CITATION:	*Barbara Klaer v Anglicare Central Australia St Mary's Family Service* [2004] NTMC 024
PARTIES:	BARBARA KLAER v ANGLICARE CENTRAL AUSTRALIA ST MARY'S FAMILY SERVICE
TITLE OF COURT:	Work Health
JURISDICTION:	Work Health Court – Alice Springs
FILE NO(s):	20312353
DELIVERED ON:	12 March 2004
DELIVERED AT:	Alice Springs
HEARING DATE(s):	8 March 2004
JUDGMENT OF:	M Little

CATCHWORDS:

REPRESENTATION:

Counsel:

Worker:	J Waters QC
Employer:	P Barr

Solicitors:

Worker:	Scicluna and Associates
Employer:	Morgan Buckley

Judgment category classification:	
Judgment ID number:	024
Number of paragraphs:	19

IN THE WORK HEALTH COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20312353

BETWEEN:

BARBARA KLAER
Worker

AND:

ANGLICARE CENTRAL AUSTRALIA
ST MARY'S FAMILY SERVICE
Employer

REASONS FOR JUDGMENT

(Delivered 12 March 2004)

Ms M LITTLE SM:

1. Two preliminary issues with respect to this case were argued on the 8th of March 2004. The first related to the issuing of a s.69 notice to the worker on the 1st of May 2003 and the validity of the Form 5. If that issue is decided as against the worker, there is an application for interim benefits before the Court. The second matter before the Court is an application to strike out the Counterclaim filed by the employer. I will deal with each in turn.

2. 1. Section 69 Issue

The worker received a letter from TIO, a notice of decision dated the 1st of May 2003 and a medical certificate signed by Dr Brian Timney. The notice of decision will be referred to as the Form 5. The worker's payments of weekly compensation were cancelled by the Form 5. Mr Waters QC, for the worker, has argued that the Form 5 does not comply with the strict requirements of s.69 of the Work Health Act ("the Act"). Section 69 sets out the preconditions to cancellation or reduction of compensation payable under subdivision B of division 3 of the Work Health Act. Payments of weekly compensation are included in that subdivision. Section

69 sets out that compensation shall not be cancelled or reduced unless certain preconditions are complied with. Once the preconditions are complied with, the employer can cancel weekly benefits from 14 days of the date of the Form 5 notice.

3. Section 69 states that compensation "shall not be cancelled or reduced unless the worker to whom it is payable has been given" (my underlining) and then various requirements under s.69 are set out. It is apparent that these requirements must be met and if they are not, cancellation or reduction of payments of compensation will not be a valid cancellation or reduction. These requirements must be strictly complied with and I point to the word "shall" in s.69 when making that statement. The employer has the unilateral ability to cancel or reduce payments within 14 days of a notice being issued and the powers in s.69 must be exercised strictly in compliance with the Act.

4. As a consequence of the decision of the employer, the worker appealed the s.69 decision. In *Disability Services v Regan* (1998) 8 NTLR 73 at 76 Justice Mildren stated:

> "An appeal under s.69 calls into question only whether there has been a change in circumstances justifying the action unilaterally taken by the employer at the time the notice was given".

The balance of the Court of Appeal agreed with Justice Mildren.

5. Mr Waters QC argued that the Form 5 does not comply with subsections 69 (3) and (4) of the Act. I am in agreement with his submission. The reasons for my decision are as follows: The Form 5 notice states in part:

> "The reasons for this decision are: -
> "You have ceased to be incapacitated for work.
> Medical Certificate from Dr Brian Timney dated the 29th of April 2003 is attached."

6. The medical certificate attached from Dr Timney is a contemporaneous assessment of the worker. The worker was examined by Dr Timney on the 9th of April 2003. On the 29th of April 2003 Dr Timney certified as follows:

> "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".

7. Section 69 (3) of the Work Health Act requires a medical certificate to accompany the Form 5 certifying that the person has ceased to be incapacitated for work. The medical certificate which accompanies the Form 5 in this matter does not adequately substantiate the reasons for decision which are given in the Form 5. The Form 5 says that the worker has ceased to be incapacitated for work. There is no proviso or rider on that statement. The medical certificate has a proviso that the worker has ceased to be incapacitated for work "as a result of the work injury". The medical certificate leaves open the possibility that the worker may be incapacitated for work but for some other reason, for example some other intervening incident. If that is the case, the worker must be advised. There is an ambiguity as between the 2 statements.

8. *Henry Walker Contracting PTY LTD v Edwards* [2001] NTSC 16, decided by Justice Angel on the 16th of March 2001, raised a similar factual issue as this case. Justice Angel said at paragraph 4:

> "The certificate in the present case was qualified by reference to particular injuries. Thus it did not support the Form 5 Notice. It is the Notice not the medical certificate that needs to be justified factually."

As in the Henry Walker case, in this case the employer has not factually justified the cessation of the payments on the sole ground given in the Notice.

9. Section 69 (4) of the Work Health Act is also a mandatory requirement. That subsection states that the Form 5 Notice must set out reasons for the cancellation or reduction of the compensation in sufficient detail to enable the worker to understand fully why the compensation is being reduced or cancelled. In this case there is no explanation set out in the Form 5, let alone an explanation that complies with s.69 (4) of the Act. There is no explanation whatsoever that the

worker can comprehend as to why her payments, which were payable up until the 1st of May 2003, would be cancelled in full 14 days after receipt of that notice.

10. I have been referred to the decisions of Justice Angel in *Dickins v NT TAB PTY LTD* [2003] NTSC 119 and *Normandy NFM v Turner* [2002] NTSC 29. *Normandy* is authority for the principle that s.69 (4) of the Act "requires a notice to spell out why the status quo should change, in clear terms that a lay reader can fully understand". Paragraph 17 of the case of *Dickins* sets out the importance of requirements under s.69 and in particular the requirements of s.69 (4) of the Act. Paragraph 17 says in part "A notice must unambiguously spell out why a current payment regime should change in clear terms that a lay reader can fully and readily understand". I rely upon Justice Angel's remarks in those cases in making the decision in this matter.

11. Whether subsection 69 (3) or (4) of the Act is relied upon, the requirements of s.69 were not complied with. Accordingly I find this preliminary point in favour of the worker. I order that the worker's entitlement weekly and other benefits of compensation, as cancelled following the notice of the 1st of May 2003, be reinstated. I will hear parties on the question of costs. Accordingly there is no need to make a decision on the interim benefits application and I will invite the worker to withdraw that application.

12. As the order was made on the preliminary point, there is no need to consider whether the worker was incapacitated for work at the time of the Form 5 and there is no need to consider any medical evidence as part of the workers case. The order sought in paragraph 8 (1) of the Statement of Claim has been made without the need for a full hearing of the matter. Apart from the question of costs, the worker is not seeking any other orders in her Statement of Claim.

13. 2. <u>Question of the Counterclaim</u>

Leave was granted by Mr Ward DCM for a counterclaim to be filed by the employer in this matter. An application has been made on behalf of the worker for that counterclaim to be struck out. It was submitted on behalf of the worker that no claim of right or entitlement is being sought in the counterclaim. It was

alternatively argued by the worker that further particularity be ordered if the counterclaim is to remain.

14. The employer argued that the counterclaim should remain and it was also submitted that Full Court findings supported the widening of issues in cases such as this.

15. Paragraph 5 of the Counterclaim reads:

> "The employer seeks a ruling under s.104 (1) Work Health Act read with s.94 (1) (a) Work Health Act as the extent of the worker's incapacity (if any) from the 1st of May 2003 to the present and ongoing and consequential orders as to cancellation or reduction as the case may be of compensation payable to the worker".

16. The employer argued that this amounted to a remedy which could be claimed under a counterclaim. I am not satisfied that this counterclaim does amount to a counterclaim pursuant to Rule 9.05 of the Work Health Rules. Rule 9.05 (2) of the Work Health Rules sets out that:

> "A counterclaim is to contain –
>
> (a) a concise statement of the nature of the claim;
>
> (b) particulars of the claim; and
>
> (c) a statement of the relief or remedy sought."

Each of these three elements must be contained within the counterclaim.

17. It is my view that the counterclaim as filed does not comply with Rule 9.05 (2) of the Work Health Rules and in particular the statement of the relief or remedy sought is not in compliance with the Rules and there is no statement of the nature of the claim. The employer is seeking a "ruling" of the Court. As it is presently drafted, this counterclaim does not contain a statement of the relief or remedy sought or the nature of the claim. I rely upon remarks I made in the case of *Barclay v TNT Australia PTY LTD* delivered on the 12th of September 2003 as to the nature of a counterclaim under the Work Health Rules in making this decision.

18. In light of my order on the section 69 issue, I propose raising with the parties the question of the counterclaim for further submissions. My initial thoughts are that, following the reinstatement of the payments of compensation, it is for the employer to make a further assessment of the workers incapacity (if it so elects to do so) and it is not for the Court to inquire into that issue. If the medical evidence provided to the employer appears to support a cancellation or reduction of compensation, a decision can be made by the employer as to whether to cancel or reduce the compensation. There has not been the need to consider any medical evidence or to consider the workers incapacity to decide the section 69 issue. As the situation presently stands, the worker will be reinstated to the level of compensation she received as at 1 May 2003. I stress that these are my initial thoughts on the issue.

19. If it is agreed between the parties that the Counterclaim can still stand following the decision on the section 69 issue, or if I am required to make a ruling on that issue and the Counterclaim is not struck out and remains to be adjudicated upon, I advise that, as there has been some particularisation of what is being sought, I would be minded to grant the employer leave to file a further counterclaim which complies with Rule 9.05 of the Work Health Rules. I will hear further from the parties on this question.

Dated this 12th day of March 2004.

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M Little
STIPENDIARY MAGISTRATE