CITATION: *Reynolds v Don Kyatt Spare Parts Pty Ltd* [2013] NTMC 004

PARTIES:	KELLY REYNOLDS
	v
	DON KYATT SPARE PARTS PTY LTD
TITLE OF COURT:	WORK HEALTH
JURISDICTION:	Work Health
FILE NO(s):	21232333
DELIVERED ON:	11 March 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	22 January 2013
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORK HEALTH – APPLICATION FOR MEDIATION AND VALIDITY OF SECTION 69 NOTICE OF DECISION – OTHER REASONABLE CAUSE FOR FAILURE TO SEEK MEDIATION

Workers Rehabilitation Compensation Act ss 69, 103D(1), (4) and (5)
Tracy Village Sports and Social Clubs v Walker (1992) III FLR 32 applied
Van Dongen v NTA [2005] NTCA 6 applied
Murray v Baxter (1914) 18 CLR 622 applied

REPRESENTATION:

Counsel:

Worker:	Mr Crawley
Employer:	Mr Liveris

Solicitors:

Worker:	NT Law
Employer:	Minter Ellison

Judgment category classification:	A
Judgment ID number:	[2013] NTMC 004
Number of paragraphs:	57

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

No. 21232333

BETWEEN:

KELLY REYNOLDS
Worker

AND:

DON KYATT SPARE PARTS PTY LTD
Employer

REASONS FOR DECISION

(Delivered 11 March 2013)

Dr John Allan Lowndes SM:

APPEAL FROM DECISION OF THE JUDICIAL REGISTRAR

1. This is an appeal by the worker against the decision of the Judicial Registrar delivered on 6 December 2012. On that date the Judicial Registrar dismissed the worker's application for an extension of time in which to apply for mediation of the dispute triggered by the employer's Notice of Decision dated 16 August 2011.

2. The worker seeks to set aside that order and to obtain an order that the time within which she may seek mediation of a dispute arising from the Notice of Decision of the employer dated 16 August 2012 be extended. The worker also seeks orders that the costs of an incidental to the application and hearing before the Judicial Registrar be costs in the cause in any substantive

proceedings arising from the dispute, and that she have her costs of and incidental to the appeal.

3. The appeal is brought pursuant to s 114A of the *Workers Rehabilitation and Compensation Act* and is by way of a hearing de novo: s 114A(3) of the Act.

4. In support of her appeal the worker relies upon her affidavit sworn 7 November 2012 in support of the original application heard by the Judicial Registrar.

THE PARTIES' ARGUMENTS

5. The worker's primary position is that the Notice of Decision dated 16 August 2012 was invalid as the s 69(1)(b) statement received by the worker on 27 October 2012 did not comply with the requirements of s 69(1)(b) and (4) of the *Workers Rehabilitation and Compensation Act* ; and therefore was insufficient to constitute a statement under that section. The worker also contends that the medical certificate required to accompany the s 69(1)(b) statement did not comply with the requirements of s 69(3) of the Act. The worker argues that until such time as a proper and valid s 69(1)(b) statement – including the accompanying medical certificate - has been received the time within which to seek mediation does not commence to run. As the notice of decision was invalid, the worker says no extension of time within which to seek mediation is necessary. Accordingly, the Judicial Registrar's order ought to be set aside.

6. The worker's secondary position is that, if the notice of decision is found to be valid, the worker has, contrary to the view taken by the Judicial Registrar, established a reasonable cause within the meaning of s 103D(5).

7. The employer's position is that the Notice of Decision was valid, and therefore the time within which to seek mediation commenced to run from 27 October 2012. The employer also contends that the worker has failed to

establish "other reasonable cause" for her failure to seek mediation within 90 days from 27 October 201

THE VALIDITY OF THE NOTICE OF DECISION

8. I have given considerable thought to the argument advanced by the worker that as the s 69 Notice of Decision was invalid then the time in which to apply for mediation did not commence to run; and therefore it is not necessary for the worker to seek an extension of time.

9. In order to put the argument in proper context, it is useful to refer to the various provisions of the *Workers Rehabilitation and Compensation Act* which deal with the pre –court process of mediation.

10. Section 103D (1) of *Workers Rehabilitation and Compensation Act* provides that a claimant may apply to the Authority to have a dispute referred to mediation. Subsection (2) states that if the dispute relates to a decision specified in s 103 B (a) or (b)[1] the claimant must apply for mediation within 90 days of receiving the statement referred to in s 85(8) or s 69(1)(b).

11. Section 103D(4) provides that a claimant who fails to apply for mediation within the 90 day period may apply to the Court for an extension of the period. The Court may extend the period if it is satisfied that the failure to apply within the prescribed period was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause: see s103D(5).

12. In my opinion, the worker's argument is misconceived because it is based on the common fallacy of "putting the cart before the horse".

13. It is not a pre-condition for the operation of s 103D that a statement referred to in s 85(8) or s 69(1)(b) be valid in order to trigger the compulsory

[1] Section 103B (a) refers to disputes as to liability for compensation claimed by a claimant, whilst s103B (b) refers to disputes regarding the cancellation or reduction of compensation paid to a claimant.

mediation process. The reason for that is that many disputes relate to the cancellation or reduction of compensation, including the validity of notices; and one of the purposes of the mediation process is to attempt to resolve disputes over notices.

14. The prescribed 90 day period runs from the receipt of either a s 85(8) or ss69(1)(b) notice – whether the notice is valid or not. The validity or otherwise of a statutory notice is a matter that is ultimately to be adjudicated upon by the Court, once proceedings have been properly commenced in accordance with s 103J of the Act[2], or, where there has been a failure to seek mediation within the prescribed 90 day period, an extension of time has been granted under s 103D(5) of the Act to ensure compliance with s 103J.

15. If, however, I have erred in reaching that conclusion, and should have accepted the worker's primary argument, I would have found the employer's Notice of Decision to be invalid for the following reasons.

16. The Notice of Decision was sent to the worker under cover of a letter dated 16 August 2012 from the Territory Insurance Office (TIO). The covering letter read:

> We refer to the above mentioned workers compensation claim for an aggravation of right cervico- brachial pain sustained on 11 June 2010.
>
> Please find enclosed a "Notice of Decision and Right of Appeal' ceasing your weekly benefit entitlements. The reasons for this decision are outlined in the "Notice of Decision".
>
> Should you have any questions regarding the above, please contact our office on the details listed below.

17. The salient parts of the Notice of Decision read as follows:

> With regard to your claim for payment of benefits (claim number 186714) as prescribed under the *Workers Rehabilitation and Compensation Act* you

[2] Section 103J provides that a claimant is not entitled to commence proceedings in respect of a dispute unless there has been an attempt to resolve the dispute by mediation and the attempt has been unsuccessful.

are hereby advised that your employer Don Kyatt Spare Parts NT Pty Ltd acting on the advice of the Territory Insurance Office hereby:

> Cancels payments of weekly benefits to you pursuant to section 69 of the *Workers Rehabilitation and Compensation Act.* The cancellation will be effective in 14 days from the receipt of this notice.

The reasons for decision are:

- On 27 January 2011, your normal weekly earnings (NWE) figure was indexed, pursuant to section 65 of the Act. Your indexed NWE was calculated to be $771.90 gross per week.

- On 12 August 2011, you tendered your resignation to Don Kyatt Spare Parts NT Pty Ltd and ceased employment on that day (copy of resignation attached).

- Furthermore, on 15 August 2011, Dr Brownscombe issued a medical certificate certifying you capable of returning to your normal duties with no restrictions (copy of certificate attached).

- Accordingly, your weekly benefits will now be cancelled as you have capacity to return to pre-injury hours.

18. The accompanying medical certificate issued by Dr Brownscombe described clinical findings/diagnosis at time of examination in terms of "tender medial border right scapula".

19. Under the heading of "Fitness for Work", Dr Brownscombe expressed the opinion that the worker was "fit to return to normal duties on 16/8/11". However, the doctor was of the opinion that further treatment was required. Furthermore, as part of a future medical management plan, Dr Brownscombe certified an orthopaedic specialist referral (Dr Metha) and an Allied Health Referral for physiotherapy (Movement for Life).

20. The Notice of Decision had attached to it the usual "Rights of Appeal" and "Mediation" information.

21. As mentioned earlier, the worker contends that the Notice of Decision was invalid as it did not conform to the requirements of s 69(1)(b) and (4) of the

Act, and the medical certificate required to accompany the Notice of Decision failed to certify that the worker had ceased to be incapacitated for work.

22. Section 69 (1) makes it clear that an amount of compensation shall not be cancelled or reduced unless a worker to whom it is payable has been given:

    (a) 14 days notice of the intention to cancel or reduce the compensation, and where the compensation is to be reduced, the amount to which it is to be reduced; and

    (b) a statement in the approved form setting out, inter alia, the reasons for the proposed cancellation or reduction.

23. Section 69(3) provides that where compensation is to be cancelled for the reason that the worker to whom it is paid has ceased to be incapacitated for work, the s 69(1)(b) statement shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work.

24. Section 69(4) requires the reasons set out in the s 69(1)(b) statement to provide sufficient detail to enable the worker to understand fully why the amount of compensation is being cancelled or reduced.

25. In my opinion, the s 69(1) statement contained in the Notice does not comply with the requirements of s 69(4) in that it is ambiguous, confusing and misleading, and fails to provide sufficient detail to enable the worker to fully understand why the amount of compensation previously paid to her was being cancelled.

26. The first two postulated reasons set out in the Notice are not – and could not qualify as – reasons for cancelling the weekly payments of compensation. They are nothing more than historical statements relating to the worker's employment with the employer. However, their inclusion in the Notice as purported reasons for the cancellation of payments would lead a reasonable person – a reasonable worker - to believe that they had something to do with

the cancellation. But what possible connection could there be between those historical circumstances and the cancellation of weekly payments in the mind of a reasonable person or reasonable worker? The first two postulated reasons are perplexing, and are incapable of instilling in the mind of a reasonable person or reasonable worker a sufficient understanding why the amount of compensation was being cancelled.

27. The third and fourth postulated reasons – although bearing a closer relationship to the cancellation of benefits – fall far short of providing the worker with sufficient detail to enable her to fully understand why the amount of compensation was being cancelled.

28. In my opinion, the statement (contained in the Notice of Decision) that Dr Brownscombe had issued a medical certificate certifying the worker capable of returning to her normal duties with no restrictions, and accordingly her weekly benefits were to be cancelled as she has a capacity to return to pre-injury hours is ambiguous and confusing. The ambiguity becomes apparent when regard is had to the accompanying medical certificate of Dr Brownscombe. Although that certificate certified the worker to be "fit to return to normal duties", Dr Brownscombe opined that further treatment was required, and to that end a future medical management plan was recommended – which included referral to an orthopaedic specialist and a course of physiotherapy. Although the employer's justification for cancelling the payment of weekly benefits appears on the face of the Notice of Decision to be that the worker has ceased to be incapacitated for work, the accompanying medical certificate of Dr Brownscombe indicates otherwise. The doctor's certificate indicates that the worker has a continuing partial incapacity for work – otherwise why recommend a future medical management plan.

29. The apparent inconsistency between the reasons for cancellation of benefits (based on a cessation of an incapacity for work) and the accompanying

medical certificate is highlighted by Dr Brownscombe's report dated 12 March 2012, wherein the doctor stated:

> I wrote a medical certificate stating that Kelly was fit for full duties, with further treatment required. I did this knowing that Kelly was commencing a non physical job which she was fully capable of performing. I did not intend to convey an opinion that she was fit to return to pre-injury duties.

30. The essential problem with the s 69(1)(b) statement, setting out the reasons for cancelling the amount of compensation hitherto paid to the worker, is that the employer purported to rely upon cessation of the worker's incapacity for work, while the accompanying certificate indicated otherwise – namely that the worker had a continuing incapacity for work, albeit partial. The patent ambiguity of the reasons disclosed in the Notice of Decision is confirmed by Dr Brownscombe's subsequent report.

31. The s 69(1)(b) statement was clearly sending conflicting and contradictory messages to the worker, which, on an objective view, would have impeded the worker obtaining a full understanding why the amount of compensation was being cancelled.

32. It must follow that the Notice of Decision, by reason of its failure to comply with the provisions of s 69(4) of the Act, should be found to be invalid.

33. There is a further, and fundamental, basis for finding the Notice of Decision to be invalid. The employer's purported justification for cancelling payment of weekly benefits was that the worker had ceased to be incapacitated for work. Where an employer relies upon that ground for cancelling payments it is obliged to provide a certificate from a medical practitioner certifying that the worker has ceased to be incapacitated for work. For the reasons given above the accompanying medical certificate fails to support the cancellation on the basis of a cessation of an incapacity for work. As stated above, the accompanying certificate, far from supporting a cessation of an incapacity for work, is indicative of a partial incapacity for work – a state of affairs that Dr Browmscombe, in fact, intended to convey in his medical certificate.

It is noted that a partially incapacitated worker may still be entitled to receive benefits.[3]

WAS THE WORKER'S FAILURE TO SEEK MEDIATION OCCASIONED BY "OTHER REASONABLE CAUSE"

34. Having rejected the worker's first argument, I now turn to consider the merits of the worker's application for an extension time based on the provisions of ss 103D(4) and (5) of the Act.

35. The worker relies upon her affidavit sworn 12 November 2012 for the purposes of explaining her failure to seek mediation within the prescribed period of 90 days from the receipt of the Notice of Decision. The worker proffered the following reasons:

1. The worker believed that after tendering her resignation and providing the medical certificate she no longer had anything to do with her former employer. The worker understood that her wages would cease and would not be paid anymore, when she resigned. She believed that she could now move on with her life in a new position. She believed that she could "put all things that happened at and with Don Kyatt behind [her]".

2. The worker understood that she could get continuing treatment as advised by Dr Brownscombe. However she was shocked to learn on about 1 September 2011 that she was not entitled to any more treatment based on a report from Dr Andrews.

3. On 27 October 2011, whilst interstate, the worker's partner forwarded her a copy of the Notice of Decision dated 16 August 2011. This was the first time that she had seen the decision. She noted that the Notice of Decision had been sent to the wrong address.

4. The worker was not sure about the relevance of the 90 days and did not know when the 90 days started and finished as "the letter seemed to be saying the same things that I had been told before". She just assumed that the letter was confirming that her wages ceased when she had resigned from her employer and obtained the

[3] See *Watson and Masonic Homes* [2009] MTSC 51 per Mildren J at [11] – [14] for a discussion of s65 of the *Workers Rehabilitation and Compensation Act* (which deals with weekly compensation after the first 26 weeks of incapacity) and the operation of s 65(2)(b)(ii) of the Act.

clearance certificate from Dr Brownscombe – which was the TIO requirement for her to commence new employment.

5. The worker did not understand what was being cancelled as she had stopped receiving her wages from her former employer once she had resigned. She was not aware that she had received weekly payments, as all payments came to her through her employer and she considered the payments to be wages. She had resigned and had been paid all her wages; and she was in a new job earning wages.

6. The worker did not understand what the Notice of Decision "was all about". She wanted to speak to Nicole Adami, the TIO Claims Officer, so she could explain "what was happening".

7. The worker sent an email to Nicole Adami requesting that the 90 days start as from 27 October to request mediation in case she needed to mediate the decision. The worker wanted to understand and have explained to her what "the letter meant" before she made any decisions. It seemed to the worker that they were confirming what she had been previously told and advised by Jobfit and TIO – that is she needed to be cleared and resign in order to commence new employment, and that her wages would cease. It seemed to the worker that the letter did not change anything. The worker's email was never responded to.

8. The worker made some telephone calls to the TIO but never heard back from the TIO. The worker was trying to contact the TIO to discuss the matter with them so that she could acquire a better understanding of the matter.

9. The worker was left wondering "what was happening". However, she was working in a new position that was going well; she was happy and working within her limitations as prescribed by Dr Brownscombe and Dr Metha. After not hearing anything from the TIO the worker put "the thought of the letter to back of [her] mind" and she tried "to move on and focus on [her] job and not get caught up in the issues and problems of the past with Don Kyatt and how [she] had been treated".

10. The worker continued to receive casual work intermittently, and in February 2012 was informed that there was no further work available. She then began looking for other employment.

11. On or about 9 March 2012 the worker contacted NT Law in relation to her worker's compensation claim. The worker was advised to request mediation in relation to the Notice of Decision. She was advised by NT Worksafe that she was out of time to seek mediation, and she would have to make an application to the Court for an extension of time.

36. By way of response, the employer relies upon the affidavit of Nicole Adami sworn 23 November 2012. Ms Adami deposes that she has no record of having received an email from the worker in the nature of a request that the 90 day period run from 27 October 2011. Ms Adami also deposes that she has no recollection of receiving messages to return the worker's telephone calls, and then failing to return her calls.

- **The Submissions**

37. The worker made the following submissions in relation to the secondary issue:

> …if the notice is found to be valid, then the time within which to seek mediation commenced to run on 27 October 2011.The question then is whether the worker can establish a reasonable cause for not so doing in the period of 90 days thereafter: *Murray v Baxter* (1914) 18 CLR 622.
>
> The evidence of the worker was that she did not understand the notice. She had not been receiving any payments that she understood to be weekly payments and no payments at all since she ceased employment with the employer on 12 August 2011 (worker's affidavit, paragraph 72). Hence it was not clear what was purporting to be ceased. Her efforts to speak to TIO in response to their invitation to do so went unanswered (worker's affidavit, paragraphs 74-75).
>
> In light of the lack of any change in financial circumstances resulting from the receipt of the decision, her inability to obtain any clarification from TIO, and the desire to put a very stressful claim experience behind her, she took no action within the prescribed period.
>
> It is submitted that this constitutes "reasonable cause" for the purposes of section 103D(5) and an extension of time within which to seek mediation should be granted.[4]

38. In reply the employer made these submissions:

> The worker's evidence is that she wanted to understand and have explained to her what the 1NOD meant before she made any decisions. Despite this, the worker did not seek legal advice until 9 March 2012, well after the expiry of the 90 day time limit of the 1NOD on 24 January 2012.

[4] See the worker's outline of submissions dated 14 January 2013.

> The worker's evidence is that one of the purposes of her attempts to make contact with Ms Adami after receiving the 1NOD was to ask that the 90 day period begin from 27 October in order to keep her options open. However, despite this in fact being the case and being aware of the concept of a 90 day time limit from at least the time she received the 1NOD the worker chose to put the 1NOD out of her mind.
>
> Further, although the worker has given generalised evidence of her attempts to speak to TIO officers about the 1NOD which went unanswered, she has not given any evidence that she attempted to contact WorkSafe about the 1NOD, as she is directed to do on the 1NOD. Whilst it is the role of TIO claims officers to assist claimants, on no reading can TIO claims officers be elevated to the role of advisors.
>
> The worker has given no evidence that her failure to refer the 1NOD to mediation was as a result of mistake, ignorance of a disease, absence from the Territory or other reasonable cause. There is no evidence of a reasonable act or omission which operated to prevent the worker applying for mediation in time.
>
> Rather, the relevant 90 day time period is marked by the worker's inactivity. The worker did nothing in relation to the 1NOD and chose to wait for the TIO to contact her about it. This explanation falls well short of the worker providing a reasonable cause for her failure to apply for mediation.[5]

- **The Applicable Law**

39. The excuse of "other reasonable cause" was considered in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at p 41 by Mildren J:

> The test of reasonableness, it is to be noted, is an objective one. In *Commonwealth v Connors* Northrop and Ryan said:
>
> > As was said by the Court in *Black v City of South Melbourne* when considering "reasonable cause", the inquiry here appears to be of a much wider kind justifying a more liberal attitude. The expression "reasonable cause" appears to us to mean some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable". In *Quinliven v Portland Harbour Trust* Scholl J used these words: "The sub-section means to refer to a cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of things which might be expected to delay the giving of notice by a reasonable man.

[5] See the employer's outline of submissions dated 14 January 2012.

40. In *Van Dongen v NTA* [2005] NTCA 6 Riley J (now Chief Justice) affirmed that the test of reasonableness in relation to "other reasonable cause" is an objective one. His Honour also affirmed that each case must be assessed upon its own facts and circumstances, and the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of the claimant must be considered in order to determine whether reasonable cause is established. It is a question of determining whether a claimant's conduct was conduct which a reasonable man would consider properly sensible in the circumstances, and sufficient to amount to a cause for his or her failure to do what was required, as was consistent with a reasonable standard of conduct.

41. As pointed out by the employer in its submissions, "in determining whether to grant an extension of time or not the relevant time frame for the enquiry is limited to the respective 90 day period. No other period of time is relevant for the purposes of the provision: *Murray v Baxter* (1914) 18 CLR 622; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32; *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 83".

- **Has Reasonable Cause been Established**

42. I am not satisfied on the balance of probabilities that the worker had reasonable cause for her failure to apply for mediation.

43. The email sent by the worker to Nicole Adami (a TIO claims officer) on 27 October 2011[6] is of critical importance in this case, and impacts upon the reasonableness or otherwise of the worker's conduct during the initial 90 day period (which should be treated as commencing on 27 October 2011, being the date the worker received the Notice of Decision) and her failure to apply for mediation within that period.

[6] The email was an exhibit before the Judicial Registrar and formed part of the evidence on the appeal.

44. In her email the worker wrote: “I am letting you know as I wish to have the 90 days start from today being 27 October 2011. Please advise me by email of the decision”. The contents of that email evince a clear understanding on the part of the worker of the significance of the 90 day period, and the need for her to take appropriate action within that period – otherwise why request the 90 days to run from 27 October 2011, and seek a specific response to her request.

45. Even if the worker did not have a full understanding of the reasons why her weekly benefits were being cancelled, she nonetheless understood the 90 day requirement, and sought confirmation that the 90 days would run as from 27 October 2011. Most significantly, the worker was concerned to ensure that the 90 day period commence as from 27 October for the purposes of seeking mediation in case she needed to mediate the decision.

46. The Court only has the worker’s word that she made various attempts to contact the TIO by telephone with a view to discussing the matter in order to obtain a better understanding of the Notice of Decision, and that those calls went unanswered.

47. As pointed out by the employer, the evidence regarding her attempts to speak to TIO officers was non specific. No evidence was adduced as to the number of the attempted contacts and the dates and times of those attempted contacts. Nor was any evidence adduced as to whom (within the TIO) contact was attempted to be made. One would expect that any such telephone calls would have been made to Nicole Adami (the person to whom the email was sent on 27 October 2011). However, somewhat surprisingly, the worker adduces no evidence to that effect.

48. The paucity of evidence from the worker in relation to the unanswered telephone calls to the TIO needs to be compared with the evidence contained in the affidavit sworn by Nicole Adami, which is to the effect that she has

no recollection of receiving messages to return the worker's telephone calls, and then failing to return her calls.

49. The state of the evidence is such that I cannot be reasonably satisfied on the balance of probabilities that the worker, in fact, followed up her email by attempting to make telephone contact with the TIO.

50. However, even if one were to accept that the worker made those attempts to contact the TIO regarding the matter such conduct only serves to demonstrate her understanding and appreciation of the 90 day time limit. Furthermore, any failure on the part of the TIO to respond to those calls – or indeed the worker's email - could not be considered to be a reasonable cause (in the sense of an act or omission which operated to prevent the worker from applying for mediation, and which was an act or omission which was in the circumstances reasonable) for not seeking mediation within the prescribed period. The onus was on the worker to respond to the Notice of Decision in terms of applying for mediation- a requirement that the worker clearly understood as evidenced by her conduct in sending the email of 27 October 2011. It was simply not reasonable in the circumstances to wait for the TIO to make contact with her.

51. In my opinion, the manner in which the worker conducted herself following receipt of the Notice of Decision was not conduct a reasonable person would consider properly sensible in all the circumstances – and accordingly did not conform with a reasonable standard of conduct.

52. Apart from requesting clarification of the commencement date of the 90 day period, the worker says that she wanted to understand and have explained to her the effect of the first Notice of Decision. To that end it was open to her to contact Worksafe (as suggested in the Notice) or to seek legal advice. The worker failed to avail herself of either of those two options. It is particularly telling that the worker eventually sought legal advice at a subsequent stage. During the 90 day period the worker chose not to take action to protect her

interests in a way a reasonable person, in the circumstances of the worker, would have taken. In my opinion, the worker's conduct did not conform to a reasonable standard of conduct.

53. The probable truth of the matter is that the worker did not bother pursuing the matter (including mediation) after receiving the Notice of Decision – she simply put it out of her mind – as she was content working in her new position, and wished to move forward and divorce herself from her past problems with her previous employer. That was a conscious decision on the part of the worker. It was not until the worker's "new job" came to an end in January 2012, and she was unable to find further employment from February 2012 onwards, that the worker again applied her mind to her worker's compensation claim sufficiently to seek legal advice.

54. Finally, I am unable to accept the worker's evidence that she did not understand what was being cancelled. The Notice of Decision made it clear that the monies she had previously been receiving were compensation payments, and it was those payments that were being ceased. In any event, irrespective of what was being cancelled, the worker understood the significance of the 90 day period for applying for mediation and was concerned to ensure that the 90 day period commence as from 27 October for the purposes of seeking mediation in case she needed to mediate the decision.

55. I agree with the employer's submission that the explanation proffered by the worker for failing to apply for mediation within the 90 day period falls well short of providing a reasonable cause for her failure to apply for mediation. I find accordingly.

DETERMINATION

56. Given the Court's rejection of all of the arguments advanced by the worker it must follow that the worker's application seeking an extension of time

pursuant to s103D(4)of the Act should be dismissed. The Court orders accordingly.

57. I will hear the parties in due course as to the question of costs in relation to this appeal and the costs of and incidental to the application and hearing before the Judicial Registrar.

Dated this 11th day of March 2013.

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE