CITATION: *Kenneth Don Swanson* [2005] NTMC 084

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| PARTIES: | KENNETH DON SWANSON |
| | v |
| | NORTHERN TERRITORY OF AUSTRALIA |
| TITLE OF COURT: | Work Health |
| JURISDICTION: | Work Health – Alice Springs |
| FILE NO(s): | 20214796 |
| DELIVERED ON: | 22 December 2005 |
| DELIVERED AT: | Alice Springs |
| HEARING DATE(s): | 29th August 2005, 30th August 2005<br>31st August 2005, 1st September 2005 |
| JUDGMENT OF: | M Little SM |

**CATCHWORDS:**

Work Health- Appeal from s.69 Cancellation of Payments-
Whether reasonable administrative action.

**REPRESENTATION:**

*Counsel:*

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| Worker: | Mr Waters QC with Mr. Anderson |
| Employer: | Mr. Tippet QC with Ms Collier |

*Solicitors:*

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| Worker: | Povey Stirk |
| Employer: | Collier & Deane |

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| Judgment category classification: | |
| Judgment ID number: | [2005] NTMC 084 |
| Number of paragraphs: | 73 |

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

No. 20214796

BETWEEN:

**KENNETH DON SWANSON**
Worker

AND:

**NORTHERN TERRITORY OF AUSTRALIA**
Employer

REASONS FOR JUDGMENT

(Delivered 22 December 2005)

Ms LITTLE SM:

1. Before the Work Health Court was an amended statement of claim filed by the Worker, Kenneth Swanson, dated 12 April 2005. The Northern Territory of Australia, through the Department of Education, is the Employer. The Employer cancelled payments of compensation pursuant to *Section 69* of the *Work Health Act* on 30 May 2002, effective from 14 June 2002. The amended statement of claim appealed the cancellation of benefits pursuant to the *Work Health Act.* The Employer filed an amended defence and counter claim dated 28 July 2005 and the Worker replied to that document on 26 August 2005. A hearing of the matter was conducted over a period of four days and decision was reserved. Unless otherwise stated, all references to the Act or the Work Health Act relate to the Work Health Act of 1986 (NT). All references to the Rules relate to Rules made pursuant to the Work Health Act of 1986 (NT).

2. The hearing was conducted by way of oral and documentary evidence. The Worker objected to much of the evidence that the Employer sought to put before the Court. I took note of those objections and proceeded with the hearing. As part of this decision I will be required to rule as to whether that evidence is admitted or not. The decision as to what material will be admitted primarily relates to the questions raised by the Worker as to the amended defence and counter claim, and whether I find that the Worker opened up the issues to be ventilated.

3. I will first consider the amended statement of claim and the way that the Worker conducted its case. Counsel for the Employer argued that the way the Worker conducted his case, in addition to matters in the amended statement of claim, demonstrated that the Worker had gone beyond merely appealing the cancellation of compensation payments pursuant to *s. 69* of the *Work Health Act* . That submission was disputed by counsel for the Worker. It is my finding that the way the case was conducted by the Worker did not go beyond appealing the cancellation of compensation payments. The matters set out in the amended statement of claim, prior to the appeal being instituted in *paragraph 10* and the remedy sought in *Clause 11*, set out some of the history of the case. While it may be argued that some of the assertions in the amended particulars of claim amount to claims (for example in paragraph 3 "…the Worker suffered a work related injury…"), a remedy sought following a *Section 69* cancellation does not of necessity require a finding that there was a work related injury. An appeal following cancellation of payments pursuant to *Section 69* can be decided without that issue being ventilated. Great care was taken to conduct the case by the Worker in a limited way. The way the case was conducted by the Worker did not open up other issues.

4. Section 69 of the Work Health Act sets out in part in subsection (1)

69. Cancellation or reduction of compensation

(1) *'Subject to this Subdivision, an amount of compensation under this Subdivision shall not be cancelled or reduced unless the worker to whom it is payable has been given…' (my emphasis)*

In this case an appeal has been lodged pursuant to section 69.

5. Notwithstanding the finding in paragraph 3 of this decision, the appeal in paragraph 10 and the remedy sought in paragraph 11(a) of the amended statement of claim do raise matters other than the question of compensation pursuant to Part V, Division 3, subdivision B of the *Work Health Act*. In Paragraph 10, the worker appeals the decision to cancel benefits pursuant to the Act. Benefit is defined to include an advantage of any kind (*s. 3 Work Health Act*.) The appeal does not limit itself to the cancellation of payments of compensation. The section relating to weekly payments of compensation are located in Part V, Division 3, Subdivision B. The order sought in Paragraph 11(a) is that the appeal be "upheld and that as a consequence, weekly payments be resumed from 14 June 2002 and that the Worker be entitled from that date to such other benefits, including treatment and rehabilitation expenses as may arise." Benefits are being claimed other than from *subdivision B* of Division *3* of *Part V* (for example from *subdivision D* of *Division 3* and from *Division 4*). Had paragraph 11(a) ended with a full stop after '2002' that would not have been the case.

6. In *Disability Services v Regan 8 NTLR 73*, Justice Mildren at page 75 stated;

> "Had the worker merely appealed under s 69, the only question would have been whether the employer had established the grounds stated in the notice, the burden of proof in so doing resting with the employer. If the employer failed to establish these grounds, the effect of allowing the appeal would be that the employer would be required by force of s 69 to continue to make weekly payments of compensation until the employer was lawfully permitted to cease or reduce those payments, either by giving a fresh notice or by making a substantive application under s 104. No question would have arisen as to whether or not, after the date of the notice, the worker had ceased to be incapacitated or was only partially incapacitated. 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."

7. I rely upon the Northern Territory Court of Appeal cases of *Disability Services v Regan NTLR 73* and *Ansett Australia v Van Nieuwmans* [1999] NTCA 138 in finding that the Worker has gone beyond the appeal of the cancellation of the payments of compensation pursuant to Section 69 in his pleadings.

8. That the Worker conducted his case differently is not determinative of the issue. The amended statement of claim goes beyond a *Section 69* appeal of the cancellation of payments of compensation. A reading of the amended statement of claim as a whole demonstrates that. As a consequence, the Employer is entitled to widen the scope of the issues to be decided, as it seeks to do in its amended notice of Defence and counter claim, and by the way it conducted its case.

9. The next issue relates to the amended notice of defence and counter claim and what status it has. Counsel for the Worker argued on various points with respect to this document. Firstly, it was submitted that the rule with respect to counter claims *(Rule 9.05)* may well be invalid as there was no section of the *Work Health Act* which enabled such a rule to be enacted. *Section 104 (2)* of the *Work Health Act* sets out that proceedings may be commenced before the court by application in the prescribed manner and form or where there is no manner or form prescribed in such manner or form as the court approves. Parliament has foreshadowed that there may not be a prescribed manner and form in which to commence proceedings before the Work Health Court. There is no specific type of application in the *Work Health Act* to commence proceedings. *Rule 5.02* sets out that an application commencing a proceeding is to be in accordance with Form 5A. "Proceeding" is defined as 'a claim before the Court for compensation or a matter or question incidental to such a claim,' *(section 49 of the Act)*. The Worker commenced proceedings pursuant to s. 104 by way of a Form 5A on 2 October 2002.

Subsequently a statement of claim, defence and counter claim and reply has been filed. The Work Health Rules specifically allow for a statement of claim, defence and counter claim. They do not refer to a reply. In my view, there is no more or less legislative backing for a counter claim than for a defence or statement of claim.

10. The case of *Disability Services v Regan* 8 NTLR 73 at page 78 raised the question of counter claims and the Court of Appeal said that the fact that no counter claims were, at that time, provided for in the Work Health Court Rules was a weakness. The Court in *Disability Services v Regan* considered that it was understandable that when proceedings had begun in the Work Health Court that parties would usually wish to litigate all outstanding issues. The Court of Appeal stated

> "An employer, who has served a section 69 notice, may subsequently decide after the employee has appealed, that the issues to be decided upon the appeal are too narrowly confined. At present, if the employer is in this position, the employer can bring its own substantive application and apply to have the two applications heard together. It may simplify hearings procedurally and focus proper attention on who bears the onus of proof if the rules were amended to permit the employer to raise new issues by way of counter claim". (page 79)

11. *Section 104* of the *Work Health Act* allows for proceedings to be commenced for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under *Part* V before the Work Health Court ( together with an application for the recovery of compensation under *part* V). An appeal pursuant to *Section 69* of the Act seeks an order with respect to such a question. The appeal has been lodged pursuant to *section 104* of the *Work Health Act*. An appearance was filed by the employer. A statement of claim and later an amended statement of claim was lodged. A defence and counter claim has been filed and, as *Regan's* case foreshadowed, the Employer is seeking to litigate the matter more fully. I decline to find that *Rule 9.05* is invalidly enacted.

12. The Worker then argued that *Section 103 J* of the *Work Health Act* has not been complied with in this case. That section sets out that a claimant is not entitled to commence proceedings under Division 2 of Part VIA *(*where *Section 104* is located) unless there has been an attempt to resolve the dispute by mediation and that attempt has been unsuccessful. I accept that this is a mandatory provision and that a separate mediation has not taken place prior to the counter claim being filed. It was argued that the counter claim commenced (that part of the) proceedings, making the Employer a claimant within the meaning of Section *103 J* of the *Work Health Act*. That raises some issues which were debated at length by counsel throughout the hearing and in particular whether the remedies sought by the Northern Territory of Australia were within the power of the Work Health Court to order. The Northern Territory of Australia is seeking that the appeal to cancel benefits be dismissed and further that there be declarations and orders made with respect to the worker as to his capacity for employment, whether he is fit to return to pre-injury employment and whether the injury arose as a consequence of reasonable administrative action. The point raised by the Worker raises questions as to the character of the document headed 'Notice of Defence and Counter Claim'. If I find that the Employer is a claimant for the purposes of *Section 103 J* of the *Work Health Act,* then the fact that they have not proceeded through mediation will mean that they are not in a position to proceed with their counter claim at this stage.

13. Section 104 of the Work Health Act talks of "commencing proceedings". Rule 5.02 sets out that an application commencing a proceeding is to be in accordance with Form 5A. The Worker has commenced proceedings by filing a Form 5A on 2 October 2002. Once proceedings are commenced and the Employer or respondent is served, they must file an appearance not later than 14 days after the date of service. If they do not do so, default judgment can be entered against them, and orders made for the remedies sought (Rule 5.05). Proceedings are commenced following the procedure in Rules 5.02 to

5.05. The formalisation of contested proceedings is by way of the statement of claim, defence and counter-claim. These documents do not commence the proceedings. Proceedings can only be commenced pursuant to Form 5A and can only be commenced once. The question of mediation arises prior to the Form 5A being filed. There is no requirement to undertake further mediation (which must already have taken place between the parties), although there is no bar to that occurring. Section 103J of the Act has not been triggered by the filing of the counterclaim. Further support for the ruling on this question can be found in Form 5A itself, where the certificate issued pursuant to section 103J of the Act is to be attached to the Form 5A (see note 2(f) of Form 5A Work Health Court Rules in the schedule).

14. The next question to be considered is whether the remedy sought by the Employer is capable of being ordered by the Work Health Court. In paragraph 10, the Employer denies that the Worker is entitled to any compensation pursuant to the Work Health Act. In paragraph 11 of the amended Defence and Counter Claim, the Employer seeks the following declarations and orders:

> " i. The Worker's appeal of the decision to cancel benefits be dismissed;
>
> ii. A declaration that the Worker has not been partially or totally incapacitated for employment since 14 May 2002;
>
> iii. A declaration that the Worker is fit to return to his pre-injury employment and has been so fit since 14 May 2002;
>
> iv. A declaration that if the Worker had suffered a mental injury that such injury is as a result of reasonable administrative or disciplinary action on behalf of the Employer and is therefore not a compensable injury pursuant to the provisions of the Work Health Act and,

v. That the Worker pay the Employer's cost of these proceedings.

15. The submission by the Worker is that there is no power for the Work Health Court to make a declaration under the *Work Health Act*. I accept that a declaration has specific legal meaning. For example, Black's Law dictionary defines it as, "a binding adjudication of the rights and status of litigants even though no consequential relief is awarded." Butterworth's Australian Legal Dictionary defines Declaratory Judgment as "an authoritative but non-coercive proclamation of the Court made for the purpose of resolving some legal issue."

16. *Section 104* of the *Work Health Act* sets out as follows;

" (1) For the purposes of the Court exercising its powers under section 94(1)(a), a person may, subject to this Act, commence proceedings before the Court for the recovery of compensation under Part V or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part."

The Employer is not seeking to commence proceedings for the recovery of compensation. Accordingly, their application can only be pursuant to the second part of section 104, namely, that they are seeking " an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part," ( being Part V). In this case, they are seeking 'declarations and orders'. This raises the question of whether a 'ruling' is one and the same thing as a 'declaration' for purposes of the *Work Health Act*. By asking this question I am not intending to consider if they are one

and the same thing for all purposes, but rather that whether, for the purposes of the *Work Health Act*, and in the granting of power to the Work Health Court, the words are interchangeable. The word "ruling" is not defined in the *Work Health Act* or in the *Interpretation Act*. When the Concise Oxford Dictionary is looked at, one of the meanings for the word 'rule' is "a legal meaning", namely "an order made by a Judge or Court with reference to a particular case". While the word "rule" has a general meaning, it is a word which has an accepted legal meaning and when used in a provision such as *Section 104* of the *Work Health Act* should be given its legal meaning. Black's Law dictionary defines the verb 'rule' to mean "to settle or decide a point arising upon a trial…" The Butterworth's Australian Legal Dictionary defines rule to include "an order or direction made by a Court during proceedings." It is apparent from a reading of Section 104 of the Work Health Act that the word 'ruling' has an even wider meaning than this, as the Court is not limited in its powers to make a ruling during proceedings. Rather the section allows a party to commence proceedings, for, inter, alia, a ruling in respect of a matter or question incidental to or arising out of a claim for compensation.

17. The Work Health Court is empowered to make rulings with respect to a matter or question incidental to or arising out of a claim for compensation. The Worker has made a claim for compensation and up until the service of the section 69 notice was being paid weekly payments of compensation (Exhibit E2). The matters raised by the employer in its amended Defence and Counter Claim are matters or questions incidental to or arising out of

the Worker's claim for compensation under part 5. Section 104 speaks of seeking "an order **or** ruling" (my emphasis). The amended Defence and Counter claim seeks "declarations **and** orders" (my emphasis).

18. The Work Health Court has exclusive jurisdiction to determine the questions relating to financial compensation to worker's incapacitated by work place injuries as between the Worker and the Employer. Because of this exclusive jurisdiction, if a declaration is made it does not have the effect of binding another Court or commission (or equivalent body) which also has power to make such orders. The case of *Liverpool & London & Globe v Deaves [1971] 2 NSWLR 131* is distinguishable on this basis.

19. While not determinative of the question, it can not be said that the word declaration has never been used in decisions in Work Health proceedings. For example, the case of *Morrissey v Conaust Ltd* at 1 NTLR page 183 at page 184 sets out the orders that were made by a Magistrate prior to the appeal. They included orders made by the Magistrate that, pursuant to a Section 69 Work Health Act appeal, "A declaration that the payments were improperly terminated". The employer appealed this decision. While the orders made (including the declaration) were appealed, there was no challenge made on the basis that the Work Health Court had no power to make a declaration. At the first appeal and before the Court of Appeal this was not raised by either Court. In the case of *1mhoff v IBM Australia Ltd* [2001] NTSC 23, a declaration was also sought. Thus there is some precedent for the expression declaration being used in a *Work Health Court* case.

20. The Worker compares the Work Health Court to the Local Court and refers to Section 14 (8) of the Local Court Act, which specifically allows for declaratory relief. It is the case that no such specific power is given to the Work Health Court. However, the Work Health Court can make a "ruling". This distinguishes it from the local Court. In the context of this case, I am

unable to see the distinction between a ruling and a declaration. The employer is precise in the terms of the declaratory relief it seeks.

21. If I am wrong about that then it is clear that in the amended defence and counter claim, the Employer seeks "declarations and orders". Orders can be made pursuant to *Section 104 of the Work Health Act.* The Employer is entitled to seek orders in the terms set out in paragraph 11 of the amended defence and counter claim. In the final analysis I can see no reason why the fact that the words "declarations and" are also used should be a bar to any orders being made in the terms sought.

22. If I am found to be incorrect in this conclusion, the Worker has widened the scope of the issues in it's pleadings by seeking orders relating to matters outside the issue of the cancellation of payments of compensation and the Employer is entitled to ventilate other matters which are incidental to or arising out of the Worker's claim for compensation. Issues are joined in the pleadings.

23. The next issue raised by the Worker was whether the counterclaim was in accordance with Rule 9.05(2). A counter claim must include, inter alia, a statement of the relief or remedy sought (see Rule 9.05 (2)(c)). Does clause 11 of the Notice of Defence and Counter Claim satisfy the requirement for a statement of the relief or remedy sought? In my view the counterclaim does satisfy the requirements, the relief or remedy sought is clearly set out. While the Defence and counterclaim are somewhat inter-related and it would have been preferable for it to have been drafted more clearly, Rule 9.05 (2) is complied with.

24. The question of the material where decisions were to be made on the admissibility of evidence can now be finalised. As a consequence of these rulings, I allow the evidence which the Employer called to be admitted into evidence, save where admission was expressly declined throughout the

proceedings. The case is not limited in the very narrow way argued by the Worker.

25. I now proceed with the summary of evidence. The Employer proceeded with their case first, it being agreed that they were dux litis. This was based on settled case law, see *Ju Ju Nominees Pty Ltd v Carmichael* 9 NTLR 1.

26. The first witness to be called was Christine Cram. She is a school teacher and previously was teaching at the Anzac Hill High School. She was the maths and science coordinator and the Worker was part of her team as a science teacher at the time of the incident alleged to have triggered the injury. Approximately six months after she arrived at the school, accusations against the Worker were made. She said that three girls from year seven had made accusations against the Worker. The accusations included that they were touched on the shoulder when dancing and that he was trying to look down the tops of the girls. She had spoken to the girls regarding dressing appropriately and to be aware of the clothing they wore. She concluded that the girls had issues relating to the Worker personally but not with respect to his behaviour. She asked them to write up the incident to set out what the complaint was. She saw Peter Swan, the Assistant Principle, and she believes that the girl's families were spoken to. She could not remember reading what the girls wrote up but she had given the material to Peter Swan as the Principle Mr. Cooper was away. In any event, Peter Swan was the teacher who was involved in matters of student management. She regarded the material given to her by the girls as accusations which needed to be looked at and taken further. As it transpired, it was decided that there was no suggestion that the Worker's behaviour was improper and they was no need to follow through with the matters. Further, there was no need for discipline of the Worker, that he had nothing to answer and that there was nothing improper about his behaviour. She was worried about him and arranged to have a coffee with the worker. She said that Ken (the Worker) felt he had been lied to and that he had not been officially told about the

incident. She indicated that she did not have any official role to play in information being given to the Worker with respect to the complaints, as that was up to Peter Swan. There was no cross-examination of Ms Cram.

27. The next witness was Peter Swan. He was at the Anzac Hill High School for some time and had a range of jobs in the position. He identified the Worker as someone who he had been supervising. He also knew Christine Cram. In 2001 he was Assistant Principal and his roles included teaching, student welfare and working with staff. The Principal John Cooper was away so he undertook the duties with respect to the complaints of the three girls. He was in his office when two teachers saw him- they were Christine Cram and Michael Fewster. The issue with the three girls was raised and he was told that the girls had been feeling uncomfortable. Chris Cram came back to him with the three hand written letters which were produced by the girls. The employer sought to tender these letters and they were objected to by the Worker on the basis of relevance. They became Exhibit E1. In the final analysis the complaints amounted to feeling uncomfortable, and he was of the view that there had been no allegations made and no suggestion of impropriety on the part of the Worker.

28. He met up with the Worker in the administration area and said he needed to discuss a delicate matter with him. Soon after, in his office, he spoke to the Worker about the letters which had been received. He told the Worker that he felt nothing untoward had been suggested by touching the girl on the shoulder as dancing was being taught at the relevant time. He said that the Worker should be aware that the girls had raised the issue and suggested that the worker did not put himself in the position to compromise himself with respect to these students in the future. He offered the Worker the opportunity of looking at the letters. The Worker said that he did not want to look at them. The purpose of the meeting was to let him know about the allegations and to suggest that he make sure that he took protective measures in the future. He said that it was not uncommon, especially for

male teachers, for suggestions to be made about their behaviour. The worker said 'Thank you for letting me know,' and then he left the office. He was clear that there were no allegations to be answered and that the purpose of the meeting was to inform the Worker of what happened and to suggest he take defensive actions. He said that there would be no enquiry entered into as there was no basis for an enquiry. He did not make a record of the time of the interview but he estimated that it would be five to ten minutes in length. He told the Worker that there was no response required by him and that there was nothing to answer. The following day he saw the Worker at the Memo Club and once again said that there was nothing to answer. He gave the Worker information about EAS (the Employee Assistance Service) and later on learnt that the Worker had lodged a work health claim. He did not enter this meeting into his diary, it was not on the Worker's official file and he put the information onto a confidential file. He did not think that Head Office had been notified.

29. The witness was then cross-examined. He said that he has now resigned from the Public Sector and he is a Principal of Jabiru School by way of a contract. At the time he was a permanent employee of the Department, as was Mr. Swanson. His evidence was that a permanent employee of the Department or the Public Sector could not take private work without permission of the Department.

30. The next witness called was Mr. Cooper. He was the Principal of Anzac Hill High School and has been there since 1985, from 1986 as principle. He knew the Worker as one of the teachers at Anzac Hill High School. He was in Tennant Creek at the time the allegations were raised. The Assistant Principle, Peter Swan, had rung about the allegations and outlined what he had done. Peter Swan was a HR type person and that he had told him that he was on the right track. He identified a copy of the Work Health Claim as being in the Worker's handwriting and with the Worker's signature. The third page of that claim was in the witnesses' hand writing, as the

Employer's response. The document was tendered as Exhibit E2 under objection. The Work Health Claim was signed by the witness Cooper on 7 April 2001. The injury was said to be sustained on the 27 February 2001. He had never received a letter of resignation from the Worker but he was aware that the Worker was no longer teaching. A document he identified became an MFI E3, letter by worker dated 18 February 2004. He had never been involved in the matters that had related to the complaint by the three students. There was no cross-examination of Mr. Cooper.

31. The Court was then advised that Mr. Fewster (the teacher who was in Mr. Swan's office with Ms Cram) was not to be called by the Employer but was available if needed by the Worker. He was not asked for by the Worker.

32. The next witness was Sondra Young from the Department of Education. She was employed as Assistant Director, Human Resources with the Department of Education. Part of her duties was to approve resignations. She knew the Worker and had known him since approximately 2000. In February 2004 she was managing the Work Health matters in the Department of Education and she received a resignation from the worker. She was shown MFI E3. MFI E3 had been faxed to her by DCIS around the 18 February 2004. She identified the letter as the resignation of the Worker and her signature was on it approving the resignation. Once the resignation was accepted by the Department it was entered onto the database and the date of the database entry was 19 February 2004. As this was a Work Health claim the matter was sent back to DCIS to be dealt with. Under objection the letter was tendered and became Exhibit E3.

33. The next witness was Dr. Brian Timney. He gave evidence by way of video link from Dundee in Scotland. He is a psychiatrist and since 1993 has been seeing people for medico-legal assessments as well as being a clinical psychiatrist. Upon request by the solicitors for the Employer, he saw the Worker on 14 May 2002 and undertook an assessment of him. A report dated

20 May 2002 was prepared and became Exhibit E4. Given the importance of Dr. Timney's role in the cancellation of payments, I will include in this summary of evidence his 'Summary and Assessment' from the report dated 20 May 2002. Dr. Timney states at pages 4 and 5 of E4;

> " Summary and Assessment
>
> Mr. Swanson is a 55 year old school teacher who was accused of touching two students shoulders inappropriately and looking at another student's breasts during a ballroom dancing lesson. A female teacher was present at all times during the lesson and Mr Swanson believes that these accusations had no basis in fact.
>
> Rather surprisingly, he claimed that he has never been told the outcome of any investigation into these allegations. He has remained in non-teaching alternate duties, without any clear evidence of a plan to return him to teaching duties.
>
> While there is evidence that Mr Swanson suffered an initial Adjustment Disorder with anxious mood, this would appear to have lasted for a maximum period of six months after the original allegations and there is no evidence currently of any formal psychiatric illness or disorder. This does not mean that Mr. Swanson does not have strong feelings about the allegations made against him or that he does not have, in addition, strident views on the way the Education Department has handled his requests for transfer and other teaching duties."

A further assessment was made upon the Worker on 29 November 2002, and a second report was prepared dated the 9 December 2002. This became Exhibit E5.

34. He prepared a medical certificate dated 28 May 2002 wherein he certified that the Worker had ceased to be incapacitated for work as a result of the work injury. That medical certificate was tendered as part of Exhibit E6, and was the medical certificate relied upon in the *section 69* cancellation of payments.

35. With respect to Exhibit E4, he confirmed that he had satisfied himself that there was an initial adjustment disorder and that such a disorder would have continued for a maximum of six months. Upon examination on 14 May 2002 he found no evidence of a psychiatric disorder. His evidence was that an adjustment disorder had an identifiable range of symptoms following a stressor. Here the allegation of misconduct in the workplace had caused distress and impairment and he was satisfied that Worker's condition was not linked to what would normally be regarded as a reason to be upset, for example, a bereavement. A disorder such as this would be linked to a stressful event. There was a suggestion of an anxious mood, for example worry, apprehension, pre-occupation with worrying about the problems, heart racing, tremors and being unable to sleep. Based on the symptoms given to him, he concluded there was an adjustment disorder and that the condition lasted approximately six months. He was of the view the symptoms returned to normal within that period. There was no treatment sought later than that and there were no features of an adjustment disorder when the Worker presented to him. The Worker presented as having an outstanding industrial relations dispute with his employer following the approximate six month period. Given the history that was related to him, and Dr. Timney's findings upon examination, there was no psychiatric diagnosis which related to the Worker at the time of the consultation.

36. At page three of Exhibit E5, he reported that the Worker was preoccupied with a belief that his employer had treated him unreasonably. The Worker reported to Dr. Timney that he no longer wished to teach High School students and that he would not return to his former teaching duties. The Worker had a strong focus for his anger and resentment and in particular this related to the lack of information that he was given and the way that the case was handled. Doctor Timney was of the view that the symptoms which the Worker reported indicated stress and that he had become ill. The doctor acknowledged that stressful situations can lead to a psychiatric condition.

He said there was no diagnosis of "stress" in DSM IV. There was no evidence that a diagnostic criteria was met by the Worker. Dr. Timney was of the view that the Worker was refusing to consider a return to work program. The doctor believed that the original complaint should not have caused such a reaction. Looking at the type of complaint made and the degree of impairment alleged by the Worker, it did not match up.

37. The doctor was then cross-examined. He said that at the time of signing the medical certificate (E6) he was registered in Australia as a medical practitioner. He was qualified by way of a Batchelor of Medicine, Batchelor of Surgery and he was a member of the College of Psychiatrists in the United Kingdom and Australia. He had formed his opinion based on the history given, the examination he undertook and an assessment of how the incident was affecting the Worker's life. The doctor was of the view that this kind of stress would resolve in six months, perhaps a little bit longer in some cases. He agreed that this was the norm and that it would not always be the case that it would be resolved in such a period. He agreed that there were some cases where the situation was not resolved but in such cases there would be identifiable symptoms. Between the first and second assessments undertaken by Dr. Timney, the Worker reported problems with sleep, increased drinking and that he was distressed and angry. Doctor Timney concluded that these symptoms were related to the effects of the Work Health Claim and not a psychiatric illness. He agreed that symptoms can reappear. He was of the view that the Worker could function as a teacher and that there was no illness from stopping him undertaking this work. Dr. Timney said that while the Worker had strong feelings regarding the case, the Worker was medically fit to return to work. It was apparent that the Worker's relationship with his Employer was poor and it would be sensible from a management perspective to recognise that and take that into account when reintroducing him into the workforce as a teacher. He was taken to page five, paragraph four of Exhibit E4. There he was asked, "What is the

short term and long term prognosis and time scale?" He had answered: "The short term prognosis is for likely complaints in relation to the adjustment back to a teaching environment, but the prognosis in the long term should be for a normal adjustment back into teaching." He stated that he was referring to the relationship between the Employee and the Employer and that there was a lingering resentment which was an obstacle to a satisfactory return to work. The Worker was very angry about the way the situation had been handled. He agreed that if put back into an environment where there are stressors a condition can recur. He stated it would be prudent to have minor modifications in the return to work but that was a management issue. He agreed it could become a medical issue.

38. He was asked whether when being assessed for the second report (Exhibit E5) the Worker had said that he did not want to be teaching High School Students as opposed to teaching teenage girls. He was of the view that the Worker did not specifically refer to girls. He believed he would have made that clear in his report if that had been said. He did not have his notes with him whilst giving the evidence and could not take the matter any further.

39. He was referred to the Worker's employment as a file clerk with DCIS, and asked whether he considered this was a graduated approach to rehabilitation. The Doctor responded that the Worker was taking no active steps to overcome his block to teaching and he should have returned to teaching. With respect to teaching, he agreed it would be reasonable to start teaching adults or working as a teacher's aide. He would not agree with a cold turkey approach. He had access to Dr. Brown's report and he acknowledged that there was a disagreement of diagnosis between Dr. Brown and himself. He indicated that he had never described the condition as chronic. In his diagnosis, the disorder arose from stress, the symptoms had resolved but workplace issues had not been sorted out. There was now a stand-off between the parties. He distinguished an emotional reaction from a psychiatric disorder. There had been an intensification in reaction towards

the Employer in the period between the two assessments he undertook. In the DSM IV manual this condition is chronic if it is longer than six months (see Dr. Brown's diagnosis.) The Worker had anger and hostility to the system but there was no diagnosable psychiatric condition at the time that Dr. Timney had seen him. He was referred to page 15 of Dr. Brown's 8 December 2003 report (which later became Exhibit E9). He disagreed with Dr. Brown. Dr. Timney stated that there was a range of reasons why a person would not want to return to work for example age, personal reasons or feelings towards an Employer, but he looks at a psychiatric diagnosis. He was referred Dr. Clugg's report from the 6 April 2005. He disagreed with the diagnosis by Dr. Clugg. He found no evidence of a superimposed major depressive disorder. He agreed that such a condition may have manifested after the time that he had seen the Worker and prior to the time that Dr. Clugg saw him. When he examined the Worker there was nothing to suggest any abnormalities, and he did not find any abnormalities. (This report was never tendered).

40. He was then re-examined. The doctor stated that he relied upon the Worker's responses. He agreed that there was a range of approaches in returning to work including being referred to another school, or being placed in the science laboratory.

41. Witness Scott Bevis was then called. He was employed as a rehabilitation consultant. He was employed by Advanced Personal Management (APM) with respect to the return to work program for the Worker.

42. He prepared assessments and progress reports with respect to the Worker which were eventually exhibited and became Exhibit E7. The first report was dated the 22 November 2002. He said that the Worker was working approximately six hours per day and he was performing satisfactorily. He monitored progress of the Worker until June 2003 and closed his file on 25 June 2003. The Worker commenced with DCIS and then after the school

stand down period he went back to DCIS. He then worked term two with Alice Outcomes. When that placement failed he went back to DCIS. He had no dealings with the worker after June 2003. In May 2003 there were discussions regarding alternative placements with the Alice Springs High School. On 12 May 2003 there was a meeting involving the parties including Alice Springs High School and Alice Outcomes. Alice Outcomes is a subsidiary campus of the Alice Springs High School and there was a work placement based at the Gap Youth Centre. Duties the Worker was to be allocated were duties he had been performing at DCIS but back within his own department rather than DCIS. These duties included data entries and liaising duties. Other duties were negotiated between the Worker and the Principal of the school. Those duties dried up and he was not able to continue with the Alice Outcomes placement. An alternative position at the Alice Springs High School was raised as a possibility, namely as Laboratory Assistant in the Science Department of the High School. The witness considered that the Worker could undertake those duties as set out in the position description. He had not discussed with the Workers' General Practitioner if the General Practitioner was of the view that the Worker could undertake these duties. There was a reluctance by the Worker to do those duties and the Worker took long service leave in term three. The Worker was resistant to a six week placement undertaking the Science Laboratory position and Mr. Bevis concluded that it would not be beneficial to the Worker to undertake that work. He said the Workers' resistance seemed to be linked to the disappointment surrounding the ending of the Alice Outcomes placement and his motivation had become less. He was not motivated to go back to Alice Springs High School and the Worker stayed with DCIS for the rest of term two. The witness was of the view that the laboratory work was appropriate given his qualifications and suitable with respect to his abilities, requiring minimal training. He would have been supervised by a department head. The worker told Mr. Bevis that he was going on leave. The witness was of the view that it was futile to pursue the

laboratory position. Whilst he believed the position was suitable he did not want to set the Worker up to fail. The closure of the file on 25 June 2004 was linked to the four week stand down period and then the worker went on ten weeks long service leave. Whilst teaching staff are entitled to the four week stand down period, DCIS staff are not entitled to the stand down. The Worker was still an employee of the Department of Education and Training and so he was entitled to the stand down period. That was then the end to the contact that Mr. Bevis had with the Worker. The reports and assessments by Advanced Personnel Management in the name of Mr. Bevis were tendered on objection and became Exhibit E7.

43. Mr. Bevis was then cross examined. He said he was conditionally registered as a psychologist during this period however he was not in the position to use his training as a psychologist. He relied upon the assessments by the Worker's General Practitioner, Dr. McCollough, by the psychiatrist, Dr. Timney and Mr. Vine the psychologist. He said that he relied upon those experts to make decisions and to form his opinions with respect to the Worker. He then crafted the return to work placements based upon the opinions of those persons and guided by those medical reports. The Worker's participation in the return to work program was good until the failure of the Alice Outcomes Program and then his motivation reduced in particular with respect to Alice Springs High School. He stated that in the six week gap that the worker could have commenced the placement in the science laboratory at the High School.

44. The next witness was Miss Delahunty, psychologist. In October 2001 she was a consultant to Alice People Services. The worker was referred from the Employee Assistance Service. The Worker had problems at the school and she saw the Worker under the Work Health Scheme. She was not the rehabilitation consultant with regard to this Worker. As at 31 October 2001, she was the psychologist as part of the return to work program. She met the Worker at Alice People Services and on 24 October 2001 he said he was not

returning to his placement at SHAPES. The Worker advised Miss Delahunty that he had decided to retire. She tried to discuss with him the impact of that decision, in particular with respect to his work health claim and the work she could do with him if he did not go back to work. There was an objection to evidence which was sought to be tendered at this point and I refused the tender of a letter to Troy Richards. There was also an objection to the evidence of this witness. No further evidence was given by this witness.

45. The next witness called was Dianne Hussey of DCIS Alice Springs. She is the manager of payroll services and had the file of Kenneth Swanson in her possession. She manages a team approximately 30 people, who look after the personnel files. A DCIS file of Mr. Swanson became Exhibit MFI Exhibit 8 and was eventually tendered as Exhibit 8 without objection.

46. The next witness to be called was Dr. Brown who gave evidence by way of a video link from Sydney. He has a Batchelor of Science (Honours) and a Bachelor of Arts in Behavioural Science. He is a psychiatrist and is a member of the Australian College of Psychologists and the United Kingdom Psychiatrists College. Upon request by Collier and Deane, the solicitors acting for the Employer, he saw the Worker on two occasions- 8 December 2003 and 29 March 2005. He prepared two reports, namely a report of 8 December 2003 (19 pages) which became Exhibit E9 and a report of 29 March 2005 (17 pages) which became Exhibit E10. He assessed the Worker and formed his opinions which he recorded in these reports. He also commented on other opinions which had been proffered. At page 15 of Exhibit E9, he stated;

> "…in my opinion , it is his attitude which has prevented the matter being resolved as one would have expected it to have been resolved in the months after the allegation was made".

He confirmed that remained his opinion. The Worker had told him that he was not going to take the position at the science laboratory and that he was angry at the department. The Worker had advised him that he felt that he

was not supported when the allegations were made. The Worker was angry with the way the matter was dealt with and the way the information was presented to him. He was angry towards the Education Department. He preferred to have a clerical position and the Worker was of the view that he was not allowed any such further clerical positions. He had also applied for a transfer to Darwin which was not successful. He had pre-existing anger and after the allegation was made he was upset about the way the allegation was handled and the rehabilitation which had been offered to him. Dr. Brown formed the opinion that the Worker's anger was sustaining his symptoms. The symptoms he recorded included anxiety, insomnia, alcohol use and depression. At the time of the second assessment, the Worker was not reporting the same behaviour as at the first assessment. He confirmed that in the report Exhibit E9 at page 18, the Worker had said that he could never teach teenagers again. The Worker did not distinguish between male or female teenagers. In the second interview, the Worker had said that he could teach boys but not girls. He referred to the triggering event with respect to the initial symptoms as being when the Worker was told of the allegations set out in the letters.

47. Dr. Brown was then cross-examined. His evidence was that the triggering event was being informed of the allegations (as opposed to the allegations being made). Other factors in the case had some sort of influence on the Worker's condition. He had first seen the Worker in December 2003. He had seen Dr. Timney's report and his diagnosis was different to that of Dr. Timney's. Dr. Brown's view was that the Worker's condition was chronic and he still had symptoms which were sustained by the Worker's anger. He accepted that it was appropriate not to put the Worker into another situation with the same type of stressors. He agreed with a gradual reintegration process in the return to work program. He said the worker was quite happy with his work at DCIS. If the Worker was to go back to teaching girls, then a graduated program was needed.

48. In re-examination he stated that his opinion was that the Worker had a chronic adjustment disorder. The symptoms which the Worker displayed were sustained by his anger at what had occurred. He was angry that he had been accused of sexual harassment and that the matter had been investigated rather than by his word being accepted, he was angry at the rehabilitation plan and he was angry that he could not stay at DCIS. Referring to the offer of employment at the science laboratory, Dr. Brown thought that was a reasonable way towards rehabilitation in a school environment. If the Worker had the motivation and had overcome his anger with the Department that would have been a reasonable step. Therapy should have been directed at getting rid of anger associated with the situation. Dr. Brown saw him some time after the event and he thought that the anger should have been dissipated under therapy. The question which Dr. Brown had was, if the complaint had not been substantiated and, as it was a minor allegation, why was the adjustment disorder still going on? He was of the view that it should have been long dissipated.

49. The next witness was Melinda Bongiorno from DCIS, manager of Work Place Injuries and Solutions. She assists the insurer TIO with work health claims. She knows the Worker who had made a Work Health claim through the Department of Education. There had been a rehabilitation program with Peter Lehmann. DCIS had taken part in the return to work program. The claim had been referred to Alice Springs for management. She had liaised with all parties with the aim to get the Worker back to pre-injury employment. There had been meetings involving Nadine Collier, Solicitor for the Employer, the Worker, the TIO claims manager and a representative from the Department of Education, Jennifer Curr. In 2003 a plan had been made for a placement with DCIS. The Worker had taken long service leave and then they tried to get a placement with the Department of Education, at Alice Springs High School. The placement was at the science faculty and took into account the return to work plan and the current medical

certificates. A proposed duties statement for the Alice Springs High School position was prepared and provided to the Worker via his solicitor. Early in October 2003, Nardine Collier contacted Ms Bongiorno's office regarding a position at the Alice Springs High School which was identified for the Worker. Under objection, a letter from Collier and Deane enclosing the proposed duty statement for Kenneth Swanson was tendered and became Exhibit E11. A proposed return to work program was to commence at the beginning of term 4 in 2003. Ms Bongiorno has discussions with the solicitors, principals of the schools, Jennifer Curr from Department of Education and Training- HR section, and also spoke with the Worker. When discussions had finalised, the return to work program was to commence on 17 November 2003. A graded return to work program had been negotiated. Ms Bongiorno contacted the Worker on 12 November 2003, and he was adamant that he was not going to commence work at the Alice Springs High School. He indicated that he wanted to remain at DCIS, that he wanted a pay out, and that he wanted to see his mother and daughter. He said he would not go to any Department of Education placements. She recalled that she was telephoning the Worker and was at her office when this phone call took place on the morning of 12 November 2003. She had made notes of this conversation. The Worker did not go to work at the Science Laboratory as had been arranged. She said that the time between the 6 October 2003 and 12 November 2003 negotiations had taken place between the parties to ensure that the duties were appropriate for the Worker to undertake. She forwarded an e-mail to various parties with respect to the conversation that she had had with the worker 12 November 2003. She can not recall if any further return to work opportunities were put to the Worker. The Worker used the rest of his entitlements including sick leave and when that was all finished in approximately February or March 2004, he resigned. The Worker was adamant that he enjoyed the work at DCIS and had very strong views that he would not go to Alice Springs High School.

50. She was then cross-examined. She indicated that she was the case manager in consultation with TIO and the relevant agency- the Department of Education. The proposed duty statement which formed part of Exhibit E11 was created as part of her management of this file. Various e-mails and letters between the solicitors were referred to in the period that the proposed duty statement was being drawn up. As part of the rehabilitation program, the Worker was working with DCIS as a filing clerk in early 2003. The main object was to get him back to work with the Department of Education with appropriate work. She was of the view that it was appropriate for the worker to go back to Alice Springs High School and took regard of the strictures imposed by the medical advice in the decision. She was of the understanding that the science laboratory assistant's job would be available on an indefinite basis. He would be paid at the teaching level of TC9. At DCIS he was working at an AO1 level. W12 was tendered through this witness with respect to the payments made to the worker and the hours he worked, following his Work Health Claim being filed.

51. Whilst the Worker was on the return to work program with DCIS, the Department of Education maintained his salary. The AO1 salary would be credited to the Department of Education for work done at DCIS. She indicated that she had no idea of the rate of pay of the laboratory assistant job but that perhaps it was at a teaching position at a lower rung than the worker was set at. In any event he would remain at the TC9 rate.

52. On 12 November 2003 she had a conversation with the worker as she had had some involvement with his claim. Prior to him taking his long service leave, the placement at DCIS had been an interim placement. She could not recall if the Worker approached her for a position in 2004, but there was no placement offered in 2004. No further positions were offered and the Worker was not participating in return to work programs. Upon service of the form 5 notice and after the relevant notice period, payments for compensation ceased. After the Worker used all his entitlements, he then

resigned. The placements which were offered to the Worker prior to this were at Ross Park Primary School, the laboratory assistant position and with DCIS. There had been opportunities that were offered to the Worker and he declined. The position with SHAKES worked for a couple of days but then the Worker did not go back. She agreed that the Section 69 notice did not relate to the refusal to do the laboratory assistant work. She was not able to advise the Court of any other steps that had been taken to offer rehabilitation.

53. She was then re-examined. She relied upon an opinion of Sean Ryan that the Worker could return to the duties as set out for the science Laboratory position. The report of Sean Ryan from Central Psychological Services to Povey Stirk (Solicitor for the Worker) dated 31 October 2003, became MFI E13. That was the conclusion of the oral evidence.

54. Exhibit MFI E8 then became Exhibit E8. The material was tendered subject to an objection by the Worker on the grounds of relevance.

55. The Employer sought to tender various letters between solicitors written prior to the laboratory assistant job being finally offered to the Worker. This became Exhibit MFI 14 and I declined to admit the documents. I also declined the tender of Exhibit MFI 13.

56. Exhibit E 15 was then tendered on objection by the Worker and I allowed the tender of the rehabilitation report and documentation from Peter Lehmann

57. The Employer then closed its case. The Worker did not lead any evidence. Submissions were made and in the course of submissions the Employer sought to reopen its case. This was not objected to and the wage rate of the science laboratory position was placed on the record as a fact before the Court. The Science Laboratory Assistant Position at Alice Springs High School is an AO3 position with a salary range of $40,297.00 and

$43,489.00. This figure will be used for any calculations of monies which may become owing to the Worker depending upon the decision in the matter.

58. That ends the summary of the evidence before the Court. Submissions were then finalised and I reserved decision in the matter. Any factual findings to be made are on the civil standard that is on the balance of probabilities. The burden of proof for the Worker's application rests with the Employer (see *Disability Services v Regan* 8 NTLR 73 at 75 and set out in paragraph 6 of this decision). The Employer also carries the burden of proof in its application. I will deal with the Worker's application first.

59. The case of *Collins Radio Constructors Incorporated v Day* (an unreported decision of the Northern Territory Court of Appeal delivered 26 March 1998) is authority for the proposition that the requirements in Section 69 (3) of the Work Health Act may not be ignored. Whilst not going so far as to suggest that the words of the statute are the only precise words that can be used, the Court of Appeal indicated that for those who draft the relevant medical certificates it would be wise to follow the words of the statute. The Court of Appeal was hearing an appeal of a decision of the former Chief Justice. They cited with approval the remarks of the former Chief Justice as follows:

> "In my opinion, the statutory requirements whereby an employer is enabled to unilaterally cancel a worker's continuing right 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 workers' rights, that the worker should obtain the information required and in the form required". (page 8 of the Judgment)

I refer also to the remarks in the case of Disability Services v Regan set out in paragraph 6 of this decision and in particular

"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" (8 NTLR 73 at 76)

Regan's case follows Morrissey v Conaust Ltd 1NTLR 183 and AAT Kings Pty Ltd v Hughes 4 NTLR 185.

60. In this case the Form Five has as its reasons for decision:

> "You have ceased to be incapacitated as a result of your work related injury of 27 February 2001. A copy of a medical certificate completed by Dr. Timney dated 28 May 2002 is attached".(Exhibit E6)

*61.* The reference to the injury of 27 February 2001 is in accordance with the Worker's claim. The 27th February 2001 is the date of the meeting between the worker and Mr. Swan. On the work health claim form ( Exhibit E2) the worker has nominated the 27th February 2001 at 10:15am approximately as the date and approximate time of when the injury happened or he first noticed the disease, the date and time he stopped work and the date and time he reported the injury or disease to his Employer. He handed the completed Work Health claim form (now E2) to his employer on 5 April 2001.

*62.* Given the reason for the cancellation set out in the Form 5, a medical certificate must accompany the Form 5 (s 69(3) of the Act).The medical certificate which was attached to the Form 5 reads as follows:

*I, Dr. Brian R Timney, Medical Practitioner HEREBY state that I have examined the worker Mr. Kenneth Swanson on 14 May 2002 in relation to his/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. Date : 28th day of May 2002, signed Dr. Brian R Timney- signature and name written.*

Strict compliance with the *Work Health Act* is called for. The relevant times are the time of the assessment and certification by Dr. Timney in May 2002 and the date of the Form 5 Notice.

63. The form of the notice pursuant to *Section 69* and the medical certificate comply with the requirements pursuant with *sub-sections 69(1), (3)* and (4) on their face. They do not contain the types of defects as demonstrated in the case of *Collins Radio Constructors Incorporated v Day (Northern Territory Court of Appeal decision delivered 26/03/98).* As the Worker has appealed the decision made under *Section 69*,

" *The question which has to be decided is whether, upon a consideration of all of the evidence in the case, the Employer has proved the facts set out in the certificate, and if so, whether as a matter of law those facts support the conclusion that the Worker's weekly compensation payments should be cancelled or reduced, as the case may be, as from the relevant date, which is fourteen days after service of the Form 5 notice"* : See *Disability Services v Regan* 8 NTLR 73 at page 77 per Justice Mildren.

64. The onus is upon the Employer to prove the matters set out in the certificate see: *Ju Ju Nominees Pty Ltd v Carmicheal* 9 NTLR 1. It has been asserted in the certificate that the Worker has ceased to be incapacitated for work as a result of the work injury. Section 3 of the *Work Health Act* defines incapacity to mean:

*"An inability or limited ability to undertake paid work because of a injury."*

The Worker's payments of weekly benefits were cancelled fourteen days from the receipt of the notice pursuant to the Notice of Decision attaching the medical certificate. The notice cancelled all of the weekly benefits and did not purport to reduce the amount of the weekly benefits because of a limited capacity to undertake work. The decision of the Employer, based upon the medical certificate of Dr. Timney, was that the Worker did not fit within the definition of incapacity and therefore was neither totally nor partly incapacitated for work.

65. As at the date of the first assessment by Dr. Timney (and the assessment relevant to the Form 5), the Worker had been working as a file clerk with DCIS. He had taken no active steps towards returning to teaching and had

not been required by his Employer to do so. Dr. Timney's view was that the block to teaching was a response to the way the claim had been handled – that it was an industrial relations or management issue, rather than a medical issue. He said that there was no psychiatric diagnosis which related to the Worker at the time of the first examination. He formed the view that it would be sensible from a management perspective for the Employer to recognise the strong feelings the Worker had regarding the case and to take that into account when reintroducing him into the workforce. I take that to mean a reintroduction to him working as a teacher. Further he stated in evidence that it would be prudent to have minor modifications in the return to work programme but he stressed that that was a management issue. He agreed that it could become a medical issue. With respect to teaching he agreed that it would be responsible to start the worker teaching adults or working as a teacher's aide.

66. In contrast to this evidence, there were no qualifications in the medical certificate which was attached to the Form 5 or on the Form 5 notice. The certificate did not call for a graduated return to work (in this case as a teacher). It stated that the Worker had ceased to be incapacitated for work as a result of the work injury. Dr Timney's conclusion is that any difficulties that the worker would have adjusting back to teaching were not as a result of a psychiatric condition but as a result of his negative attitudes towards his Employer and were industrial or management issues. He reported on short term and long term prognosis for the return to work as a teacher. He readily agreed that returning the worker to an environment where there are stressors, a psychiatric condition could recur. He stated that it would be prudent to have minor modifications in the work return to work program but that was a management issue. Whilst that may be a management issue, in the context of the Work Health Act, which aims to promote occupational health and safety to prevent work place injuries, to promote the rehabilitation and maximum recovery from incapacity for injured Workers and to provide

financial compensation for Workers incapacitated from Work place injuries and for other purposes (see the Preamble to the *Work Health Act*) , it is my view the medical certificate attached to the Form 5 and the Form 5 should have included qualifications, modifications and guidelines as to the Worker's return to work as a teacher. I base this finding upon the evidence of Dr. Timney. Dr. Brown's evidence also called for such an approach. I rely upon that evidence but to a more limited extent due to the timing of Dr. Brown's examinations. The Preamble sets out the reasons for the making of the Work Health Act and the scope of the Act. Rehabilitation and maximum recovery, and the prevention of work place injuries (in this case a recurrence of the injury) are all relevant matters in the context of this case. The medical certificate stated that the worker "has" ceased to be incapacitated. This is in the present tense. The Form 5 stated that "you have ceased to be incapacitated", again in the present tense. What Dr. Timney said in evidence was that with a graduated return to work programme, the Worker would cease to be incapacitated. He did not opine a return to work without modification. To suggest that the Worker, who has been away from teaching for the period from February 2001 to May 2002 and who may be expected to return to the stressors which have precipitated the injury by a return to work as a teacher, should return without a graduated return to work does not take into account of the opinion and the evidence of Dr. Timney. Nor does it take account of the stated purpose of the Act as set out in the Preamble. There were no qualifications or modifications on the medical certificate which formed part of the Form 5 notice or on the Form 5 (Exhibit E6). In the words of *Disability Services v Regan* "upon a consideration of all evidence in the case, the Employer has [not] proved the facts set out in the certificate", (8NTLR 73 at 75.) I find that, to the extent set out in this paragraph, there was a defect in the Form 5 Notice and attached medical certificate in this matter. (*Rupe v Beta Frozen Products* 2000 NTSC 71 followed.)

67. The Employer submitted that I rely upon s 69(2)(d) of the Work Health Act. I do not think that in these circumstances s 69(2)(d) of the Act should be invoked. First, the Employer issued a Form 5 notice after requiring the Worker to be examined by Dr. Timney. Secondly, Dr. Timney's evidence, together with that of Dr. Brown, calls for a graduated return to work programme. As such, a cancellation of compensation payments is not demonstrated. While a reduction of compensation payments may be warranted, I can make no findings on the percentage to be reduced. Thirdly, the Employer's defence and counterclaim does not seek such an order. While it is arguable that the Court can initiate such an approach, I would only do so in very rare circumstances and these are not such circumstances. The case of *Alexander v Gorey & Cole Holdings Pty Ltd* [2002] NTCA 7 *at paragraph 30,* states that an Employer may cease or reduce payments either upon notice under s.69(1) or by seeking an order of the Court under s. 69(2). As stated above no such order is expressly applied for in this case.

68. The cancellation of the Worker's payments of compensation, which was made by the employer pursuant to s 69 of the Work Health Act on 30 May 2002, effective from 14 June 2002, was defective and I order that, to that extent, the Worker's application is allowed. I make no such order with respect to the second part of the Worker's application, namely "that the Worker be entitled from that date to such other benefits, including treatment and rehabilitation expenses as they may arise" as such matters were not the subject of the s 69 cancellation. These other benefits had a continuing effect, the claim still being on foot, as was indicated, for example, by Ms. Bongiorno's ongoing involvement in the claim.

69. I now turn to the matters raised by the Employer in their amended defence and counter claim. As a consequence of my finding, in the Worker's application, paragraph 11(i) of the Employer's amended defence and counter claim is unsuccessful in part. I will now deal with paragraph 11 (iv). The Employer seeks a declaration that, if the Worker had suffered a mental

injury, that such injury is as a result of reasonable administrative or disciplinary action on behalf of the Employer and therefore is not a compensable injury pursuant to the provisions of the *Work Health Act*. The Employer did not run its case on the basis that there had been no injury, but rather that it was not a compensable injury. I can see no basis on the material before me to find that there was disciplinary action by the Employer. If the complaint made by the students had been substantiated or a formal investigation taken place then such matters may have arisen. *Section 3* of the *Work Health Act* defines injury to exclude;

'an injury suffered by a Worker as a result of reasonable administrative action taken in connection with the Worker's employment'.

The Worker's Work Health claim form (Exhibit E2) makes a direct link between the injury and the meeting that he had with Mr. Swan on the 27 February 2001 at approximately 10:15am. The injury is said to be "Extreme stress" (paragraph 5 of Exhibit E2). As previously set out in this decision, 27 February 2001 was the date and time which the Worker stated the injury/ disease occurred, the date and time that the injury was reported to his Employer and the date and time that the Worker stopped work because of the injury/ disease. That is, he stopped work straight after the meeting with Mr. Swan. Whilst the unsubstantiated allegations were the catalyst for the meeting, these are not said to be the reason for the injury. The worker links the meeting time with the onset of the injury. The Employer submitted that it had taken reasonable administrative action in advising the Worker of the allegations which had been made. I formed the view that Peter Swan was a credible and reliable witness. He was acting within his authority in his employment, that being part of his role as Assistant Principal. The evidence of Peter Swan is that he made it clear to the Worker that there were no allegations which the Worker needed to answer and he was simply making the Worker aware that the issues had been raised. As a subsidiary issue, he

suggested to the Worker that he take care not to put himself in the position to compromise himself with respect to these students in the future. That advice is capable of being misinterpreted and may be seen as an implied criticism. But there is no evidence before the Court to suggest that the Worker took it that way. Mr. Swan told the Worker that no response was required from the Worker and there was nothing for him to answer. He reinforced this in a social setting the following day. I am satisfied on the evidence before me that, at the time Mr. Swan spoke to the Worker at the Memo Club, he did not know that the Worker was suffering the injury that the Worker claims he was suffering from the time of the meeting at the school. Mr. Swan later learnt that the Worker had lodged a Work Health claim. The time nominated by the Worker that the injury was sustained was the time of the meeting with Mr. Swan. Not only is this clear in Exhibit E2, it is evident throughout the accounts given by the Worker set out in the medical reports which are before me.

70. The question arises as to whether the actions taken by Mr. Swan for and on behalf of the Employer were reasonable administrative actions. None of those words are defined by the *Work Health Act* and their ordinary meaning can be relied upon. There is no doubt that Mr Swan was the appropriate person on this occasion to hold the meeting with Mr. Swanson. The principal, Mr. Cooper was away from the school at this time and, in any event, Mr. Swan was the person who was normally charged with responsibilities such as this at the school. The Assistant Principal did not raise this matter in a public place and asked that the Worker come back to his office. He gave the Worker the opportunity of seeing the letters written by the students but the Worker declined. At no stage did he say that the Worker had anything that he needed to respond to. He reinforced that point on several occasions. There was nothing placed on the Worker's personnel file and any notes that were made by Mr. Swan were kept in a confidential file which would not have been accessed by any other person. The Worker

thanked him as he left the meeting. The action which was undertaken was an administrative action. In the context of a teacher having allegations of a delicate nature being made by students, it was reasonable for the school to raise the matters with the Worker. They were raised in a reasonable way. The case does not fall into the same type of category as *Rivard v NTA* [1999] NTSC 28. In that case the way the issues were approached was not of the same high standards as in this case.

71. The material that I have before me satisfies me that the Worker did suffer a mental injury as a result of the meeting he had with Mr. Swan. I can not be satisfied that the injury manifested itself at the time of the meeting as asserted in E2. The Worker did not demonstrate any symptoms of a mental injury which, on the evidence I have before me, was witnessed by Mr. Swan. Mr. Swan said that the Worker said "Thank you for letting me know," and then left the office. I am satisfied that the symptoms later manifested themselves and a mental injury was suffered. I am satisfied on the balance of probabilities, based on the evidence before me, that this meeting was a reasonable administrative action which was taken by the Employer in connection with the Worker's employment. Accordingly, the injury is excluded as being a compensable injury under the *Work Health Act* by *section 3* of the *Work Health Act*. That being the case, I do not need to consider paragraphs 11(ii) or 11(iii) of the amended defence and counterclaim.

72. I declare and order that the Worker suffered a mental injury and that such injury is as a result of reasonable administrative action on the behalf of the Employer and the said mental injury is not a compensable injury pursuant to the provisions of the Work Health Act.I will hear the parties on any consequential applications on a date and time to be fixed.

Dated this 22nd day of December 2005

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**Melanie Little**
STIPENDIARY MAGISTRATE