOP J:

This is an appeal from Martin J. in an appeal on a question of law pursuant to s.116 of the Work Health Act 1986.

The facts, which were not in dispute, are that the appellant worker sustained successive injuries to his left

shoulder from 1982 onwards and on the last occasion, 12 January 1988, when he returned to work he suffered further injury to it. He was incapacitated for work as a result. The respondent employer admitted its liability under the former Workmen's Compensation Act and current Work Health Act until about 22 December 1989. On that date the worker received from the employer's insurer a letter enclosing two medical reports obtained by the insurer which indicated that the doctor considered the incapacity the worker had suffered in respect of the injury in January 1988 had ceased by March 1988 and that he was no longer incapacitated by reason of that injury. The letter gave notice to the worker that future payments of weekly compensation would cease.

The worker then caused an application to be made to the Work Health Court which was endorsed as being "Appeal against termination of compensation payments". The Magistrate in the Work Health Court found that the worker should have served upon the appellant a notice pursuant to s.69 of the Work Health Act before being entitled to cease making payments of weekly compensation.

The orders made by the Magistrate were:

(a) that the appellant (the present respondent) make payments for compensation for total incapacity to the respondent (the present appellant) from and including 13 December 1989 and to (sic) continue to pay the same in accordance with the provisions of the Act;

(b) a declaration that the payments were improperly terminated and that the worker is entitled to additional payments pursuant to s.89 calculated in accordance with the formula contained in s.89; and

(c) that the appellant (the present respondent) pay the respondent's (the present appellant's) costs.

The relief sought on appeal before Martin J. was that:

(a) those orders be set aside;

(b) a declaration that the appellant (the present respondent) was entitled to discontinue payments to the respondent (the present appellant) without giving 14 days' notice as envisaged in s.69 of the Act;

(c) an order dismissing the respondent's (the present appellant's) application to the Work Health Court;

(d) in the alternative, an order remitting the respondent's (the present appellant's) application to that Court to it for determination on the merits; and

(e) an order that the respondent (the present appellant) pay the appellant's (the present respondent's) costs of the appeal and of the hearing before the Work Health Court.

The grounds of appeal before Martin J. were that the Magistrate erred in finding that the employer should have served upon the worker the notice referred to in s.69; that his Worship erred in finding that without a notice having been served as required by s.69 the employer was unable to present evidence to the Court concerning the incapacity of the worker; that he erred in finding that without such a notice having been served he could not make a finding as to incapacity; and that he erred in finding that the worker was entitled to appeal or seek a review of cessation of payments pursuant to s.111 of the Work Health Act.

Both parties were represented by counsel before the Work Health Court. On the appeal before Martin J. the worker was not represented, but the respondent was.

His Honour referred to the relevant provisions of the Work Health Act 1986 and its statutory predecessors, which were s.7A of the Workmen's Compensation Act and the amendment thereto by Act No. 47 of 1986, which came into force on 11 September 1985. The Workmen's Compensation Act was repealed by the Work Health Act, which came into force on 1 January 1987. His Honour also referred to some decisions concerning the construction of the repealed provisions. In particular, he referred to Western Australian Coastal Shipping Commission and Another v. Wallner in the Federal Court of Australia ((1979) 26 ALR 591), and in the High Court ((1980) 144 CLR 110).

Central to the resolution of the appeal from the Work Health Court was the proper construction of s.69 of the Work

Health Act. His Honour held that an employer may cancel the payment of compensation for incapacity where the person receiving it ceases to be incapacitated or dies, or the payments were obtained by fraud or by other unlawful means, without first giving notice as provided for in s.69. He held that it is only where other circumstances arise which may relieve the employer of the obligation of paying weekly compensation or reducing the amount payable that the notice and statement described in paras (c) and (d) of s.69 must be given. Accordingly he held that the respondent's cancellation of the amount of compensation was not rendered nugatory by its failure to give notice and statement setting out the reasons for the proposed cancellation.

The orders of the Work Health Court were set aside and a declaration made that it was not a condition precedent to the respondent's cancelling the amount of compensation payable to the appellant that the notice and statement referred to in s.69(c) and (d) by given to the appellant. It is from those orders that the appeal to this Court is brought.

It has been authoritatively determined that a voluntary payment of compensation by an employer is a payment "due under" the Workmen's Compensation Ordinance because it is paid by reason of and by reference to the Ordinance. Once such a payment had been made, the worker had a right to its continuation until the issue of liability was determined in the employer's favour: Western Australian Coastal Shipping Commission and Another v. Wallner (so held by the Federal Court and confirmed by the High Court).

In my opinion, the reasoning of the High Court should be applied mutatis mutandis to the words "an amount of compensation under this Subdivision" in s.69. Hence s.69 applies to any payment of compensation pursuant to the Work Health Act whether the employer pays voluntarily or pursuant to an order made by the Work Health Court.

The basic submission on behalf of the present appellant was that, consistent with the repealed provisions and their judicial interpretation, an employer cannot take it upon himself to determine when a person ceases to be incapacitated and thereupon suspend payments of compensation without notice to the worker. It would be oppressive and unfair if an employer could simply allege that the worker was no longer incapacitated and leave it to the worker to establish time and again his continued entitlement.

It was further submitted on behalf of the worker that the concept of incapacity embraced by s.69 should be defined by reference to other provisions of the Act.

By definition "incapacity" means an inability or limited ability to undertake paid work because of an injury (s.3). The other provisions to which counsel referred as impinging upon the operation of s.69 are ss.65(6), 67 and 68.

Section 65(1) provides that a worker who is totally or partially incapacitated for work as a result of an injury out of which his incapacity arose or which materially contributed to it, shall be paid compensation until he attains the age of 65

years or normal retiring age for the industry or occupation in which he was employed. Section 65(2) defines loss of earning capacity as the difference between the worker's normal weekly earnings and the amount he is reasonably capable of earning in work he is capable of undertaking if he were to engage in the most profitable employment reasonably available to him. Section 65(6) provides that a worker shall be taken to be totally incapacitated if he is not capable of earning any amount if he were to engage in the most profitable employment reasonably available to him.

Section 67 provides that a worker is deemed to be able to undertake employment if he unreasonably fails to undertake medical or other treatment or unreasonably refuses to present himself for medical assessment of his employment prospects. Section 68 provides certain criteria for assessing what is the most profitable employment available to a worker for the purposes of ss.65 and 67.

It was submitted that the incapacity embraced in s.69 should be limited to situations where the worker has returned to his employment or is engaged in similar work. In those circumstances, so it was submitted, notice would not be necessary because the fact that he had ceased to be incapacitated would be obvious. Likewise, if the worker had died notice would not be necessary, for the same reason. Counsel argued that other than in those circumstances incapacity is usually a live issue and the employer is not entitled to determine the issue without notice to the worker, thereby casting upon the worker the necessity to resort to the Work

Health Court to have the cancellation or reduction of compensation reviewed.

It was submitted on behalf of the employer that according to the plain and ordinary meaning of the words in s.69 there are three situations in which notice is not required to be given by the employer:

(1) cessation of incapacity;

(2) death; or

(3) where the payments of compensation were obtained by fraud or by other unlawful means.

In all other cases of termination of weekly payments the employer must give notice pursuant to s.69. Counsel instanced examples of such cases, namely:

(a) where the worker attains 65 years of age or the normal retiring age. Section 65 of the Act is relevant in that it provides for payment of weekly compensation for total or partial incapacity for work until the worker attains the age of 65 years;

(b) there is a change in the amount the worker is capable of earning. Section 65(2) provides definition of loss of earning capacity as the difference between the worker's normal weekly earnings taxed and the amount he is from time to time reasonably capable of earning

in a week in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him;

(c) the worker has unreasonably failed to undertake medical, surgical or rehabilitation treatment. Section 67(2) provides that in such circumstances a worker is deemed to be able to undertake more profitable employment; and

(d) the worker has failed to present himself for assessment of his employment prospects. Section 67(3) provides that in such circumstances the worker is likewise deemed to be able to undertake the most profitable employment that would be reasonably possible for a worker with his experience and skill.

The relevant former provisions of the Workmen's Compensation Act as amended into that form by Act No. 53 of 1974 were:

"7A. WITHHOLDING OF PAYMENT

(1) An employer shall not, except in accordance with this Ordinance, an Act or determination of the Tribunal, discontinue, withhold or diminish a weekly or other payment due under this Ordinance to a person.

Penalty: 100 dollars."

Section 7A was amended by Act No. 47 of 1984 as follows:

10. WITHHOLDING OF PAYMENT

Section 7A of the Principal Act is amended by omitting sub-section (2) and substituting the following:

'(2) An employer may discontinue, withhold or diminish a weekly or other payment due under this Act to a person where:

(a) the person returns to his employment and is engaged in work in, or work similar to, which he was engaged prior to; or

(b) subject to sub-sections (3) and (5), a medical certificate in respect of the person is issued certifying that -

(i) he is wholly or partially recovered from; or

(ii) his continued incapacity is no longer a result of,

the accident in respect of which compensation is being paid.

'(3) An employer shall not under sub-section (2)(b) discontinue, withhold or diminish a weekly or other payment due under this Act to a person unless -

(a) he has given to the person a copy of the medical certificate issued under that sub-section in relation to the person together with written notification that he intends to discontinue, withhold or diminish the payment; and

(b) 21 days have elapsed since the giving of the medical certificate and the written notification referred to in paragraph (a).

'(4) A person given under sub-section (3) a copy of the medical certificate issued under sub-section (2)(b) in relation to him and written notification referred to in sub-section (3) may, not later than 21 days after he has been given those documents, apply to the court for an order that the weekly or other payment due under this Act to him, to which that written notification relates, be not discontinued, withheld or diminished, as the case may be.

'(5) At the hearing of an application made under sub-section (4), the court may -

(a) where it is satisfied that the employer seeking under this section to discontinue, withhold or diminish, as the case may be the weekly or other payment due under this Act to the person who made the application has established a prima facie case for carrying out such action - adjourn the application on such conditions, including conditions as to payments; or

(b) in any other case - make such order for the continuation of the weekly or other payment referred to in paragraph (a),

as it thinks fit.

'(6) The onus of proving that a weekly or other payment due under this Act to a person should be discontinued, withheld or diminished in accordance with this section shall be on the employer seeking to carry out that action.'"

Section 69 of the Work Health Act now provides:

69. BENEFITS NOT TO BE ALTERED EXCEPT AFTER NOTICE

Subject to this Subdivision, except where -

(a) the person receiving it;

(i) ceases to be incapacitated; or

(ii) dies; or

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

an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given -

(c) 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

(d) 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."

Counsel for the employer analysed the effect of the amendments to s.7A of the Workmen's Compensation Ordinance by the insertion of sub-s.(2) by Act No. 47 of 1984. It is to be noted that those amendments were made after the decision of the High Court in Western Australian Coastal Shipping Commission and Another v. Wallner. The effect of the amendments, as

is plain from the words of s.7A(2), was that an employer was authorised to discontinue, withhold or diminish a weekly or other payment due under the Act to a person where the person returned to his employment and engaged in work in, or work similar to, which he was engaged prior to the subject accident in respect of which compensation was paid, or subject to the later provisions of s.7A, a medical certificate in respect of the person was issued certifying that he was wholly or partially recovered from, or his continued incapacity was no longer a result of, the subject accident.

The later provisions of the repealed s.7A required that where the employer wished to discontinue, withhold or diminish a payment due under the Act by reason of a medical certificate certifying either of the matters set out above, the employer could not do so unless he gave the person a copy of the medical certificate and written notification that he intended to discontinue, withhold or diminish the payment and 21 days had elapsed since the giving of the certificate and the written notification.

By repealing s.7A in its amended form and enacting s.69 of the Work Health Act, the legislature has, so it was submitted, expanded the circumstances in which notice need not be served by the employer upon the worker from the former situation where the worker had returned to work and was engaged in the work he was engaged in prior to receiving worker's compensation payments, or similar work, to all situations where the worker ceased to be incapacitated, had died or obtained

payments of compensation by fraud or by other unlawful means. A plain reading of s.69 seems to lead to that construction.

In Davison v. Totalizator Administration Board (1988) 56 NTR 8, a special case had been stated from the Work Health Court pursuant to the Work Health Act, s.115. The substantial question raised was whether in the circumstances of the matter the appropriate route to the Work Health Court was s.104 or s.111 of the Act. I answered the questions raised to the effect that the worker had a right to appeal or make application to the Work Health Court in respect of the decision of the employer to cancel weekly payments and that that application should be made by the process provided by s.111. In J.H. Constructions Pty Ltd v. Phillip Davis (unreported, 3 November 1989) Asche C.J. agreed. In the course of my reasons I held, perhaps obiter, that an amount of compensation could be cancelled or reduced without notice to the worker if the worker:

(a) ceased to be incapacitated or died; or

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

I also considered the well recognised principle that in the interpretation of statutes, an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction (Sargood Bros v. The Commonwealth (1910) 11 CLR 258 at 279). I applied that maxim to the relevant provisions under construction. Having had the benefit of full argument on the proper

construction of s.69, I adhere to my opinion previously expressed.

It is important to note that s.69 is purely procedural. It is a provision requiring notice in a class of instances of indeterminate reference with three specified exceptions. In my opinion it does not matter that any one of the exceptions has not been positively established at the time when cancellation or reduction of the amount of compensation is to take place. It is highly likely that whether a person has ceased to be incapacitated and whether the payments of compensation were obtained by fraud or other unlawful means, may be disputed. Even death may be capable of dispute, although one would imagine that such an issue would not be disputed as readily as either of the others. As was conceded by counsel for the employer, if the premise upon which the amount of compensation has been cancelled or reduced is disputed and has not been determined, the appropriate route is s.111 and the employer would carry the onus of establishing the change of circumstances which warranted the cancellation or reduction of the amount of compensation. The concession was no doubt made because of clear authority to that effect (Phillips v. Commonwealth (1964) 110 CLR 347; Barbaro v. Leighton Contractors (1980) 30 ALR 123; and JH Constructions Pty Ltd v. Phillip Davis, supra). If the employer failed to justify cancellation or reduction of the compensation, he might also be faced with an order for interest on the amount to be paid as provided by s.109.

In my opinion that would be the position even if the ground of justification for cancellation or reduction was such that notice was required to be given to the worker.

It follows, in my opinion, that the concept of incapacity in s.69 is not to be construed in the limited way contended for on behalf of the worker. To do so would be to fail to give the provision its plain and ordinary meaning in accordance with the definition in the Act.

In my opinion Martin J. correctly construed s.69 of the Act and correctly held that notice by the employer to the worker is not required where the worker ceases to be incapacitated or dies or the payments were received by fraud or other unlawful means.

I would dismiss the appeal.

ANGEL J:

I agree that the appeal be dismissed for the reasons given by Gallop J.