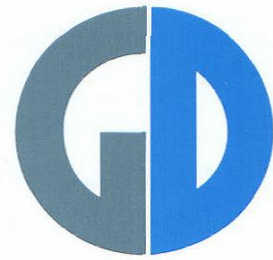


Gun & Davey

Covered



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COVERED CASES

MORE BIG NEWS AS “SUBSTANCE CONQUERS FORM”

GAETA – JD 80/1999

Deputy President Cawthorne in the decision of *Gaeta (JD80/1999)* has restored the equilibrium in respect of issues of invalidity arising from technicalities of form and the application of the principles of natural justice applicable to Section 38(3) and (7) notices.

In *Gaeta*, the worker had argued that the two-year review determination was invalid for the following reasons: -

1. The submissions made by the worker in response to the Section 38(3) notice were not referred to in the Section 38(7) notice as having been relied upon in undertaking the reviews;
2. The Section 38(7) notice did not make reference to Section 36(2)(c) and (3) which the worker argued was a mandatory requirement of Regulation 17; and
3. Some of the material on which the compensating authority had based its decision was not available to the worker before him making his submissions.

Held:

1. The Tribunal held that this was not fatal and in particular, that it did not necessarily follow that merely because a reference had not been made to the worker's submissions in the Section 38(7) notice that those submissions had been ignored.

2. The Tribunal held that whilst the requirement to refer to Section 36(2)(c) could be classified as a mandatory requirement of Regulation 17, it was sufficient that there had been *substantial* as opposed to strict compliance with that requirement.

Here, the Section 38(7) notice advised the worker that the review was undertaken pursuant to Section 38 of the Act taking into account the provisions of Section 35(1) and (2) and the worker was informed of the relevant notice requirements of Section 36(3a). The Tribunal concluded that there could be no confusion on the worker's part as to why the reduction was being effected and that the worker was in a position to make an informed decision about whether or not to seek a review. Consequently, any failures to refer to relevant statutory provisions were in the context of this case *technical breaches only* falling within the "*de minimis*" principle to not render the determination invalid.

3. Deputy President Cawthorne sanctioned the reasoning of Deputy President Parsons in [*De Young* \(JD47/1998\)](#).

In [*De Young*](#) following the issue of a Section 38(3) notice, the worker requested details from the compensating authority of functional and vocational assessments, which had been carried out in connection with the review but did not receive such information before the date of notification of the outcome of the review. The resultant determination was held to be invalid because the worker had not been given a proper opportunity to be heard on the subject of the review.

Deputy President Cawthorne said that the ratio in [*De Young*](#) did not represent a *hard and fast rule* that a failure to provide material upon which a review is ultimately based either at all or within a particular time frame, necessarily results in invalidity. He considered this was a question of *fact and degree*.

In this case, because the worker had a substantial body of material upon which to base his submission to the compensating authority, and the additional material which had not been provided was "up dated" material which did not fundamentally alter the situation, the worker had "a meaningful opportunity" to address the issue related to the review before it was completed.

Recommendation:

Notwithstanding this decision, we would recommend by way of precautionary measures that you ensure you attend to the following as part of the second year review procedures:

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1. Where you have received representations by the worker ensure that in the Section 38(7) notice you mention that you have considered them in carrying out the review;
2. Refer to Sections 35(2), 36(2)(c) and 38 and reproduce these provisions in whole;

3. Provide all abundant material acquired since the issue of the Section 38(3) notice to the worker within sufficient time to enable him/her to consider and make submissions thereon.