

White; Ex Parte Cunningham

Decision of Supreme Court of Western Australia delivered 21 September 2015

Key Points

Stipulation of an incorrect termination day on a Section 93O Notice does not mean that the requirements of that section have not been complied with.

Background

This decision is an appeal against a decision not to extend a termination day and whether there was any error by the decision-maker in refusing to extend the termination day under Section 93M(4)(b) of the Workers' Compensation and Injury Management Act 1981 ("the Act").

Mr Cunningham suffered an injury in the course of his employment on 23 September 2013. He completed a workers' compensation claim form on 26 September 2013. Liability was accepted for the claim on 4 October 2013.

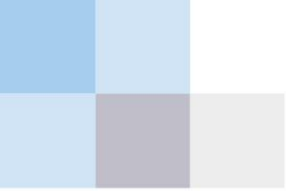
On 14 March 2014, the workers' compensation insurer provided a Form 36 Notification under Section 93O of the Act to Mr Cunningham regarding the termination day for election. That form indicated that the termination day was 28 September 2014, but in fact the termination day was 26 September 2014.

Approved Medical Specialist, Dr Kennedy, issued a Form 8 certifying that the worker's condition had not stabilised on 30 September 2014.

In November 2014, Mr Cunningham sought an extension of the termination day pursuant to Section 93M(4)(b) on the basis that the employer had failed to comply with Section 93O of the Act.

The Director declined to grant the extension and explained that the intent of Section 93O of the Act is to notify the worker of certain things about his or her termination day. Even if it was accepted that Mr Cunningham had been incorrectly advised of the termination day, all the other requirements of Section 93O(1) were met. Crucially, the worker was given notice fourteen days before the period of six months before the termination day as required by the Act. The Notice achieved its objective, despite the alleged incorrect termination day, which did not invalidate the Notice.

The Director also noted that even if an extension to 28 September 2014 had been made, Mr Cunningham still would have been out of time for a subsequent extension given that he did not obtain an AMS Form 8 until 30 September 2014.



Mr Cunningham sought to quash that decision.

The Decision

The Supreme Court noted that where a claim has been made for compensation by way of weekly payments, an election to retain the right to seek damages cannot be made after the termination day unless an extension of time is granted under Section 93M(4).

Justice Beech did not agree that the Director found that Section 93O had not been complied with. Rather, although the termination day was incorrectly stipulated, it was not a case where the worker had not received any notice under Section 93. The various elements of Section 93O(1) and (2) were satisfied and, in the circumstances, an extension beyond the incorrectly stipulated date of 28 September 2014 was not justified.

The Director had considered the respect in which the Notice failed to comply with Section 93O and the apparent consequences of that failure and the respects in which it did comply in determining whether to grant the extension. No error was revealed in such an approach. His Honour did not accept that the Director was obliged to take into account that Mr Cunningham's condition had not sufficiently stabilised, as revealed in Dr Kennedy's certificate. The Director was not obliged to put one side the difficulty arising from the date in the certificate, namely that it was 30 September 2014. He also did not accept he was required to grant the extension on the basis of Dr Kennedy's certificate because of the incorrect stipulation of the termination day.

His Honour considered that the Director had reasoned that, on the face of it, the erroneous stipulation of the termination day would justify an extension to 28 September 2014, but not beyond that date. However, Mr Cunningham had not sought an extension of time to 28 September 2014, but rather an extension to 30 September 2014.

In any event, an extension to 28 September 2014 would not assist because no election had been made prior to that date and the certificate from Dr Kennedy, which was dated 30 September 2014, would not have been provided before the (extended) termination day and so could not sustain any further extension.

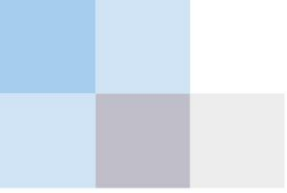
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