PARTIES:	COLLINS RADIO CONSTRUCTIONS INC
	v
	DAY, Shirley
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 80 of 1996
DELIVERED:	25 AUGUST 1997
HEARING DATES:	ALICE SPRINGS, 29 APRIL 1997
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Workers compensation - Appeal - Assessment and amount of compensation - Cessation of payments - Cancellation by employer by reason that worker has ceased to be incapacitated for work - Whether requirements of s69(3) Work Health Act must be strictly complied with - Reason for notice of proposed cancellation - Purpose of medical certificate - Use of "shall" - Question of inconvenience to employer and worker respectively - Unilateral cancellation by employer of workers' continuing right to receive compensation constitutes such interference with personal rights as to require strict compliance with the conditions attaching to it.

Work Health Act (NT) 1986, ss69(1)(b),(2)(d),(3),(4), 85(2),(4), 94, 104(3), 106(4), 107(2)(c).
Work Health Amendment Act (NT) No61 of 1991.
Workers Compensation Act (NT) 1949, ss7A, 10.

Hunter Resources v Melville (1988) 164 CLR 234 at 252 per Dawson J. referring to *Clayton & Ors v Heffner & Ors* (1960) 105 CLR 214 at 247, applied.
Grunwick Processing Laboratories Ltd & Ors v Advisory, Conciliation and Arbitration Service & Anor (1978) AC 655 at 690, referred to.

Fang & Ors v The Minister for Immigration and Ethnic Affairs & Anor (1996) 135 ALR 583 at 615 per Nicholson J., referred to.
Morrissey v Conaust Ltd (1991) 1 NTLR 183 at 187, referred to.
Johston v Paspaley Pearls Pty Ltd (1996) 110 NTR 1 at 5, referring to *Tasker v Fullwood* (1978) 1 NSWLR 20 at 23-24, applied.

REPRESENTATION:

Counsel:

Appellant:	Mr C McDonald QC
Respondent:	Mr M Spargo

Solicitors:

Appellant:	Ward Keller
Respondent:	Caroline Scicluna & Assoc

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

No. 80 of 1996

BETWEEN:

COLLINS RADIO CONSTRUCTIONS INC
Appellant

AND:

SHIRLEY DAY
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 25 August 1997)

This appeal raises the issue as to whether or not strict compliance is required of the demands in subs(3) of s69 of the *Work Health Act* (NT) 1986. Relevantly, s69(1) provides that an amount of compensation under SubdivB of Div3 of PtV of the Act (weekly compensation) shall not be cancelled unless the worker to whom it is payable has been given 14 days notice of the intention to do so, and a statement in the prescribed form setting out the reasons for the proposed cancellation indicating, as well, that the worker has a right to appeal against the decision to cancel the compensation. Subsection

(3) provides that 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 referred to shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work. The question is whether a failure to comply with subs(3) renders the cancellation of the payment of compensation invalid, or whether substantial compliance will suffice.

It may be as well to commence with a brief history of s69. It derived from s7A of the *Workers Compensation Act* (NT) 1949 which was repealed upon the commencement of the *Work Health Act*. That earlier provision, enabled an employer to discontinue, withhold or diminish a weekly payment under the Act to a person where, inter alia, 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 accident in respect of which the compensation was paid. Further, an employer was not to discontinue, withhold or diminish a weekly or other payment unless he had given to the person a copy of the medical certificate together with written notification that he intends to discontinue etc., and 21 days had elapsed since the giving of the certificate and the notification. It was specially then provided that a person given those documents might not later than 21 days after he had been given them, apply to the then court for an order that the weekly payments not be discontinued, withheld or diminished. On hearing such an application, the Court, where it was satisfied that the employer seeking to discontinue etc. the weekly payments had established a prima facie

case for carrying out the action, could adjourn the application on such conditions, including conditions as to payment or make such order for continuation of weekly payments as it thought fit. The statute provided that the onus of proving that a weekly payment to a person should be discontinued etc. was on the employer seeking to carry out that action. The full details of ss7A and 10 are set out in *Morrissey v Conaust Limited* (1991) 1 NTLR 183 at 187.

When originally enacted in the *Work Health Act*, s69 relevantly provided that an amount of compensation should not be cancelled or reduced unless the worker to whom it was payable had been given 14 days notice of the intention to cancel, a statement in the prescribed form setting out the reasons for the proposed cancellation, and indicating that the worker had a right of appeal. The provision was recast in 1991 by, inter alia, introducing subs(3). There was later added subs(4) which provides that for the purposes of the statement referred to, the reasons set out should provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled. Thus, the Act provides that the worker be informed by the employer's statement that compensation is to be cancelled for the reason that the worker has ceased to be incapacitated for work, and the statement is to be accompanied by the medical certificate referred to in subs(3). The form of the medical certificate is not prescribed by regulation or otherwise, but the subsection requires that the medical practitioner certify that the worker has ceased to be incapacitated for work. (The use of the word "the" as opposed to "a", in relation to medical practitioner is not explained).

The appellant gave to the respondent a notice in prescribed Form 5 in relation to cancellation of payments of compensation, informing her that it thereby "cancels payment of weekly benefits to you pursuant to s69 of the *Work Health Act*". It goes on to say that the reason for the decision is that "you are no longer totally incapacitated for work". In accordance with the statute, the worker was informed by that form of her rights under the Act. The certificate purporting to be given pursuant to s69(3) was in the following form:

> "My full name is MARK AWERBUCH.
>
> I am a legally qualified medical practitioner.
>
> On 2 February 1995 I medically examined Mrs Shirley Day and I was informed that she claimed to have injured her right shoulder at work in or about October 1991.
>
> I HEREBY CERTIFY that she is no longer totally incapacitated."
>
> (The document appears to be signed by the doctor and it was dated on 15 February 1995).

There is evidence that that document and certificate were served on the respondent on 24 February 1995, and that on 11 August of that year, an application was made by her to the Work Health Court. A preliminary issue raised the question as to whether the payment had been properly cancelled pursuant to s69(3). The Court ruled that it had not been and ordered the appellant to pay the respondent her entitlements under the Act from the date of the purported cancellation. Her Worship constituting the Court at Alice Springs, gave written reasons for that decision on 25 September 1996. Her

Worship based her decision upon the fact, evident on the face of it, that the doctor's certificate did not certify in accordance with the requirement of s69(3). He certified that the respondent had ceased to be incapacitated, but not that she had ceased to be incapacitated for work. The learned Magistrate said that she considered:

> "... it is imperative before an employer can cancel payments that the procedures under Section 69 should be strictly complied with. I do not consider in this case that that has been done. From a practical point of view, the terminology of the certificate would give no notice to the employee that it was considered that she had ceased to be incapacitated for work."

Accordingly, the limitation on bringing proceedings in respect of a decision of an employer under s69 to cancel compensation within 28 days after notice was received, as set out in s104(3) of the Act, did not apply. Implicitly her Worship held that the cancellation was of no effect and thus the respondent was entitled to be paid weekly compensation from the date upon which payments were purportedly cancelled.

Section 69 is a provision by which an employer may pre-emptorily deprive a worker of the benefit of weekly compensation secured to the worker, either by acceptance of liability under s85(2) or (4) or by order of the Court under s94. 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 s69 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 in s69(2)(d), that is, by seeking an order of the Court cancelling the obligation to pay the compensation. In the course of that procedure, once an application is in the Court, it would seem that an interim determination could be made of a party's entitlement to compensation on such information, evidence and material as is then placed before the Court (s107(2)(c)). If the employer does not adopt that procedure, then it is up to the worker to make application to the Court, after receiving notice under s69, if the worker wishes to challenge the employer's grounds for cancellation. An interim determination could also be made in those circumstances.

The requirement to give notice of the reasons for the proposed cancellation and the medical certificate, is that the worker will know what is intended for disclosed reasons which, prima facie, are supported by relevant evidence. The worker, equipped with that material, can be in a position to seek the assistance of the court including in making orders for interim payments.

What purpose does the medical certificate fulfil in all that? It seems to me that firstly it discloses the name of the medical practitioner who advised the employer, which of itself may be a relevant factor for the worker to take into consideration. The requirement that it be certified that the worker has ceased to be incapacitated for work informs the worker that the medical practitioner has, at least on the face of it, directed his or her mind to the appropriate test. The worker knows the employer is acting upon relevant advice, not the employer's own untutored opinion. The worker thus knows

that prima facie the employer has a case to justify the cancellation. Those matters would probably be very important to a worker when considering whether to take the issue to the Court (ss69(1)(b) & 104). 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 similarly 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. The procedure also enables the worker to identify a medical report which might be sought pursuant to the powers contained in s106(4). The subject here being addressed, namely the workers capacity for work within the meaning of the Act, is not something necessarily within the certain knowledge of the worker. Incapacity means an inability or limited ability to undertake paid work because of an injury, and injury, which is also defined in s3 of the Act, is another matter open to disagreement.

There are accordingly significant and well merited reasons why there should be strict compliance with s69(3). The question which is raised, however, is not answered so simply. In *Johnston v Paspaley Peals Pty Ltd* (1996) 110 NTR 1 at p5 the Court of Appeal adopted what was said by the Court of Appeal of New South Wales in *Tasker v Fullwood* (1978) 1 NSWLR 20 at pp23-24:

> "(1) The problem is to be solved in the process of construing the relevant statute. Little, if any, assistance will be derived from the terms of other statutes or any supposed judicial classification of them by reference to subject matter. (2) The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the

> act would be preserved notwithstanding non-compliance: the *Franklins Stores Pty Ltd* case [1977] 2 NSWLR 955 at 963 et seq. (3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute: *Hatton v Beaumont* [1977] 2 NSWLR 211 at 220. (4) The intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement: *Victoria v Commonwealth* (1975) 134 CLR 81 at 179, 180; 7 ALR 1. (5) It can mislead if one substitutes for the question thus posed an investigation as to whether the statute is mandatory or directory in its terms. It is an invitation to error, not only because the true inquiry will thereby be sidetracked, but also because these descriptions have been used with varying significations. (6) In particular, it is wrong to say that, if a statute is couched in directory terms, the act will be invalid, unless substantial performance is demonstrated: the *Franklins Stores Pty Ltd* case [1977] 2 NSWLR 955 at 965 et seq. A statute which, on its proper construction, does not nullify the act in question, even for total non-observance of the stipulation, is also described as directory in its terms: *Victoria v Commonwealth* (1975) 134 CLR 81 at 118, 162, 179, 180; 7 ALR 1."

It will noted that in *Johnston v Paspaley Peals* it was seen as being significant that the provision in question had been inserted by the legislature as an amendment. So too here (*Work Health Amendment Act* No 61 of 1991). The amendment restored the like requirements contained in s7A of the *Workers Compensation Act,* not originally re-enacted in the *Work Health Act*. The Court there also observed that the requirement was either met or it was not "there must either be strict compliance or non compliance". Subsection (3) is not so loosely worded as to admit shades of meaning or degrees of compliance, in contrast with, for example, subs(4).

There are other indications that the intention of Parliament is that the requirements as to the giving of the medical certificate and of its contents are

essential to the validity of cancellation. The use of the word "shall" when used in a statute, prima facie, is used "as a term of art to impose a duty to do what is prescribed, not a discretion to do it or not according to whether it is reasonably practicable to do it, nor a discretion to do something like it instead." *Grunwick Processing Laboratories Ltd & Ors v Advisory, Conciliation and Arbitration Service & Anor* (1978) AC 655 in the House of Lords per Lord Diplock at p690.

In *Hunter Resources v Melville* (1988) 164 CLR 234 at p252 Dawson J. considered the question of inconvenience, one of the considerations referred to in *Clayton & Ors v Heffron & Ors* (1960) 105 CLR 214 at p247. No inconvenience to an employer results from an insistence upon strict compliance with subs(3) beyond ensuring strict compliance. For reasons given, failure to do so could lead to significant inconvenience to the worker. Compliance is important to the worker and presents no problem to the employer. If there is a doctor prepared to certify to the required opinion, then it is easy enough to translate it into a certificate to that effect and, if an error is made somewhere along the way, to produce a fresh certificate containing the prescribed information. As to inconvenience, see also the remarks of Nicholson J. in *Fang & Ors v The Minister for Immigration and Ethnic Affairs & Anor* (1996) 135 ALR 583 at 615.

Relying upon what Lord Diplock said in *Grunwick v ACAS* at p658, the appellant submitted that a court is less reluctant to treat "shall" as being directory rather than mandatory in a provision in which all that is involved is a mere matter of machinery for carrying out the undoubted purpose of the Act. In *Morrissey v Conaust Ltd* (1991) 1 NTLR 183 at 189 the court said that the provisions of the earlier version of s69 were "purely procedural". Whether that expression is equivalent to "a mere matter of machinery for carrying out the undoubted purpose of the Act" is not the point because whatever words may be used is not determinative of the question. Other reasons for holding that strict compliance is required outweigh any legitimate consideration of indications which might arise from "machinery provisions".

Section 69 is clear in that it prohibits the cancellation of payment of compensation where the worker to whom it is paid has ceased to be incapacitated for work, unless there has first been given to the worker a notice (subs(1)(a)), a statement (subs(1)(b)) and the medical certificate (subs(3)). In my opinion, the statutory requirements whereby an employer is enabled 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, that the worker should obtain the information required and in the form required.

The appeal is dismissed.

There was a further appeal going to her Worship's award of costs to the respondent on an indemnity basis. It was not argued.
