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LAWYERS

Workers Rehabilitation & Compensation Tribunal

CASE COMMENTARIES • August 2020

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Recent cases dealing with the notice/failure to make a claim provision

The law as to what employers are required to prove when disputing liability for claims in accordance with s81A, based on a worker's failure to comply with s32(1)(a) or (b), has changed as a result of a recent decision from the Supreme Court in Tasmania v Pilling [2020] TASSC 1.

The Workers Rehabilitation and Compensation Tribunal is now bound by the Supreme Court decision, and the Tribunal have now applied the reasoning in the Supreme Court decision in Insurance Australia Group t/as CGU Insurance v A and Duerinckx Enterprises Pty Ltd t/as Stepping Stones Childrens Services v H. The two decisions have confirmed that in order to successfully dispute liability for a claim in accordance with s81A, based on the grounds that a worker has failed to comply with s32(1)(a), being that a worker failed to give notice as soon as practicable, or (b) that the worker has not made their claim within six months, that the employer must adduce evidence that it is reasonably arguable that s37 does not apply to notice disputes and that it is reasonably arguable that s38 does not apply to claims not made within six months of the date of injury.

Tasmania v Pilling [2020] TASSC 13 (8 May 2020)

Link: Click Here

Re: What needs to be established when disputing a claim based on failure to give notice?

1 Facts

1.1 The worker made a claim in respect of psychological injury which she alleged had occurred as a result of workplace bullying.

1.2 The worker was employed at the Launceston General Hospital as a State servant.

1.3 The worker left work to consult her GP about stress arising from a bullying incident on 22 May 2019. The worker was certified as incapacitated for work and the doctor's receptionist sent the certificate to the facsimile number of the specialist clinic.

1.4 It was argued by the State, that the worker did not give notice as soon as practicable under s32(1)(a) and that the worker did not comply with her obligations under s33(1)(b), (as the medical certificate needed to be served on the employer), nor did she give notice to anyone nominated in s33(1)(b) by sending the medical certificate by facsimile.

1.5 Before the Tribunal, the former Chief Commissioner Webster at the hearing of the referral rejected the ground that the worker had not complied with her obligation to give notice as soon as practicable and that the worker had complied with her obligations under s33(1)(b).

2 Grounds of Appeal to the Supreme Court

2.1 On an appeal to the Supreme Court, the State argued that the learned Chief Commissioner:

(a) misconstrued the provisions of s33(1)(b) of the Act by determining that subparagraph (i) could apply to the State.

(b) erred in law in determining that it was not reasonably arguable that the worker failed to provide notice referred to in s32(1)(a).

3 Determination

3.1 The important issue to be determined was whether the worker gave notice of her injury as soon as practicable after its occurrence as required by s32(1)(a) and in turn whether, on an application in accordance with s81A, it was necessary for the employer to adduce evidence in relation to the considerations contained in s37, excusing a failure to comply with s32(1)(a).

3.2 Brett J said that the evidence before the Tribunal was that the worker said that she thought that if the notice were faxed to the clinic that it would be brought to her supervisor's attention.

3.3 Brett J said that notice was not given directly to the worker's supervisor and it was arguable on the evidence that she did not actually receive the written notice and accordingly, it was reasonably arguable that the worker had not complied with s32(1)(a).

3.4 Brett J said however, that he agreed with the worker's case that an employer will not establish a reasonably arguable case that it is not liable to pay compensation because of the worker's failure to give notice of injury as soon as practicable, unless it establishes a reasonable argument that s37 will not apply to the relevant failure. Brett J said that the failure to give notice under s32(1)(a) will not affect the worker's entitlement to compensation if the conditions in s37 are established.

3.5 In this case, Brett J said that the evidence at the hearing of the s81A permitted a finding that the failure to give notice was occasioned by a mistake and that the employer had failed to adduce any evidence of its defence to the claim being prejudiced by that failure to give notice as soon as practicable.

4 Practical implications of the recent decision

4.1 Traditionally the failure to make a claim within six months of an injury, as required by s32(1)(b), and the failure to give notice as soon as practicable after the occurrence of an injury, as required by s32(1)(a), would give rise to an ability to dispute liability for a claim under 81A.

4.2 On the basis of this decision however, the employer cannot simply rely upon those two sections alone, what it now needs to do is adduce evidence as to s37 for notice arguments and s38 for situations where it is arguable that the worker has failed to make a claim within six months of the claim.

4.3 In the case of a failure to give notice as soon as practicable after the occurrence of the injury as required by s32(1)(a), the following evidence needs to be adduced when disputing a claim based on notice:

(a) That it is reasonably arguable that the failure was not occasioned by mistake, absence from the State or other reasonable cause; and

(b) That it is reasonably arguable that the employer's defence of the claim is not prejudiced by the failure.

4.4 Given this decision, this now requires evidence from the employer which responds to any argument about the application of s37. For example, this might include:

(a) The worker was aware of their right to make a claim;

(b) The worker was in the State;

(c) That there was no indication given to the worker that payment of compensation absent a claim would be sufficient;

(d) The worker's failure to make a claim was not due to some other reasonable cause; and

(e) That the employer has suffered prejudice as a result of the worker's failure to give notice as soon as practicable.

4.5 As you will see, this case extends beyond the ordinary notice dispute, in that it is not enough to just dispute the claim based on a failure to give notice as soon as practicable, but it is also necessary to address the possible reasons for that and the effect that has had on the employer.

Insurance Australia Group t/as CGU Insurance v A. [2020] TASWRCT 18 (29 May 2020)

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Re: The effect of the failure to give notice as soon as practicable

1 Facts

1.1 This case was handed down after the decision in Pilling and saw the Tribunal applying the new law.

1.2 The worker was involved in a motor vehicle accident on 18 April 2019, where she suffered injuries in her upper back, shoulder, right arm and hand.

1.3 The worker claimed to have a recurrence of previous symptoms (sharp tingling in her right thumb and fingers, radiating from her back) at 9am on 20 February 2020. She claimed that her pre-existing symptoms had been aggravated by her work with the employer.

1.4 The worker verbally notified the employer of her symptoms on 20 February 2020 before leaving work.

1.5 The worker visited her GP on 20 February 2020 and was given two days sick leave and was recommended physiotherapy treatment.

1.6 The worker handed her medical certificate to her manager on 20 February 2020 and mentioned her symptoms, without relating the symptoms to her work.

1.7 The worker returned to work on 25 February 2020. In the meantime, she had her old chair replaced with a new one, which she thought was the cause of her pain.

1.8 The worker visited her GP on 27 February 2020 for a review. She claimed to have made it through the week without having the time to trial the new chair.

1.9 On 2 March 2020, the worker told the employer of her appointment with the physiotherapist but did not mention this was work related.

1.10 Due to increasing pain, the worker took time off work on 3 March 2020, without a medical certificate, because her GP was not available for an appointment.

1.11 The worker visited her GP on 4 March 2020 due to increasing intolerable pain in her finger and her back. The worker was certified as incapacitated for work until 10 March 2020.

1.12 A claim for compensation was served on 4 March 2020. The worker left the "Notification and Witnesses" section empty. The employer filled out the "Notification and Witnesses" section. The worker served her claim on the employer on 4 March 2020.

1.13 The employer disputed liability for the worker's claim on the basis that it was reasonably arguable that the worker had not given notice as soon as practicable after the occurrence of the injury as required by s32(1)(a) of the Act.

2 Issues in dispute

2.1 Whether it was reasonably arguable that:

(a) notice of the injury was not given to the employer as soon as practicable after the occurrence of the injury; and

(b) if notice was not given to the employer as soon as practicable after the occurrence of the injury, whether the failure to comply with s32(1)(a) affects the worker's right to claim compensation by taking into account s37.

2.2 You will see now that the Tribunal has to consider that second question, not just the first.

3 Determination

3.1 Commissioner Wilkins held that the worker failed to give notice as soon as practicable noting

that:

(a) pursuant to s33(1)(d) of the Act, notice of an injury must include the nature of the injury, the date on which the injury occurred and the cause of injury.

(b) the worker merely stated her symptoms on numerous interactions with her employer, she did not advise her employer of any connection between her symptoms suffered and her employment. This does not suffice as notice under the Act.

3.2 Commissioner Wilkins said that as a result of Pilling, she was required to consider the application of s37. In this case, the worker insisted that she had given notice on 20 February 2020 and Commissioner Wilkins said that as a result, there was no evidence to suggest that s37 may be enlivened because of the failure was caused by a mistake or some other reasonable cause. Accordingly, she said she was satisfied that there was a reasonable argument s37 did not apply to this claim.

3.3 The employer was found to have a reasonably arguable case.

3.4 This confirmed the application of *Pilling* and that employers need to address s37 in their disputes of liability under s81A.

Duerinckx Enterprises Pty Ltd t/as Stepping Stones Childrens Services v H. [2020] TASWRCT 23 (25 June 2020)

Link: Click Here

Re: Claim not made within 6 months

1 Facts

1.1 This case is another which deals with the Pilling decision.

1.2 The worker made a claim for workers compensation dated 10 March 2020 in relation to an injury that was suffered on 2 January 2019 when she fell and injured her ankle in the course of her employment.

1.3 The employer disputed liability for the claim on the grounds that the worker failed to make her claim within six months of the injury.

2 Issues in dispute

2.1 It was clear in this case that the claim had been made outside of six months from the date of the injury.

2.2 The case turned to two issues, one being that on the morning of the s81A hearing, the worker submitted an unsworn affidavit to which the employer then prepared two statements from the employer and sought to have them admitted after the referral had been filed. The Tribunal had to consider:

(a) whether the employer ought to be allowed to rely upon the statements which were not filed with the s81A referral; and

(b) whether the employer had a reasonably arguable case concerning the dispute of its liability to pay compensation to the worker in relation to the claim.

3 Determination

3.1 Regarding the first issue, the obligation is on the employer to file all of its evidentiary material at the time the referral is made to the Tribunal. The employer did not do this. It made an application to the Tribunal to use its discretion to allow the additional evidence into evidence to respond to the worker's affidavit.

3.2 Commissioner Wilkins exercised her discretion to permit the employer to rely on the statements because the statements responded to the issues raised by the worker relevant to s38.

3.3 She said as a result of Pilling it was necessary for the Tribunal to consider whether there was an excuse for the failure to comply with s32(1)(b) and that the statements the employer sought to tender, addressed the explanation provided by the worker in her affidavit on the morning of the hearing.

3.4 Regarding the s38 considerations, Commissioner Wilkins had to consider whether on the materials, the employer had a reasonable argument that s38 would not apply to excuse the delay in making the claim. The worker said that she had a "reasonable cause" for not making her claim within six months of the injury.

3.5 The employer's position was that the worker's failure to claim within six months was not occasioned by any reasonable cause and given that the employer's further statements had been allowed into evidence, Commissioner Wilkins determined that there was a dispute and if the employer's evidence was accepted then there is a reasonable argument that they would be successful at a final hearing because s38 had not been enlivened.

3.6 There was a reasonably arguable case.

3.7 What this means again is that Pilling has now changed the landscape when dealing with notice arguments and failure to make a claim arguments, and employers will have to file evidence with their referrals that address the requirements contained in s37/38.

P v Circular Head Livestock Transport Pty Ltd [2020] TASWRCT 24 (1 July 2020)

Link: Click Here

Re: Did Section 87 of the Act apply in relation to P's circumstances?

This recent decision provides an interpretation of the relatively recently amended s87 and confirms that a worker who has attained the pension age at the time they suffer their injury, cannot have their weekly payments terminated 12 months after the injury by reliance on s87.

1 Facts

1.1 On 24 April 2017, the worker suffered serious injuries when he was driving a truck during the course of his employment.

1.2 At the time he was almost 74 years of age. There was little doubt that the worker would be permanently incapacitated for work as a result of his injuries.

1.3 At the time of the worker's accident, s87 of the Act dealt with two categories of workers and when their entitlement to weekly payment ended. Section 87 also provided for the ability to extend that entitlement.

(a) The first category being s87(1)(a) said that where a person had not attained the age of 64, their entitlement to weekly payment ended on their 65th birthday.

(b) The second category, being s87(1)(b), dealt with the situation where, at the time the worker was injured, he had already attained the age of 64 (which was the case here). In those circumstances, the subsection provided that they would receive weekly payments for one year after their injury occurred.

1.4 In the circumstances, at the time of the injury, the worker was entitled to weekly payments for one year.

1.5 Section 87 went on to provide that payments could be extended beyond that one year if:

(a) the terms and conditions of the worker's employment permitted him to continue beyond the age of 65;

(b) but for the injury, he intended to continue in that employment beyond the age of 65; and

(c) the incapacity of the worker resulting from that injury would continue beyond the age of 65.

1.6 If those criteria were satisfied, then the Tribunal could make an order that weekly payments of compensation extend beyond the age of 65 for such period for which the Tribunal determined.

1.7 Section 87 was amended however, as at 1 January 2018. These amendments were expressed to be retrospective and changed the age categories set out above.

1.8 The amendment provided as follows:

(a) If the injury occurred 12 months or more before the date on which the worker attained the pension age, weekly payments would cease on the date on which the worker attained the pension age.

(b) If the injury occurred less than 12 months before the date on which the worker attained the pension age, then weekly payments would expire one year after the injury occurred.

1.9 In either of those situations, the worker could still make an application to the Tribunal to have those benefits extended in the same way as he could prior to the amendments. (see 7(a), (b)

and (c)).

1.10 On the face of it, the amendments failed to address a worker who had attained the pension age at the time at the time of the injury. As a result, an issue arose as to whether s87 applied to the worker and if the weekly payment could be terminated a year after the injury, as it could have been based on the legislation at the time of the injury.

1.11 In this case the worker's weekly payments of compensation continued until 25 October 2019. Prior to that time however, the employer had indicated that they did not intend to continue making weekly payments of compensation which in turn led to the worker making an application pursuant to s87 to extend the period of time for which he was entitled to weekly payments.

2 Determination

2.1 Chief Commissioner Clues found that s87 did not apply to the worker because the worker was 73 years of age at the time he was injured.

2.2 In her view, the meaning of s87(1)(b) was clear. The worker did not fall within the wording of that section.

2.3 There is no doubt that in some circumstances where an amendment produces an irrational or absurd result, the Court/Tribunal may look for a "realistic solution" in such a case, however, the irrationality or absurdity must arise because of the lack of clarity as to the words used in the section.

2.4 There are cases where, if the ordinary meaning is given to words and they produce an irrational result, then the Courts/Tribunals may be able to construe legislation so as not to produce patently unintended or absurd results.

2.5 In this case however, there was nothing unclear about the words. The words as applied did not produce an absurd or inconsistent result. Rather, what seems to have happened is that Parliament, when making the amendments to this section, did not include a sub-section which dealt with the case where someone was injured after they had attained the pension age. In these circumstances, there was no warrant to read down s87 in such a way as to place some limitation on the period for which workers receive weekly payments of compensation in the worker's case.

2.6 Accordingly, Chief Commissioner found that s87 did not apply to the worker and that as a result he was entitled to continue to receive weekly payments in accordance with the Act.

2.7 This means that a 73 year old person who is injured, does not fall within s87 and in those circumstances can continue to receive weekly payments of compensation indefinitely, at least for nine years post injury.

2.8 This may be regarded as a very unusual result but that unusual result comes about not because the section itself is unclear, it comes about because essentially another sub-section is needed in s87 to deal with a case where a person is injured after they have attained the pension age. That type of situation was catered for in the old s87, but Parliament failed to deal with that situation in the new s87.

2.9 In any event, Chief Commissioner Clues did not conclude that an absurd result was achieved because she accepted the proposition that by Parliament removing the age restriction for people who had already demonstrated their intention to continue beyond the pension age, there was no reason why that person's entitlements could not be determined in accordance with s69.

3 Effect of the decision

3.1 If someone is injured after they have already attained the pension age, on the face of it they may be able to continue to receive weekly payments of compensation for nine years if they have a less than 15% Whole Person Impairment.

3.2 Arguably, this does produce an extremely beneficial result to an elderly worker. Nevertheless, the only remedy is for Parliament to specifically deal with that situation.

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