Sayson v Northern Territory of Australia [2006] NTCA 11

PARTIES:	SAYSON, Ruby v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 8 of 2006 (20408292)
DELIVERED:	16 November 2006
HEARING DATE:	6 November 2006
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN and RILEY JJ
APPEAL FROM:	Judgment of Thomas J in Supreme Court Proceedings LA 1 of 2006, 18 July 2006

CATCHWORDS:

WORKERS' COMPENSATION -- Obligations of employer under s 69 of Work Health Act – Meaning of "return to work" – Not necessary for worker to resume same position or duties prior injury to return to work.
Appeal dismissed

Miller v Cameron (1936) 54 CLR 472, followed.
Disability Services of Central Australia v Regan (1998) 8 NTLR 73, referred to.
Morrissey v Conaust Ltd (1991) 1 NTLR 183, referred to.
Carmichael v Ju Ju Nominees Pty Ltd (unreported 7 May 1998, Angel J), partly followed.

Work Health Act 1986 (NT), s 64, s 65, s 69
Workmen's Compensation Act 1979 (NT) (repealed), s 7A

REPRESENTATION:

Counsel:

Appellant:	J Waters QC
Respondent:	PM Barr QC

Solicitors:

Appellant:	Caroline Scicluna
Respondent:	Collier & Deane

Judgment category classification:	B
Judgment ID Number:	ril0616
Number of pages:	16

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sayson v Northern Territory of Australia [2006] NTCA 11
No AP 8 of 2006 (20408292)

BETWEEN:

SAYSON, Ruby
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 16 November 2006)

MARTIN (BR) CJ

[1] I agree that the appeal should be dismissed for the reasons given by Riley J.

[2] I also agree with his Honour's reasons and conclusions with respect to the Notice of Contention and the interpretation of "return to work" for the purposes of s 69 of the Work Health Act.

MILDREN J:

[3] I agree with Riley J.

RILEY J:

[4] On 29 March 2004 the appellant (hereinafter "the worker") claimed entitlements under the Work Health Act from the respondent who was her employer at the time. In her statement of claim she provided a history of her injuries and the claims for compensation she had made. She stated that she had suffered injuries on 20 May 1999 whilst employed as a patient services assistant at the Alice Springs Hospital. She had lodged a worker's compensation claim on 30 May 1999 and the employer had accepted liability for the claim.

[5] The worker was totally incapacitated for a period and then resumed work in a restricted capacity pursuant to a return to work program. She gradually increased her hours of work until she was working full-time, but continuing on restricted duties. In February 2001 she commenced maternity leave returning to work on 25 October 2001. By 22 November 2001 she was again working full-time but not carrying out all of the duties she had previously undertaken. In particular she was assigned to work in a paediatric ward where her duties were limited to lifting young children as distinct from lifting heavier older children and adults.

[6] In her statement of claim she pleaded that on 14 March 2002 and again on 9 May 2003 she "suffered recurrences and/or an exacerbation or aggravation of her injuries in the course of her employment and was consequently totally incapacitated for work" on various dates and then "continuously since

21 August 2003". She lodged a further claim for entitlements in respect of the injury of 9 May 2003 and the employer denied liability for that claim. The worker went on to plead in par 11:

> "The employer suspended the worker's entitlements to weekly payments of compensation which were due to the worker pursuant to s 64 and s 65 of the Work Health Act, on various dates from 9 July 1999, particulars of which will be provided prior to trial. No notification pursuant to s 69 of the Act has ever been received by the worker nor has the employer made any application to this Court pursuant to s 104 of the Act."

[7] The worker sought orders including:

> "(i) That the suspension or cessation of the worker's compensation benefits on various dates since 9 July 1999 is invalid.
>
> (ii) That the worker is entitled to compensation pursuant to the Work Health Act and the employer is to pay the worker weekly benefits of compensation and other benefits as may be outstanding from the date of accident in accordance with the Act."

[8] The matter came before the Work Health Court and on 19 December 2005, after a contested hearing, the learned magistrate ruled that the worker had not returned to work for the purposes of s 69(2) of the Work Health Act and therefore that "the suspension, cessation or termination of benefits was necessarily subject to the provisions of s 69(1) of the Act". Since the requisite notice was not given his Honour ruled that the cessation of payments was "not lawful".

[9] However, the matter did not end there. His Honour went on to consider the evidence of the worker (which he regarded as unsatisfactory) and of the

various expert medical witnesses who were called by each of the parties. His Honour determined that the employer had established that the worker did not suffer any incapacity arising out of the "alleged injury on 20 May 1999" and that the "alleged exacerbation, etcetera, on 14 March 2002 and/or 9 May 2003" did not give rise to any entitlements. He went on to say:

> "Insofar as the negation of any compensable injury on or after 14 March 2002 is concerned and/or alternatively the negation of any such incapacity during such period is concerned this Court finds that the onus of proving such negation, reposing as it does on the employer, has been discharged and consequently the application by the worker made on 26 March 2004 (sic 29 March 2004) to the Work Health Court fails."

[10] The claim was dismissed with costs. The worker then appealed to the Supreme Court and, on 18 July 2006, the appeal was dismissed. The worker now appeals to this Court on the following grounds:

> "1. The learned judge on appeal (par 44) erred in finding that the worker in the conduct of its case expanded the issues beyond a strict appeal against cancellation of compensation pursuant to s 69 of the Work Health Act.
>
> 2. The learned judge on appeal erred in finding that the appellant had sought orders beyond the reinstatement of compensation such as to bring the case within the strictures of *Disability Services of Central Australia v Regan.*
>
> 3. The learned judge on appeal erred in particular in failing to have regard to the conduct of the appellant's case at trial and in particular the case management statements and the worker's written submissions (18 November 2005) presented to the Court at first instance.
>
> 4. The learned judge on appeal erred in finding that the matters referred to in paragraphs 46, 47 and 48 of her judgment

amounted to a "widening of issues" by the worker and the employer for determination by the learned stipendiary magistrate at first instance, rather than background to the only issue litigated on the appellant's case.

5. The learned judge on appeal erred in finding that any onus issue in respect of the appellant's case fell upon the appellant (paragraphs 80 and 81)."

[11] It was the submission of the worker that the only issue raised in the pleadings was whether there had been compliance by the employer with the provisions of s 69 of the Work Health Act. It had been the case for the employer before the learned magistrate that the worker had in fact "returned to work" for the purposes of s 69(2) of that Act and, consequently, it was not necessary to give a notice under s 69(1) of the Act before cancelling or reducing the amount of compensation paid to the worker. In this Court the worker submitted that, as both the learned stipendiary magistrate and the judge on appeal determined that the worker had not returned to work, it had been necessary for the employer to comply with s 69(1) before cancelling or reducing payments of compensation and, that not having occurred, there should have been an order reinstating the weekly benefits invalidly cancelled. There was, it was submitted, no expanding of the issues as between the parties. There was no amendment to the pleadings to reflect an expansion of the issues and it was impermissible for the learned magistrate and the judge on appeal to go beyond the issues as defined by the pleadings.

The pleadings

[12] In her statement of claim the worker pleaded the history of the matter as set out above and claimed to have been totally incapacitated for work for various periods between March 2002 and June 2003 and "continuously since 21 August 2003". She sought the "reinstatement of weekly and other benefits". As the worker's particulars of claim reveal the claim was for weekly compensation from the date of cessation to the date of hearing and continuing. The scope of the hearing was clearly broadened beyond the issue of whether there had been a failure to comply with the provisions of s 69 of the Act: *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73 per Mildren J at 76. In its defence the employer placed in issue the original diagnosis from May 1999 of "a left brachial plexus traction injury leading to ongoing neuropathic pain in her left shoulder and neck". The employer admitted the worker had been absent from work on the dates pleaded in the statement of claim but denied that the worker had been totally or partially incapacitated for work on those dates. The incidents which were said by the worker to have occurred on 14 March 2002 and 9 May 2003 were specifically denied. The employer pleaded that "since 9 May 2003 the worker has been and remains fit to return to her pre-injury employment with the employer".

[13] In relation to par 11 of the statement of claim (see par 3 above) the employer pleaded:

> "Paragraph 11 is denied. On various occasions prior to 9 May 2003, when the employer did not pay the worker weekly benefits pursuant to s 64 and s 65, such payments were not made, or payments were reduced, because the worker had returned to work or was not entitled to benefits pursuant to the Work Health Act. The employer denies any notification was required to be made to the worker for these periods.
>
> For the period after 9 May 2003 the employer denies liability for the worker's claim for compensation."

The employer went on to seek orders dismissing the application and a finding that the worker was fit for employment and "has been so for all periods of time when Work Health benefits were not paid to her by the employer". In seeking such relief it is necessary for the employer to have proceeded by way of counterclaim unless the worker has raised the question of her own fitness for employment in the statement of claim. If that allegation is then denied in the defence, it has been properly raised in the pleadings. In this case, the issue was raised in both the statement of claim and in the defence. Even if the issue had only been raised in the defence, no application was made to strike out the paragraphs of the defence raising that issue on the ground that those issues could only be raised by counterclaim.

[14] The issues raised by the worker in her statement of claim and those raised by the employer in its defence went beyond a dispute as to whether the worker had "returned to work" for the purposes of s 69 of the Act. The pleadings raised issues of the correctness of the original diagnosis, whether there was any ongoing injury and whether there was any ongoing compensable incapacity. Both parties called evidence in relation to these

issues and addressed them fully. The issues were fought out as part of the trial and neither party should now be permitted to take a pleading point of the kind raised on this appeal: *Miller v Cameron* (1936) 54 CLR 572 at 576. Notwithstanding the fact that the employer failed to formulate its claim as a counterclaim, the issues were directly and clearly raised in the defence. It is not the case, as the worker submitted, that the issues were confined by the pleadings to a consideration of whether notice ought to have been given under s 69 of the Act.

The issues addressed by the parties

[15] Reference to the reasons for decision and to the transcript of the hearing reveals that, no matter what may have been the issues as defined by the pleadings, the submissions of counsel and the evidence called went beyond the question of whether the worker had "returned to work". Consideration of that issue would have been confined to: establishing the fact that the employer had accepted responsibility for, or been required to make, payments of compensation; determining whether the worker had returned to work for the purposes of the Act and whether a s 69 notice was required to be given; and, if so, whether it had been given. The focus of such a hearing is restricted to determining whether the unilateral action taken by the employer was justified: *Disability Services of Central Australia v Regan* (supra). In the present case the issues addressed by the parties went beyond the narrow issues necessary to determine whether there had been a breach by

the employer of an obligation under s 69. The worker called evidence from herself, her husband and a medical practitioner. The respondent called evidence from two medical practitioners. The evidence was largely focused upon whether the worker suffered an injury and, more importantly, whether the effects of any injury were short-lived and whether any subsequent incapacity related back to the claimed injury. The findings on those issues were against the worker.

[16] A review of the opening remarks of counsel for the worker, the written submissions of the parties, the final addresses of each counsel and, of course, the evidence led by the parties without objection makes it clear that the issues were not narrowly defined as submitted by counsel for the worker before this Court.

[17] I see no error in the conclusions of either the learned magistrate or the judge on appeal.

The respondent's notice of contention

[18] The respondent contended before this Court, as it did in the court below, that the learned magistrate erred in law in finding that the worker had not "returned to work" for the purposes of s 69(2) of the Work Health Act. The learned magistrate had concluded that, although the worker had returned to work, the return to work "was not a full return to work, for reason of, duties being performed only in the paediatric unit". He went on to conclude that "in those circumstances … the cessation of payments was unlawful".

[19] Section 69 of the Work Health Act is, relevantly, in the following terms:

> "(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 …
>
> (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 or her employer a certificate under section 91A within 14 days after being requested to do so in writing by his or her employer;
>
> (b) the medical 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 or her employer on or before that date with another medical certificate as to his or her 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."

[20] The issue to be addressed is what is meant by the expression "returns to work" in subsection (2)(a).

[21] Dealing with this issue, on appeal the learned judge said:

> "'Return to work' is not a term of art. I agree with Angel ACJ, as reported in Carmichael v Ju Ju Nominees, that it ought to be given its ordinary English meaning according to the language in the context in which it appears. It is a finding dependent on the facts in each case. I have concluded that 'return to work' means, in the context of this case, when the worker has resumed performing the work she was engaged in at the time of the injury for the equivalent period of time."

And later:

> "Following the report dated 2 January 2002, the worker was receiving full entitlements and was in full-time employment. The progress report dated 2 January 2002 does not satisfy the requirements of proof on the balance of probabilities that the worker had 'returned to work' because of the reference to lighter duties, ie working in the paediatric ward as distinct from an adult ward."

[22] Her Honour therefore held that the worker had not returned to work for the purposes of the Act and the employer was required to deliver a notice under s 69 of the Act. Her Honour rejected the submissions of the employer to the contrary.

[23] In determining the meaning of the expression it is of assistance to consider the legislative history behind s 69. As is noted in *Morrissey v Conaust Ltd* (1991) 1 NTLR 183, the statutory predecessor to s 69 included s 7A of the Workmen's Compensation Act. Section 7A as originally formulated provided a prohibition on an employer discontinuing, withholding or diminishing a payment due under the Act. Section 7A was amended by Act No 47 of 1984 and thereafter provided, inter alia, that an employer may discontinue, withhold or diminish such a payment to a person where:

> "(a) The person returned to his employment and is engaged in work in, or work similar to, [in] which he was engaged prior to [his] accident in respect of which compensation was being paid."

[24] The Work Health Act replaced the Workmen's Compensation Act in 1987. In its original form s 69 of the Work Health Act provided that benefits payable under the Act could not be altered except after notice save for certain exceptions. The relevant exception for present purposes was where "the person receiving it ceases to be incapacitated". The section was subsequently amended to delete reference to the person ceasing to be incapacitated and included the exception that "the person receiving the compensation returns to work". It is to be noted that the exception as presently worded simply requires a return to work and does not refer to a return to "his employment" or being engaged in work similar to the work in which the worker had previously been engaged as was the case in s 7A of the Workmen's Compensation Act. There has been a departure from this form of words.

[25] The meaning of the expression "returns to work" was discussed by Angel J in *Carmichael v Ju Ju Nominees Pty Ltd* (unreported 7 May 1998) where his Honour, in passing, observed that the phrase "ought to be given its ordinary meaning according to the English language in the context in which it appears". His Honour went on to say:

> "The preferable interpretation is that where a worker, who is in receipt of compensation payments, returns to gainful employment the employer is entitled to reduce or cancel those compensation payments to take account of the worker's renewed income without

> complying with s 69(1), provided the worker continues to receive such compensation payments, if any, as he remains entitled to under the Act taking account of his return to gainful employment."

[26] In adding the proviso regarding the receipt of compensation payments it is not clear whether Angel J was intending to qualify what is meant by the expression "returns to work" or whether he was simply observing that the worker continued to be entitled to any benefits otherwise payable under the Work Health Act. Clearly, existing rights under the Act would be unaffected by the decision of the employer to cease or reduce payments of compensation and the observations of his Honour, if they be so read, are unexceptional. However if his Honour was seeking to qualify what is meant by "returns to work" by the addition of those words, I respectfully disagree.

[27] I agree that the words should be given their ordinary meaning and, in light of the history to which I have referred, the expression should not be read as requiring a return to the work the worker was previously doing or to similar work. Given that the section contemplates a reduction in compensation as distinct from a cessation, the return to work need not be to work that is the subject of remuneration at the same level as the work previously undertaken.

[28] Where a worker who is in receipt of compensation payments returns to work, the employer is entitled to cancel or reduce those compensation payments to take account of the worker's income without being obliged to provide the notice referred to in s 69(1) of the Act. I do not regard the expression as being subject to a proviso that "the worker continues to receive such

compensations payments, if any, as he remains entitled to under the Act taking account of his return to gainful employment". Whilst the employer remains obliged to make payments in accordance with the requirements of the Act, there is nothing in the wording of the exception to suggest that a miscalculation of any reduction in any entitlement would invalidate the decision of the employer. In the event that the worker regards the cessation of payments or the reduction in payments as being in breach of his or her rights under the Act or in any way unwarranted, application can be made for a review. In that regard the employer will bear the onus of establishing the change of circumstances which it asserts warranted the cancellation or reduction of the amount of compensation: *Morrissey v Conaust Ltd* (supra at 189).

[29] The word "work" is not defined in the Act. It is a word capable of many meanings including the mere expenditure of energy or exertion to a purpose without reference to remuneration. However, the Work Health Act is (inter alia) concerned with providing financial compensation to workers incapacitated from workplace accidents or diseases. The entitlement to payments of compensation pursuant to s 64 and s 65 of the Act is assessed by reference to the loss of earning capacity of the worker. Section 69 relates to the cancellation or reduction of those payments. In my view it is tolerably clear that in referring to a return to "work" the legislation is referring to a return to gainful employment reflecting a change in the

earning capacity of the worker. This was the view expressed by Angel J in *Carmichael v Ju Ju Nominees* (supra).

[30] What amounts to a return to work will be a matter of fact for determination in the circumstances of each case. It may not be a return to work if the worker returned to a place of employment and carried out minor duties as part of a rehabilitation program. A return to work must be a return to work in a meaningful sense. It would be expected that the work would be of value to the employer for whom the work is performed and would be of a kind for which that employer would be prepared to pay the worker. On the other hand it is not necessary for the worker to have resumed the same position he or she occupied with his or her employer before suffering the relevant injury or that the worker be carrying out the same duties or at the same remuneration for there to be a return to work. It will be a matter of fact and degree in each case.

[31] In the present case there had been a return to work even though the work "was not a full return to work" as described by the learned magistrate and adopted by the judge on appeal. The evidence as to the worker's return to work showed that she had progressed through a graded return. She eventually reached the stage of being engaged in full-time work and managed a full range of duties even though the learned magistrate concluded that the work in which she was engaged involved lighter duties, when compared with her pre-injury duties. Her work was meaningful work that was of value to her employer and was such that her employer would be

expected to pay for the completion of that work. In my view there was a return to work for the purposes of s 69(2) of the Work Health Act. The learned magistrate and the learned judge on appeal were in error in concluding that s 69(2) did not have application in the circumstances.

Conclusion

[32] The appeal must be dismissed.

———————