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CATCHWORDS

COMMONWEALTH EMPLOYEES' COMPENSATION - Determination by Commissioner relating to period of total incapacity - No determination concerning partial incapacity - Power of Administrative Appeals Tribunal to award compensation for partial incapacity.

Compensation (Commonwealth Government Employees) Act 1974
ss.20, 27, 45, 46, 54, 56-60, 61, 63
Administrative Appeals Tribunal Act 1975 ss.43, 44

Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577, Nevistic v Minister for Immigration and Ethnic Affairs (1981) 34 ALR 539, Re Brian Lawlor Automotive Pty Limited and Collector of Customs (1978) 1 ALD 167 applied.
The Commonwealth v Rutledge (1964) 111 CLR 1, Re Compensation (Commonwealth Government Employees) Act 1971; Ex Parte Portelli (1981) 35 ALR 207, (1982) 39 ALR 161, Australian Capital Territory Health Commission v Cavanagh (3 March 1978, unreported) referred to.

NSW G.257 of 1985
THE COMMONWEALTH OF AUSTRALIA v HANNA FORD

Wilcox J.
Sydney
27 March 1986

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY)
)
GENERAL DIVISION)

No. G.257 of 1985

ON APPEAL from a Decision of
J O Ballard Senior Member
Administrative Appeals
Tribunal

BETWEEN: THE COMMONWEALTH OF
AUSTRALIA

Applicant

AND: HANNA FORD

Respondent

CORAM: WILCOX J.

DATE: 27 MARCH 1986

PLACE: SYDNEY

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. Paragraph (a) of the decision of the Tribunal of 9 August 1985 be set aside.

2. The case be remitted to the Administrative Appeals Tribunal for the determination of the amount of compensation for partial incapacity to which the respondent is entitled.
3. Save as above, the appeal be dismissed.
4. The applicant, the Commonwealth of Australia, pay to the respondent, Hanna Ford, her costs of the appeal.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

By this appeal the Commonwealth of Australia challenges what it calls the jurisdiction of the Administrative Appeals Tribunal, in a review of a determination made under the Compensation (Commonwealth Government Employees) Act 1974 dealing with total incapacity,

to award compensation for partial incapacity. I think that the question is one of power rather than of jurisdiction but, however it may be described, the point is without merit.

Hanna Ford, the respondent to the appeal and the applicant before the Tribunal, was employed as a word processor operator in the Office of the Special Prosecutor, an institution within the administrative purview of the Department of the Attorney-General. She developed repetitive strain injury -- variously described in the evidence as overuse syndrome, carpal tunnel syndrome and tenosynovitis -- involving pain in the neck and some pain and loss of function in the hands and arms. At all times it has been conceded that the injury was caused by her employment.

Ms Ford first lost time from work during the period 13-18 October 1983. She returned to her employment, but on 24 October 1983 again left work. She received sickness benefits. On 26 October 1983 Ms Ford made a claim for compensation pursuant to the Compensation (Commonwealth Government Employees) Act; the only formal claim which she ever made in connection with the injury. On 15 November 1983 Ms Ford's employment was terminated, the reason being her repetitive strain injury and consequent absence from duty. Notwithstanding that termination, the compensation claim was considered. On 16 May 1984, a formal determination was made whereby the delegate of the Commissioner for Employees'

Compensation found, inter alia, that Ms Ford "has been totally incapacitated for work for the periods 24 October 1983 to 14 November 1983 and 16 November 1983 to 31 January 1984, all dates inclusive" and awarded compensation at the rate of \$280.71 per week.

On 1 February 1984 Ms Ford commenced work with a new employer, the Pharmacy Guild of New South Wales, in a job which did not involve repetitive work but which returned a lesser salary. She saw various medical practitioners who, from time to time, reported to the Department that she continued to be fit only for selected duties. In April or May 1984 Ms Ford received from the Department a review form which she completed and returned, apparently on 23 May 1984. The form set out details of her new employment. Possibly because this form had not then been returned, no mention was made of compensation for partial incapacity in the determination of 16 May 1984.

Ms Ford was dissatisfied with the determination of 16 May 1984. On 27 July 1984 her solicitors made application to the Tribunal for review of the determination. They specified two reasons: firstly, in relation to the period of total incapacity ending 31 January 1984, that Ms Ford was entitled to compensation at the rate of \$310.00 per week rather than the rate of \$280.71 specified in the determination, and

secondly, that she was entitled to compensation for partial incapacity at the rate of \$40.00 per week from 31 January 1984 and continuing.

For reasons which do not appear it was not until 5 June 1985 that the application for review came on for hearing before the Tribunal. By that time the issue between the parties as to the rate of compensation for total incapacity had been resolved, but Ms Ford pressed her claim for compensation for partial incapacity. Counsel for the Commonwealth submitted that, as the Commissioner had never made a formal determination upon the question of partial incapacity, the Tribunal had no jurisdiction to consider that aspect of the claim. Ms Ford gave evidence and the submission as to jurisdiction was argued. On 14 June 1985 Mr J O Ballard (Senior Member), who constituted the Tribunal, held that the Tribunal had jurisdiction to review the determination of 16 May 1985 in respect of compensation for partial incapacity. The matter was again adjourned. On 22 July 1985 evidence relating to the issue of partial incapacity was given. Eventually, on 9 August 1985, the Tribunal determined that Ms Ford was entitled to compensation for partial incapacity under s.46 of the Act at the rate of the difference between her pay with the Commonwealth and her pay with the Pharmacy Guild. From that decision the Commonwealth now appeals to this Court under s.44 of the Administrative Appeals Tribunal Act 1975;

raising no issue as to the correctness of the substantive decision of the Tribunal but contesting its entitlement to determine that Ms Ford suffered a partial incapacity.

Part III of the Compensation (Commonwealth Government Employees) Act deals with the entitlement of Commonwealth employees -- or in the case of death, their dependants -- to recover compensation for work related injuries. For present purposes the fundamental provision is s.27(1), which provides that, if personal injury arising out of or in the course of the employment of an employee by the Commonwealth is caused to that employee the Commonwealth is, subject to that Act, "liable to pay compensation in respect of that injury in accordance with this Act". Various benefits are set out in Part III. They include compensation payable to the employee during any period of total incapacity for work, the amount of which is to be calculated in accordance with s.45, and compensation during the period of any partial incapacity, calculated under s.46.

Part IV of the Act is entitled "Making and Determination of Claims". It includes s.54(1) which provides "that compensation in relation to an employee is not payable under this Act to a person unless a claim in writing for the compensation was served, as prescribed, on the Commissioner by or on behalf of the person within the prescribed period"; generally, six months. Sections 56-60 deal with medical

examinations and certificates. Section 61 requires the Commissioner to serve notice of any determination upon the claimant and the Commonwealth. Section 20 deals with the Commissioner's powers in relation to determinations.

Relevantly it provides:

"20.(1) Subject to this Act, the function of the Commissioner under this Act is to determine all matters and questions arising under this Act and the Commissioner is empowered to do all things necessary for the carrying out of that function.

(2) In determining any matter or question under this Act, the Commissioner --

(a) shall be guided by equity, good conscience and the substantial merits of the case without regard to technicalities; and

(b) is not required to hold a formal or oral hearing and is not bound by the rules of evidence but shall give to any person who will be directly affected by the determination a fair opportunity of presenting his case.

(3) A determination by the Commissioner shall be in writing.

(4) Where a determination has been made under this Act --

(a) the Commissioner may, of his own motion, whether or not a proceeding has been instituted or completed under Part V in respect of the determination, reconsider the determination and may, if he thinks fit, make a determination varying or revoking the first-mentioned determination; and

(b) the Commissioner shall, at the request of the Commonwealth or of the claimant or, where there is more than one claimant whose claim was dealt with by the determination, of any of the claimants, if a

proceeding has not been instituted under Part V in respect of the determination, reconsider the determination and may, if he thinks fit, make a determination varying or revoking the first-mentioned determination.

(5) Where --

- (a) a proceeding has been instituted under Part V in respect of a determination by the Commissioner;
- (b) before the completion of the proceeding, the Commissioner makes, under paragraph (a) of the last preceding sub-section, a determination varying or revoking the first-mentioned determination; and
- (c) the proceeding is rendered abortive by reason of the later determination,

the Commonwealth is liable to reimburse the claimant, or, if there is more than one claimant whose claim was dealt with by the determination, to reimburse each of the claimants, for any costs reasonably incurred by him in connexion with that proceeding.

(6) ...

(7) ..."

As will be clear from the references set out above, the scheme of the Act is to impose upon the Commonwealth a liability to pay compensation upon the occurrence of a relevant injury. That liability is not confined to any particular type of compensation; s.27 refers to a liability "to pay compensation ... in accordance with the Act". The liability of the compensation is subject to the making of a claim by the affected employee, but the Act does not require

that the claim specify the particular type of compensation sought by the employee; the claim is one for compensation under the Act. It is for the Commissioner then to determine the particular category or categories of compensation to which the employee is entitled and to determine accordingly. The obligation of the Commissioner under s.20(1) is "to determine all matters and questions arising under this Act". It follows that, if it appears that the employee is entitled to a category of compensation not the subject of a previous determination, it is the obligation of the Commissioner -- provided that a claim for benefits under the Act has already been lodged -- to determine accordingly. Moreover, the Commissioner may reconsider a determination already made (s.20(4)); and this notwithstanding that an application for review of that determination has already been made to the Administrative Appeals Tribunal (s.20(5)).

In the present case a claim was made by Ms Ford for compensation under the Act on 26 October 1983. Consistently with the scheme of the Act the claim form which she signed did not refer to any particular type of benefits; she claimed "compensation under the Compensation (Australian Government Employees) Act" -- as the Act was once known -- itself. That claim having been lodged, it became the duty of the Commissioner to make such determinations from time to time as were necessary to confer upon her the particular benefits to which she was, on the facts as they may be from

time to time, entitled. The Commissioner understood this. His determination of 16 May 1984 not only dealt with compensation for total incapacity up to 1 February 1984 but also re-imbusement of certain medical expenses. Later, on 19 July 1984, he issued a further determination of entitlement to compensation for total incapacity from 1 February 1984 to 9 March 1984. The determination was issued in error -- Ms Ford had by then notified her new job -- and the amount awarded thereunder has been refunded; but the fact of the issue shows that the Commissioner appreciated that he was entitled -- I would say obliged -- to issue a further determination, without the intervention of a fresh claim, once it became clear that additional benefits were payable. It would clearly have been open to the Commissioner to make a further determination in respect of the period of partial incapacity after 1 February 1984 once the facts became known to him. There is no evidence as to the reason why this was not done.

Jurisdiction to review determinations by the Commissioner is conferred by s.63 of the Act in the following terms:

"63.(1) Where a determination by the Commissioner is made under this Act, an application may be made to the Administrative Appeals Tribunal for a review of the determination by or on behalf of a party to the determination but, notwithstanding section 27 of the Administrative Appeals Tribunal Act 1975, no other person may make such an application.

(2) The parties to a proceeding before the Tribunal for a review of a determination shall be the person by or on behalf of whom the application for the review was made and any other person who was a party to the determination but, notwithstanding section 30 of the Administrative Appeals Tribunal Act 1975, the Commissioner shall not be a party to a proceeding before the Tribunal for a review of a determination."

In the present case the Commissioner made a determination under the Act: that of 16 May 1984. Ms Ford, a competent party, requested review of that determination. The jurisdiction of the Tribunal was thus invoked. In the exercise of that jurisdiction the Tribunal had "all the powers and discretions that are conferred by any relevant enactment on the person who made the decision" and, in particular, had power to set aside the decision under review and to make a decision in substitution for that decision: see s.43 of the Administrative Appeals Tribunal Act 1975. Those provisions mean that the Tribunal had power to reconsider the determination of 16 May 1984 and to make a decision varying that determination; as, for example, by awarding benefits under the Act to which the claimant was entitled but which were not referred to in the Commissioner's determination. And, of course, the Tribunal was bound to consider the facts as they were proved in evidence before the Tribunal, making the decision which upon that material and at that time was the correct or preferable administrative decision. The Tribunal was not confined either to the material which was before the Commissioner, as

primary decision-maker, or the events which had occurred up till that time: see Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 at p.589, Nevistic v Minister for Immigration and Ethnic Affairs (1981) 34 ALR 539 at pp.640-641. If, upon consideration of the evidence before the Tribunal, it appeared that Ms Ford was entitled to benefits over a longer period -- including a period after the date of the Commissioner's determination -- than that covered by the determination under review, it was the duty of the Tribunal to so find and to award compensation accordingly. If, upon that evidence, it appeared that Ms Ford was entitled to benefits different in kind to those referred to in the determination under review, it was obliged to so find and to award accordingly.

Counsel for the Commonwealth referred to authorities in which reference has been made to the fact that the Administrative Appeals Tribunal is not a primary decision-maker. In Re Brian Lawlor Automotive Pty Limited and Collector of Customs (1978) 1 ALD 167 Brennan J, sitting as President of the Tribunal, held that a decision of the primary decision-maker which was beyond power was nonetheless reviewable. In the course of his reasons, at pp.175-176, his Honour said:

" The Tribunal is not a primary administrator. It is not the original repository of powers and discretions under an enactment. When it makes an order under s43(1) to take effect under the 'relevant enactment', the grant to the Tribunal of the original repository's

powers and discretions makes its order effective under the enactment. Not all of the orders for which s43(1) provides are orders which draw upon the original grant of powers and discretions. A decision by the Tribunal pursuant to s43(1)(a) to affirm the original decision leaves the original decision intact, and that is the only decision which takes effect under the enactment: the original powers are not drawn upon by the Tribunal's order. Equally, a decision to set aside the decision under review and remit the matter for reconsideration pursuant to s43(1)(c)(ii) requires the original repository of the powers and discretions to exercise them afresh: they are not exercised by the Tribunal. Section 43(1) grants the original powers and discretions to the Tribunal, but it does not require the Tribunal to exercise them unless the Tribunal is making a fresh order the effectiveness of which depends upon their exercise.

...

The Tribunal may exercise its powers with the same flexibility as the administrator whose decision is under review. All that is necessary is that the administrator whose powers and discretions are conferred upon the Tribunal should perform his functions under a relevant enactment, for the Tribunal may then make the decision which that administrator ought to make if he were then substituting a fresh decision for the decision which is set aside."

There is no inconsistency between that passage and what has been said above. It was, in the present case, essential to the jurisdiction of the Tribunal that there be a determination for review. Section 63 of the Compensation (Commonwealth Government Employees) Act makes this clear. The condition precedent to the entitlement of a party to seek review is that "a determination by the Commissioner is made under this Act". Had no determination been made, then

-- whatever other remedies might have been available -- no relief before the Tribunal could have been obtained. This is all that is meant by the statement that the Tribunal is not a primary decision-maker. But once there is a decision by the primary decision-maker which is, by the relevant legislation, susceptible of review, the Tribunal has jurisdiction to undertake a review and it has the power to make such decision as -- upon the facts proved before it -- is appropriate to be made.

Reference was made in the argument to two decisions in relation to earlier versions of the compensation legislation: The Commonwealth v Rutledge (1964) 111 CLR 1 and Re Compensation (Commonwealth Government Employees) Act 1971; Ex parte Portelli (1981) 35 ALR 207, (1982) 39 ALR 161. Having regard to the legislative amendments which have occurred, neither of these decisions is decisive of the present question. But the approach taken in each case -- that, upon a claim being made under the Act it is open to the review tribunal to grant the whole of the relief to which the claimant is entitled -- is consistent with the view I have expressed.

The Tribunal was critical of the course taken by the Commonwealth in challenging its jurisdiction. Mr Ballard referred to a comment made by Nimmo J in Australian Capital Territory Health Commission v Cavanagh (3 March 1978, unreported):

"The highly technical approach to the interpretation of the provisions of what is a remedial Act which the appellant's argument demands has been repeatedly denounced over a long period in judgments of the High Court of Australia and the House of Lords. An observation made by Lord Shaw in McDermott v. Owners of s.s. Tintoretto 1911 A.C. 35 affords a good example. His Lordship said at p.45

'I reckon it to be quite unsound, and to be productive of wrong and mischief, to interpret a remedial statute in the spirit of meticulous literalism.'

Mr Ballard remarked that this comment "is of equal application to the respondents" (the Commonwealth's) "submission".

It is difficult not to feel critical of the course taken by the Commonwealth in the present case. The purpose of administrative review is to provide a relatively speedy, informal and inexpensive method of reviewing administrative decisions of public officers which touch upon private interests. The process of review ought not to be complicated or delayed by technicalities. By the time that the matter first came before the Tribunal the Commonwealth had known for 12 months of Ms Ford's new employment. It had received several medical reports relating to her fitness for work. The officers concerned were in a position to form a view as to whether her claim of partial incapacity was justified. If, upon the material before them, the relevant officers had reached the conclusion that the claim of

partial incapacity was not well founded, the claim could -- and should -- have been resisted on the merits. A formal determination of no partial incapacity could have been made if this had been thought administratively desirable. Nothing was to be gained by taking a technical point based upon the lack of a relevant determination to that date. The only effect of that point being upheld would be to force Ms Ford to re-commence proceedings in the Tribunal and to wait an additional few months for the claim to be resolved.

If, on the other hand, the officers had been satisfied that Ms Ford was entitled to compensation for partial incapacity, the proper course -- both in fairness to the claimant and to minimize expense to the Commonwealth -- was to arrange for a consent order to that effect by the Tribunal. This could have been done at any time; being preceded if thought necessary by a new formal determination.

The order made by the Tribunal was that the determination of 16 May 1984 be set aside and that in substitution therefor it be decided that Ms Ford is entitled to compensation for partial incapacity under s.46 of the Compensation (Commonwealth Government Employees) Act at the rate of the difference between her former pay with the Commonwealth and her current pay. This order was too wide, in that it disposed of that part of the determination which awarded compensation for total disability to 1 February

1984. If the proper amount of compensation for partial incapacity from 1 February 1984 to the date of the Tribunal's decision had been established before the Tribunal, it would have been possible for me to rectify the position by substituting the order which, upon the conclusions reached by it, the Tribunal was bound to make. However, although a figure for part of the period was agreed, there was no finding or agreement in respect of the whole period. Regrettably, the matter will have to go back to the Tribunal but I express the hope that the parties can agree upon the appropriate figures and thus enable the Tribunal to dispose finally of the review at an early date.

The applicant, the Commonwealth, must pay the respondent's costs of this appeal.

I certify that this and the fifteen (15) preceding pages are a true copy of the Reasons for Judgment herein of his Honour Mr Justice Wilcox.

Associate: *Yvonne A. Hilton*

Date: 27 March 1986

Counsel for the applicant:	Mr B J Tamberlon QC with Mr R B Wilson
Solicitors for the applicant:	Australian Government Solicitor
Counsel for the respondent:	Mr R Madgwick QC with Mr G Barter
Solicitors for the respondent:	Messrs Lewis Wilson
Date of hearing:	18 March 1986