| | |
|---|---|
| PARTIES: | COLLINS RADIO CONSTRUCTORS INC.<br><br>v<br><br>SHIRLEY DAY |
| TITLE OF COURT: | COURT OF APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPELLATE |
| FILE NO: | AP 24 of 1997 |
| DELIVERED: | 26 MARCH 1998 |
| HEARING DATES: | 9 MARCH 1998 |
| JUDGMENT OF: | KEARNEY ACJ, MILDREN J AND GRAY AJ |

**CATCHWORDS:**

Statutes – Interpretation – *Work Health Act*(NT) s69(3) – cancellation of compensation where medical certificate that "the person has ceased to be incapacitated for work" – this requirement of such importance to the object of the statute as to disclose an intention that its complete non-observance should invalidate cancellation – not sufficient that medical certificate that person "no longer totally incapacitated" – another form of words other than those prescribed by the sub-section but conveying the same meaning would suffice - Form 5 certificate under the *Work Health Regulations* defective in not corresponding with the requirements of s69(1)(a) -

Work Health Act (NT), s69(1)(a), (b) (3), (4)
Work Health Regulations (NT), Form 5

*Johnston v Paspaley Pearls Pty Ltd* (1996) 110 NTR1, followed.

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Appellant: | C McDonald, Q.C. |
| Respondent: | M Spargo |

*Solicitors:*

| | |
|---|---|
| Appellant: | Ward Keller |
| Respondent: | Caroline Scicluna & Associates |

| | |
|---|---|
| Judgment category classification: | B |
| Judgment ID Number: | MIL98002 |
| Number of pages: | 12 |

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

No. AP 24 of 1997

BETWEEN:

**COLLINS RADIO CONSTRUCTORS INC.**
Appellant

AND:

**SHIRLEY DAY**
Respondent

CORAM: KEARNEY ACJ, MILDREN J AND GRAY AJ

REASONS FOR JUDGMENT

(Delivered 26 March 1998)

THE COURT: The appellant served a notice upon the respondent accompanied by a medical certificate in purported compliance with s69 of the *Work Health Act*. The notice purported to cancel the respondent's weekly benefits under the Act. In the Work Health Court, Ms Deland SM held that the notice was invalid as the medical certificate which accompanied it did not comply with s69(3) of the Act. On appeal, Martin CJ held that s69(3) had to be strictly complied with, and as the certificate did not comply with the subsection, the appellant had not validly terminated the respondent's right to continue to receive weekly payments of compensation. Accordingly, his

Honour dismissed the appeal. After hearing Mr McDonald Q.C. for the appellant, we ordered that the appeal to this Court should be dismissed with costs, for reasons to be published at a later time. We now publish those reasons.

S69 of the Act provides as follows:

"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 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.

(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 employer a certificate under section 91A within 14 days after being requested to do so in writing by his employer;

(a) the prescribed 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 employer on or before that date with another medical certificate as to his incapacity for work;

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

(c) the Court orders the cancellation or reduction of the compensation.

(2) 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.

(3) 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."

In this case, the appellant served on the respondent a statement of reasons which purported to follow Form 5 in the Regulations in which it was said that the appellant:

"hereby cancels payment of weekly benefits to you pursuant to s69 of the *Work Health Act*.

The reasons for this decision are:

1. You are no longer totally incapacitated for work."

The medical certificate which accompanied the notice was as follows:

"CERTIFICATE PURSUANT TO SECTION 69(3) OF THE N.T. WORK HEALTH ACT 1986 (AS AMENDED)

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.

M. Awerbuch (Signed)
FRCP (Qualifications)

DATED: 15/2/1995"

It is clear that this certificate did not comply with s69(3) in two respects. First, the certificate added the word "totally". Secondly, the certificate omitted the words "for work".

Pursuant to s64 or 65 of the Act (whichever is applicable) a worker may be entitled to weekly benefits if the worker is totally or partially incapacitated for work as the result of an "injury", as defined. A worker who has "ceased to be incapacitated for work", to use the words of s69(3), is no longer entitled to receive weekly benefits, and therefore the employer is justified in employing s69 to cancel weekly payments. However the mere fact that a worker has ceased to be totally incapacitated for work does not mean that the worker is not entitled to receive weekly benefits. The worker may be partially incapacitated and therefore still entitled to receive benefits.

The learned Magistrate said:

> "Section 69(3) uses the term "the person has ceased to be incapacitated for work". The certificate of Dr. Awerbuch states that the applicant was "no longer incapacitated". The certificate does not state that the applicant has ceased to be incapacitated for work. One can imagine various situations where a person may no longer be totally incapacitated, but nevertheless still be incapacitated for work. The two terms, therefore, are not in my view synonymous.
>
> … 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 incapacitated for work."

Martin CJ said that the question raised by the appeal was "whether or not strict compliance is required of the demands of ss(3) of s69 of the *Work Health Act*." After considering the legislative history of s69 and its predecessor, s7A of the *Workers Compensation Act* (NT) 1949, his Honour considered the purposes of s69, and of s69(3).

> "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 worker's capacity for work within the meaning of the Act, is not something necessarily within the certain knowledge of the worker. Incapacity means an ability 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."

His Honour concluded that whilst there were accordingly "significant and well merited reasons why there should be strict compliance with s69(3)" the question was to be answered by reference to the criteria set out in *Tasker v Fullwood* (1978) 1 NSWLR 20 at 23-24, adopted by this Court in *Johnston v Paspaley Pearls Pty Ltd* (1996) 110 NTR1 at 5:

> "(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 Store 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 Store 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."

His Honour noted that in *Johnston v Paspaley Pearls Pty Ltd* (supra) this Court thought it significant that the provision in question had been inserted by the legislature as an amendment, and that that was the case here. His Honour also observed that the provision was one which was either met or it was not; i.e. there must be either strict compliance or non-compliance. He held that "subsection (3) is not so loosely worded as to admit shades of meaning or degrees of compliance, in contrast with, for example, subs (4)." His Honour said that there were other indicia that the giving of the medical certificate in strict compliance with subs (3) were essential to the validity of cancellation. He pointed to the use of the word "shall"; to the lack of inconvenience to the employer if strict compliance is insisted upon and the "considerable inconvenience" to the worker if it is not. His Honour concluded:

> "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."

Mr McDonald Q.C. for the appellant submitted that his Honour erred in concluding that there could not be degrees of compliance with s69(3), and that the appellant had substantially complied with the subsection. He referred to the following matters: first, he submitted that s69 is a procedural provision:

*Morrissey v Conaust Ltd* (1991) 1 NTLR 183 at 189; *Horne v Sedco Forex Australia Pty Ltd* (1992) 106 FLR 373 at 383. Secondly, he submitted that s69(3) is an ancillary, procedural or machinery provision describing also what needs to go with the statement prepared under ss69(1)(b); thirdly, he submitted that the use of the word "shall" does not necessarily mean that the requirement must be strictly complied with: *Grunwick Processing Laboratories Ltd v Advisory Conciliation and Arbitration Service* (1978) AC 655 at 690, per Lord Diplock, cited with approval by Mildren J in *Perfect v Northern Territory of Australia* (1993) 107 FLR 429 at 439:

> "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 purposes of the Act."

Fourthly, he pointed to the absence of any prescribed form for the certificate, although there had been a prescribed form in previous versions of the provision. He submitted that s69(1) should be construed as being mandatory as to the step to be taken, i.e. the provision of the statement under s69(1)(b) and the certificate under s69(3), but directory only as to the precise content. He referred us to s68 of the *Interpretation Act* which requires only substantial compliance with prescribed forms. He referred to Geddes and Pearce, *Statutory Interpretation in Australia*, 4th Edn., at pps 284-5:

> "The only guiding principle will be the statute and from it the court will have to glean one of three intentions in regard to the designated procedure: (a) that strict compliance is necessary; (b) that substantial compliance is necessary together with the degree of 'substantiality'; or (c) that compliance is not a precondition of the action taken. Breach of (a) or (b) will result in invalidity but no adverse

consequences will flow if (c) is found to apply (unless some separately designated penalty is included in the legislation)."

Mr McDonald Q.C. submitted that s69(3) fell into category (b) and not category (a) as the learned Magistrate and the learned Chief Justice decided, and that there had been substantial compliance.

Adopting what was said in *Johnston v Paspaley Pearls Pty Ltd* (supra), the question can be narrowed down to whether the requirement that the certificate 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. For the reasons given by the learned Chief Justice, we think that the answer to this question must be 'yes', and that it is clear beyond question that the requirements of s69(3) as to the contents of the certificate may not be ignored. However, we would not go so far as to say that a form of words other than those prescribed by the subsection could never amount to compliance. If, for example, Dr. Awerbuch had certified that the appellant was "capable of returning to employment full time in all forms of employment for which she had any previous experience" this, or some other suitable words, would convey the same meaning as "ceased to be incapacitated for work". 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. Obviously those who draft these certificates would be wise to follow the words of the statute, but they are not to be treated as possessing special magical

powers which other words to like effect do not. It is not necessary to decide whether words conveying the same meaning comply 'strictly' or 'substantially' with the subsection.

However, in this case, the words chosen in the certificate do not convey the essential meaning for the two reasons previously identified. It may be that the words "for work" can be implied from the circumstances and from the form of the certificate, but even if this be so, to say merely that the worker is no longer totally incapacitated for work, is not another way of saying that the worker is no longer incapacitated for work.

Mr McDonald Q.C. tried to persuade us that the Form 5 certificate somehow remedied this defect, but even if recourse could have been had to that Form, the certificate itself carried the matter no further. Moreover, there are patently other difficulties with the certificate in that (a) it purports to cancel the payments forthwith, whereas ss69(1)(a) requires fourteen 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 ss69(1)(a); (b) the reasons given for cancelling the benefits do not comply with s69(4).

Whilst it may be that we have differed slightly with the learned Chief Justice in the manner indicated above, the result is that his Honour's decision to dismiss the appeal was correct.

Mr McDonald Q.C. submitted that we should, in these circumstances, allow the appeal because the ground of appeal argued had been made out. This Court will not allow an appeal, even if a ground is made out, if the ultimate decision of the Court below is correct. Accordingly, the appropriate order is to dismiss the appeal with costs. Order accordingly.