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A Toothless Tiger? Section 143Q

Allianz Australia Limited v L. [2016] TASWRCT 10

BACKGROUND

The amendments to the *Workers Rehabilitation and Compensation Act* 1988 (**the Act**) which came into effect on 1 July 2010 included the introduction of the injury management provisions which are found in Part 11 of the Act. Those provisions are intended to establish a system to ensure that workers recover as soon as possible from workplace injuries and are able to return to and remain in work that is safe for them to perform without aggravating the injury or impeding its healing (s.139(1) of the Act).

The provisions provide for:

- the appointment of injury management and return to work co-ordinators and plans;
- the role of primary treating medical practitioners in return to work; and
- the injured workers obligations concerning return to work.

Part 11 concludes by providing for the resolution of disputes in relation to injury management and the powers of the Tribunal in dealing with such disputes. The Tribunal's Practice Directions 2016 state that the "*statutory intent is that these disputes be resolved at the lowest level and directly with the key players*." Importantly, the dispute process is initiated by way of "notification" to the Tribunal, not a formal referral.

However, if the "State Service employee" (usually the Registrar), that the dispute has been referred to, is of the opinion that the matter cannot be resolved between the parties, the matter is taken to have been referred to the Tribunal under s.42 on the day the notice is given (s.143Q(6)). If the matter is taken under ss.143Q(6) to have been referred to the Tribunal under s.42, the Tribunal may resolve the matter by making any of the orders listed in ss.143Q(7).

FACTUAL BACKGROUND

In *Allianz Australia Limited v L.* [2016] TASWRCT 10, the worker made a claim for compensation concerning a knee injury as a result of a slip on 18 September 2015. She was initially certified as totally incapacitated for work from 1 October 2015, however she was certified as fit to return to work by a medical certificate dated 2 November 2015, subject to restrictions and provision of suitable duties.

A return to work plan dated 6 November 2015 was developed to address the proposed return to work arrangements and for her to attend an injury rehabilitation centre. The worker failed to attend the first 2 rehabilitation appointments and also refused to participate in the return to work program endorsed by her GP. The insurer gave notice to the Tribunal as provided by s.143Q.

The Registrar was appointed to mediate the dispute and mediation occurred on 22 December 2015. The worker subsequently did not comply with undertakings she gave in the mediation process to participate in a physiotherapy program and revised suitable duties, and upon advice in that regard from the employer, the Registrar referred the matter to the Tribunal pursuant to s.143Q(6). The matter ultimately went before the Tribunal on 22 March 2016.

THE DECISION

After hearing the matter, the Chief Commissioner ordered that the worker's entitlement to receive weekly payments, subsequent to the date of the order, be suspended for a period corresponding to the period in which she received weekly payments but ought to have been at work for the period specified in the relevant return to work plans.

In arriving at that determination, the Chief Commissioner held:

- the Act sets out in Part 11 extensive details concerning injury management which incorporates return to work;
- it is established that one of the guiding principles is to ensure the recovery of the worker from injury and the return of the worker to work;
- to achieve this purpose, obligations are placed upon the worker, the employer and the insurer with complimentary roles required from the treating general practitioner, injury management consultants and return to work providers;
- given the clear expression of Parliament's intent in this regard, the Tribunal must ensure that insofar as it is able, it gives effect to that intent and also, if required to make specific orders, those orders are directed to ensure compliance by the relevant parties of the statutory intent; and
- the Tribunal must give effect to ensuring that the worker complies with the obligations imposed and this would be best achieved pursuant to subsection (i) by ordering that the worker's entitlement to receive weekly payments be suspended for a period commensurate with her non-compliance.

PRACTICAL IMPLICATIONS

There has been criticism from some quarters that the dispute mechanism prescribed by s.143Q is somewhat of a "toothless tiger" in cases where the defaulting party maintains their non-compliance after the initial contact from the Tribunal. This is especially so from the perspective of employers

and insurers with the 2010 amendments repealing certain other provisions in the WRC Act which allowed employers and insurers to take steps for non-compliance by a worker. For example, s.86(1)(d) used to permit employers to terminate or reduce the weekly payment without needing an order from the Tribunal where the worker "*failed or refused to undertake or participate in a rehabilitation program or suitable alternative duties recommended by his employer*...".

The dispute resolution process introduced in s.143Q has benefit in that the initial informal contact from the person appointed to deal with the dispute tends to see non-compliance issues dealt with effectively and efficiently without the need for a formal referral to the Tribunal, and the associated time and cost that comes with that.

However, where a defaulting party continues their non-compliance despite the intervention of the appointed person, the party wanting to enforce compliance needs to wait until the dispute is deemed to be a s.42 referral by operation of s.143Q(6). The usual "conciliation process" provided for in Division 2 of Part 5 of the Act is then engaged, and that can mean significant time and cost for the non-defaulting party before the non-compliance is dealt with by the Tribunal under s.143Q(7). It is possible that the defaulting party might agree to consent orders before the dispute is deemed to be a s.42 referral, but if that consent is not forthcoming, the intended overall effect of these provisions – to deal with disputes over injury management and return to work quickly and efficiently – might be lost.

If an employer or insurer intends to notify the Tribunal of a dispute pursuant to s.143Q, it needs to have a clear strategy in place for the effective resolution of the dispute if the worker continues their non-compliance.

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