CITATION: *Robinson v Uniting Church in Australia* [2003] NTMC 063

PARTIES:	MARGARET ROBINSON
	v
	UNITING CHURCH IN AUSTRALIA
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20216231
DELIVERED ON:	10th December 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	28th November 2003
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Cancellation of benefits – validity of medical certificate – Counterclaim – nature of – section 69 Work Health Act – summary judgement - Rule 21.02(1)(a) Work Health Rules

Collins Radio Constructions Inc v Day [1997]116 NTR 14
Rupe v Beta Frozen Products [2000] NTSC 71
Henry & Walker v Edwards [2001] NTSC 16
Barclay v TNT Australia Pty Ltd [2003] unreported decision 12th Sept 2003 Little SM
Dickin v NT Tab Pty Ltd [2003] NTSC 119 unreported decision Acting Chief Justice Angel.

REPRESENTATION:

Counsel:

Worker:	Mr Francis
Employer:	Mr S Smith

Solicitors:

Worker:	David Francis & Associates
Employer:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	[2003] NTMC 063
Number of paragraphs:	41

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20216231

[2003] NTMC 063

BETWEEN:

Margaret Robinson
Worker

AND:

Uniting Church in Australia
Employer

REASONS FOR JUDGMENT

(Delivered 12th December 2003)

Judicial Registrar Fong Lim:

1. The Worker has applied for summary judgement pursuant to Rule 21.02(1)(a) of the Work Health Rules. The Worker maintains that the Employer cannot rely upon its Defence that the Form 5 served upon the Worker was valid nor can the Employer rely upon the Counterclaim as pleaded because there is no counterclaim that can be pleaded to the Worker's action as pleaded.

2. The Worker has appealed the decision of the Employer to cancel her weekly work health benefits on the basis that the cancellation was based on an invalid Form 5. In particular the Worker challenges the validity of the medical certificate attached to the Form 5 cancelling her benefits. The Employer has defended the application and applied for a declaration that the worker has ceased to be incapacitated for work as a result of the work injury.

3. The Worker was issued with an original Form 5 which did not have a medical certificate attached and received that notice on the 4th October 2002 and then a couple of days later was issued with a further Form 5 to which a medical certificate was attached.

4. The Employer is not relying on the first Notice of Cancellation. The second Form 5 purported to cancel the Worker's benefits on the following basis:

> "1. You have ceased to be incapacitated for work as a result of the work related injury which occurred on or about 19/9/89.
>
> 2. The effects of your work related injury have ceased.
>
> 3. Attached to the Notice is a medical certificate as issued by Dr Tony Blue Consultant Orthopaedic Surgeon on 29/8/02
>
> 4. In t he alternative, if you do continue to suffer a work related injury (which is denied) this does not give rise to any incapacity for work.
>
> 5. Further and/or in the alternative if you do continue to suffer a work related injury (which is denied) we deem you abole to return to modified duties or alternate work with no loss of earning capacity.
>
> 6. Further and/or in the alternative if you are incapacitated for work the such incapacity is due to other factors not related to your previous employment with the employer and/or your work related injury which occurred on or about 19/9/89.
>
> 7. Under Section 75B of the Work Health Act you are obligated to participate in a work place based return to work programs.

> 8. We conclude that any incapacity for work you may have as a result of other factors not related to your previous employment or employer will render you unavailable for any potential return to work with your employer or any other employer.
>
> …….
>
> 20. You have obtained payments of compensation by fraud or other means"

5. Basically the Employer has set out in its Form 5 all of the possible reasons available to it to cancel benefits. It is interesting to note however, that the Employer does not particularise in its defence the claim that the Worker has failed to present for work based work programs nor has it specified the "fraud or other means" as suggested in the Form 5. In her affidavit the Worker states that she has never been offered a return to work with the Employer and the only return to work proposal that was put to her in 1999 was complied with freely by her.

6. On a separate note I am concerned that the Employer saw fit to put a claim of fraud in the Form 5 yet failed to follow that claim through in its Defence. The allegation of fraud is a serious allegation and should not be made without evidence to support it. The fact that it has not been pleaded in the Defence suggests that there was in fact no evidence of fraud and that the Form 5 is most likely a pro forma which has been issued to the Worker without any real thought being put into the issue of that notice.

7. While the Worker's solicitor briefly argued that the Form 5 cannot stand in relation to the claims regarding rehabilitation and return to work programs the main thrust of the Worker's argument is that the form of the medical certificate attached to the Form 5 did not comply with section 69(3) of the Act and therefore the whole of the Form 5 is invalid.

8. The issue of the validity or otherwise of a Form 5 served upon a worker has been the subject of several Supreme Court decision on appeal. In Collins Radio Constructions Inc v Day [19] 116 NTR 14 the Chief Justice held

> "Section 69 is clear in that it prohibits the cancellation of payment of compensation where the worker to whom it is paid has ceased to be incapacitated for work, unless there has first been given to the worker a notice (subs(1)(a)), a statement (subs9109a) and the medical certificate (subs(3)). In my opinion, the statutory requirement whereby an employee is enabled to unilaterally cancel a worker's continuing fight to receive compensation constitutes such an interference with personal rights as to require strict compliance with the conditions attaching to it. Further, there are good reasons why, within the scheme of the Act designed to protect worker's rights, the worker should obtain the information required and in the form required"

9. It is clear from this authority and others which had followed that given the nature of the legislation and given the ability to unilaterally cease benefits the courts will be very strict in their assessment as to whether a Form 5 complies with the legislation.

10. In this matter the medical certificate stated that

> "I have examined the worker Margaret Robinson on 29/8/2002 in relation to her work injury.
>
> As a result of that examination I CERTIFY that the worker has ceased to be incapacitated for work as a result of the work injury"

11. The Worker argues that the wording of the certificate does not comply with the Act and therefore is not valid. The Worker argues that the words "as a result of the work injury" makes the certification conditional and therefore is not valid. Section 69(3) provides that

> " …..the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work"

12. It is the Worker's view that the certificate cannot be conditional it must be an unconditional statement that the worker is no longer incapacitated for

work. The Employer argues that the Employer's obligation under the Work Health Act is to pay the worker benefits for as long as he remains incapacitated for work because of the work injury. It is generally accepted that it is possible for a worker to cease to be incapacitated for work due to a work injury yet remain incapacitated for work for other reasons. It would therefore be a nonsense to suggest that a medical certificate cannot specify that the worker has ceased to be incapacitated for work because of the work injury.

13. It is clear from the decision of Martin CJ, as he then was, in Ju Ju Nominees Pty Ltd v Carmichael [1999] 9 NTLR that the Employer has the onus to prove the grounds stated in the notice. His Honour came to that conclusion in applying the decision of Mildren J in Disability Services v Regan [1988]8 NTLR 73.His Honour found at page 77 that

> "In dealing with an appeal under s69, the Court is not called upon to decide whether or not the employer was justified in the action it took because there was evidence to support the action. The question which has to be decided is whether upon consideration of the all the evidence in the case the employer has proved the facts set out in the certificate"

14. In Henry & Walker Ltd v Edwards [2001] NTSC 16 Angel J considered the validity of a certificate. Counsel in this case argued that the Employer has to prove that there is evidence to support the medical certificate which was attached to the Form 5 notice of cancellation of benefits.

15. His Honour considered Disability Services v Regan (supra) and confirmed that the Employer simply has to establish grounds stated in the notice not the medical certificate. However his honour noted that the terms of the Form 5 and the terms of the Medical certificate were identical in that case and therefore to give evidence supporting the Form 5 the Employer had to give evidence supporting the medical certificate also.

16. His Honour Justice Angel suggested that the facts in the Henry & Walker case were distinguishable to Disability Services v Regan the notice and the medical certificate in Disability Services v Regan were in identical terms whereas in Henry & Walker v Edwards the Form 5 stated the worker "ceased to be incapacitated for work as a result of any injury arising out of or in the course of (his) employment with the Employer" and the medical certificate stated the worker "has ceased to be incapacitated for his employment as a labourer with Henry Walker as a result of the said injury".

17. His honour found that because the medical certificate was qualified by reference to a particular injury and the Form 5 was more general referring to "any injury" then the Form 5 was invalid. The facts of that case were that the worker had a physical injury followed by an alleged psychiatric sequelae and the medical certificate only related to the physical injury. The Employer was aware of the psychiatric claim because they had received a report linking the worker's psychiatric condition to the work injury. Therefore His Honour could not accept the Form 5 a valid, it was not supported by a certificate stating the worker had recovered from her psychiatric injury as well.

18. In the present case the Form 5 states

> "1. You have ceased to be incapacitated for work as a result of the work related injury, which occurred on or about 19/9/89.
>
> 2. The effects of your work related injury have ceased
>
> 3. Attached to this Notice is a medical certificate issued by Dr Tony Blue Consultant Orthopaedic Surgeon on 29/8/02…."

19. The medical certificate states:

> "I CERTIFY that the worker has ceased to be incapacitated for work as a result of the work injury"

20. There is no other injury besides the physical injury claimed by the worker. The medical certificate supports what the Form 5 says and in the application of Disability Services v Regan the Employer need go no further than to show that there is evidence support the Form 5 which in this case is the certificate and report of Dr Blue. Mr Francis argued that the report of Dr Blue does not support the view expressed in the medical certificate and on one view he may be correct. However, Dr Blue's report can also be read to totally support Dr Blue's certificate that the worker is no longer incapacitated as a result of her work injury. Dr Blue accepts that the worker has some pain but does not accept that it is response to the work injury.

21. Most recently in the Supreme Court in the matter of Dickin v NT TAB [2003] NTSC 119 his honour Acting Chief Justice Angel considered the validity of a Form 5 which was couched in very similar terms to the one in this matter. The certificate read:

> "You have ceased to be incapacitated for work as a result fo your work –related injury of 28/11/1995.
>
> As per attached certificates from Dr Timney and Dr Kutlaca both dated 17/12/2001"

22. His honour found that this Form 5 must fail for ambiguity it asserts nothing to enable the worker to understand why her benefits were to cease.

23. In the present case the worker is advised that "the effects of your work related injury have ceased" it is my view that is an assertion that should make it clear to a worker why her benefits have ceased.

24. To be granted an order for summary judgement the Worker has to convince the court that there is no arguable Defence to the action and therefore justice would be served if a judgement was granted.

25. In relation to summary judgment on the validity of a Form 5 it is my view the court must be convinced that there can be no doubt that the Form 5 is

invalid. The Court must be convinced that the grounds stated in the Form 5 cannot possibly be supported and are not clear to the worker. Should the Form 5 be issued pursuant to section 69(1) then the court must be satisfied that the medical certificate does not support the statement made in the Form 5, as the court found in Henry & Walker v Edwards. I am not convinced that there Form 5 in this case is invalid.

26. To accept Mr Francis's argument that a Form 5 cannot specify that the worker has ceased to be incapacitated "as a result of the work injury" would be to make a nonsense out of Section 69. The purpose of section 69 is to allow the Employer to unilaterally cease benefits paid to the worker given certain circumstances. It is only logical that the reference in section 69(1) to the worker ceasing to be incapacitated for work must refer to an incapacity to work because of a work injury. If the section is read to mean incapacity to work for other reasons then taking that argument to the extreme then once a worker is receiving benefits then the Employer will be responsible to pay those benefits even if the worker has a car accident which prolongs his inability to work. A more typical example would be if the worker has suffered an injury to her back and there is a pre existing degenerative back condition which will mean she will no longer be able to work, if Mr Francis' argument is accepted then the Employer would not be able to use section 69 to cut off the benefits should the effect of the work injury cease.

27. Further, given the most recent decision in Dickin v NT TAB Pty Ltd (supra) it would be more correct to argue that the Employer is bound to put more details into a Form 5, not less, so a Worker is made aware of exactly why the benefits have ceased.

28. Therefore in my view the Form 5 (such that it relates to section 69(1) & (3)) is valid and therefore the application for summary judgment cannot succeed.

29. There were other grounds set out in the Form 5 however the parties did not address those grounds except the Worker states she did not participate in a

return to work program because none was offered. In any event it is not necessary to consider the other grounds as I have found that there is arguable support for the first ground and that the Form 5 is not invalid for those reasons. There were extremely limited submissions made regarding the balance of the Form 5 and the issue of the survival of the Form 5 in relation to those grounds should the first fail was not addressed. If the Form 5 stands in relation to the other grounds then summary judgment cannot be obtained because the Form 5 remains valid for those grounds even if it is invalid in relation to the medical grounds. However it is not necessary for me to decide on this issue in this matter.

Counterclaim

30. The worker also made an oral application that the Counterclaim of the Employer cannot stand and should be struck out. The submission was that as the worker's claim was basically an appeal there cannot be any form of counterclaim. The procedure relating to counterclaims is governed by Rules 8 & 9 of the Work Health Rules. Prior to the introduction of Rule 8 & 9 there was no provision for counterclaims in the Work Health Court.

31. Rules 8 & 9 was introduced to ensure that all issues between the parties were decided without the need for parties to have a multiplicity of proceedings (see rule 8.02(2)). The nature of a counterclaim was not contemplated in the rules however it was the subject of an unreported decision of Magistrate Little in Barclay v TNT Australia Ltd 12th September 2003. In that matter the Worker applied for the Employer's counterclaim to be struck out. The Worker argued that the counterclaim was note a counterclaim within the meaning of the Work Health act or as understood at common law. Little SM quoted rule 9 of the Work Health Rules which require a counterclaim to be pleaded with

> "(a) a concise statement of the nature of a claim

(b) particulars of claim; and

(c) statement of relief or remedy sought"

32. In Barclays case the "counterclaim" did not give particulars or plead a remedy and on that basis the "Counterclaim" was struck out.

33. It was argued by the Worker's counsel in Barclay's case that if you applied the common law the nature of the claim by the Employer is not a proper counterclaim in the Worker's appeal. Mr Francis in the present case has submitted that Magistrate Little accepted that argument and therefore the counterclaim in this case ought to be struck out.

34. The solicitor for the Employer provided me with written submissions on the application of Barclays case. Those submissions went into great detail about the application of Rules 8 & 9 of the Work Health Rules and how a Counterclaim should be characterised. The Employer submitted that the counterclaim in this matter can be distinguished from that as pleaded in Barclays case and as such should not be struck out. It is my view that Magistrate Little even though she heard submissions on the nature of a counterclaim she did not rule as to the nature of a counterclaim she merely applied the Rules and the Common Law and struck out the Counterclaim as not properly pleaded.

35. Her worship found at page 5 of her decision that:

> "The document headed Counterclaim in this matter does not fall within any of the definitions as set out in paragraph 21, 22, and 23 above. There is no allegation of a claim or an entitlement to some relief or remedy. There is no allegation of a crossclaim which, by law, the employer is entitled to raise and have disposed of in the action brought by the worker. (underlining is mine)"

36. Her worship then went on to confirm her earlier ruling to strike the counterclaim out. It is my view that the Employer has pleaded facts and

remedies in this case and on the application of Barclays case would not be struck.

37. I must however make comment on the application of the most recent case of Dickin v NT TAB Pty Ltd (supra) also sheds some light on how the court will treat any counterclaim pleaded in these circumstances. In Dickin's case his honour Justice Angel found (at paragraph 20) that

> "The respondent could only raise a case outside the terms of the notice, if at all, by way of counter- claim or separate proceedings"

38. His honour found that the counterclaim in Dickin's case did not raise any issue whether the worker's present incapacity was caused other than by her original injury and therefore in that case the issue of the cause of the worker's incapacity should not have been considered by the court.

39. The counterclaim in Dickin's case was couched in similar terms as in the present case and it is likely should this matter proceed any further the Employer ought to consider amending its counterclaim.

40. I am not prepared to strike out the Employer's counterclaim on the oral application at this point given the decision in Dickin's case was only handed down two days after I had heard this application and the Employer did not have the opportunity to make submissions to me on the application of that decision.

41. The application for summary judgment is dismissed. The worker to pay the Employers costs the application fixed at the composite scale amount for a contested interlocutory application.

Dated this 10th day of December 2003

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Tanya Fong Lim
JUDICIAL REGISTRAR