Normandy NFM Ltd v Turner [2002] NTSC 29

PARTIES:	NORMANDY NFM LTD trading as GRANITES GOLDMINE v THOMAS JAMES TURNER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS4/02 (20111581)
DELIVERED:	10 MAY 2002
HEARING DATES:	8 MAY 2002
JUDGMENT OF:	ANGEL J

REPRESENTATION:

Counsel:

Appellant:	Mr M Grant
Respondent:	Mr J Waters QC

Solicitors:

Appellant:	Cridlands
Respondent:	Povey Stirk

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

Normandy NFM Ltd v Turner [2002] NTSC 29
No. AS4/02

BETWEEN:

NORMANDY NFM LTD trading as GRANITES GOLDMINE
Appellant

AND:

THOMAS JAMES TAYLOR
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 10 May 2002)

ANGEL J:

[1] This is an employer's appeal against a summary judgment of the Work Health Court at Alice Springs delivered on 7 December 2001 ordering reinstatement of the respondent worker's entitlements to weekly compensation, consequent upon a finding that a s 69 *Work Health Act* Notice purporting to terminate existing payments was void and of no affect

[2] The respondent worker was employed by the appellant as a production operator at the Granites Goldmine. On 20 August 1996 whilst loading rocks on to a vehicle at the mine he sustained injury when a piece of quartz rock shattered and a shard of that rock penetrated his left forearm. The

respondent underwent surgery at the Alice Springs Hospital on 29 November 1996 for the repair of a severed left antebrachial cutaneous nerve. Later in 1997 an excision was performed upon discovery that the respondent had a neuroma. It is common ground he suffers from Complex Regional Pain Syndrome Type II.

[3] In November 1996, the respondent made a claim pursuant to the *Work Health Act* and the appellant commenced payments pursuant to the Act. On 9 February 2000 the appellant in purported pursuance of s 69 of the Act, served a Form 5 Notice (the Notice) on the respondent which purported to cancel those payments from fourteen days after receipt of the Notice. However, without prejudice, payments were made to the respondent thereafter during negotiations, which subsequently broke down. By letter dated 6 June 2001, the appellant gave notice that payments would cease within fourteen days. On 31 June 2001, the respondent worker commenced proceedings in the Work Health Court seeking to appeal from the appellant employer's decision to suspend payment of compensation pursuant to s 69 of the Act and, in addition, payment of all medical, physiotherapy and other expenses incurred.

[4] On 18 October 2001, the respondent worker sought summary judgment in the matter on the basis that the Notice was void and of no affect. That application was heard by the Work Health Court on 26 October 2001. On 7 December 2001, the Work Health Court held that the Notice was void and made orders in the following terms:

"1. The worker's entitlement to compensation under the Work Health Act which was suspended on or about 9 February 2000 be reinstated forthwith and arrears that have accrued to date be paid.

2. The worker's entitlements to weekly compensation be indexed according to the Work Health Act and the arrears thus calculated be paid forthwith.

3. Penalty interest on the payments referred to in 1 and 2 (above), pursuant to s 89 of the Act.

4. Costs of this application are to be paid by the employer to the worker."

[5] In his reasons the learned Magistrate held that the Notice cancelling the respondent's payments was based upon the premise that the respondent was no longer totally incapacitated. As such, he held that the Notice should have been accompanied by a medical certificate, as required by s 69(3) of the Act, and that in the absence of such a certificate, the Notice was invalid.

[6] Counsel for the appellant submitted that the learned Magistrate erred in determining that the respondent worker's application to the Work Health Court turned solely on the question of whether the Notice was accompanied by a medical certificate. In doing so, it was said, the learned Magistrate failed to heed the distinction between a notice served on the basis of cessation of physical incapacity and a notice served on the basis of the cessation of loss of earning capacity. Counsel for the appellant submitted that the reasons for cancellation contained in the Notice provided that the respondent worker no longer suffered any loss of earning capacity within the meaning of s 65 of the Act sufficient to attract continuing entitlement to

benefits. It was submitted that from the terms of s 69 it was apparent that a cessation of physical incapacity was not the only ground upon which a reduction or cancellation of payment may be effected. It was submitted the section also permits cancellation of benefits in circumstances where "incapacity" as defined in s 3 of the *Work Health Act* persists, but the worker's earning capacity nevertheless remains at or exceeds pre–injury levels. The appellant submitted that as that was the ground upon which the present Notice was given, no accompanying medical certificate was required.

[7] In order to understand these arguments, it is desirable to set forth the relevant portion of the Notice. It provided the following material reasons and explanation:

> *"REASONS*
>
> 1. Your employer says that you are no longer incapacitated from seeking, procuring, obtaining, or performing employment duties that would, if undertaken, result in you receiving an income comparable to or in excess of your pre–injury income.
>
> 2. You have failed to mitigate your loss.
>
> 3. The amount you are from time to time reasonably capable of earning in a week in work you are capable of undertaking if you were to engage in the most profitable employment reasonably available to you, and having regard to the maters referred to in section 68, exceeds your pre–injury earnings.
>
> *EXPLANATION*
>
> 1. You suffer no loss of earning capacity as defined by section 65 of the Work Health Act (NT) 1986 in that the amount you are reasonably

capable of earning in a week in work is greater than or equal to your normal weekly earnings, as defined by the Work Health Act.

2. You maintain an active lifestyle which features no sign of restriction or impediment;

4. Your employer says that the most profitable employment available to you, having regard to sections 65 (2); 65 (5); 68; and 75B of the Work Health Act (NT) 1986 produces income greater than or equal to your normal weekly earnings;

5. You have taken no or inadequate or insufficient steps to obtain employment or self–employment."

[8] Of this notice, the learned Magistrate said:

"6. … The reasons for the termination are, in summary:

(1) The worker is said to be no longer incapacitated from income producing work, capable of generating an income equal to or in excess of this pre–injury income.

(2) The worker has failed too mitigate his loss.

(3) Restatement of reason number one.

7. The explanations for the reasons can be summarised as follows:

- The worker suffers no loss of earning capacity.
- The worker maintains an active lifestyle.
- Re–statement of dot point l.
- The worker has taken no steps to obtain employment.

8. The last dot point obviously refers to reason number (2). The other dot points refer to reasons numbers (1) and (3). In my opinion, it is plain that all reasons and all dot points are based upon the premise

that the worker is no longer totally incapacitated, whereas before the notice, it had been accepted that he was totally incapacitated (affidavit of Penny Loo Turner sworn 26 October 2001, paragraph 4). The compensation was therefore cancelled on the basis that the worker had ceased to be incapacitated for work. If the notice was to be valid, it had to be accompanied by a medical certificate to that effect (s.69 (3)). It was not. The notice in February 2000 was therefore plainly invalid, and the worker is entitled to the relief sought."

[9] Section 69 of the *Work Health Act* relevantly provides:

69. Cancellation or reduction of compensation

(1) Subject to this Subdivision, an 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 approved form –

(i) setting out the reasons for the proposed cancellation or reduction;

....

(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.

[10] Counsel for the appellant submitted that the Notice addressed the respondent's earning capacity only and did not address the question of physical incapacity or incapacity as defined in s 3, i.e. "an incapacity or limited capacity to undertake paid work because of an injury". This being so, it was said, no accompanying medical certificate was required under s 69(3).

[11] I reject these submissions. I think that on a fair reading the Notice (read as a whole within the factual matrix in which it was issued), is to be read as addressing, at least inferentially, the changed physical circumstances of the respondent worker such as to warrant the appellant employer's unilateral action to stop payment. As Mildren J (Thomas and Priestly JJ concurring) said in *Disability Services v Regan* (1998) 8 NTLR 73 at 76:

> "An appeal under s 69 calls into question only whether there has been a change in circumstances justifying the action unilaterally taken by the employer at the time the notice was given: see *Morrissey v Connaught* (1991) 1 NTLR 183 at 189; *AAT Kings Tours Pty Ltd v Hughes* (1994) 4 NTLR, 185 at 189."

Until the Notice, the respondent worker was in receipt of payments as if he were fully incapacitated. The Notice in its terms merely asserts a state of affairs. It asserts nothing "to enable the worker to whom the statement is given to understand fully why" he was paid compensation in full before the Notice and is to be paid no compensation after the Notice. Of course a change of physical or medical circumstances may not be the only reason such as to justify a cessation or reduction of payments. As counsel said, job

opportunities, economic changes, a pre–existing payment regime obtained by fraud or other circumstances may be relevant. Section 69(4) requires a Notice to spell out why the status quo should change, in clear terms that a lay reader can fully understand. The present Notice fails to do that. For instance, it does not spell out how it is that the respondent is no longer incapacitated from earning income comparable to or exceeding his pre–injury income. In my view, the ambiguous terms of the Notice fall far short of complying with s 69(4).

[12] The learned Magistrate's conclusion that the Notice was invalid was correct, generally for the reasons given by the learned Magistrate and also for the reasons I have advanced above.

[13] Counsel for the appellant argued that even if the Notice was invalid, the respondent in his statement of claim, having claimed more than simply an appeal from the termination of payments, that is, having widened the scope of the issues for trial beyond an appeal under s 69, it was open for the appellant employer to raise by way of answer grounds outside those in the appeal. He relied on the judgment of Martin CJ in *Ju Ju Nominees v Carmichael* (1999) 9 NTLR 1 at 8, para [15] point 6. Thus it was wrong, it was submitted, for the learned Magistrate to give summary judgment.

[14] I reject that argument. The appeal under s 69 forms a discrete part of the respondent worker's claim and as that appeal was bound to succeed, I see no reason why judgment should not be given with respect to that claim, leaving

the remaining claims, and the appellant employer's counter–claim, remaining for later determination.

[15] The appeal is dismissed with costs.

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