CITATION: Joanne Claire Catford v Laminex Group [2018] NTLC 007

PARTIES: JOANNE CLAIRE CATFORD

v

LAMINEX GROUP PTY LTD

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: Work Health

FILE NO(s): 21748195

DELIVERED ON: 22 March 2018

DELIVERED AT: Darwin

HEARING DATE(s): 8 February 2018

JUDGMENT OF: Judge Armitage

CATCHWORDS:

Work Health – Summary Judgment – Invalidity of s69 Notice – Strike out of pleadings
Section 69 *Return to Work Act*
Alexander v Gorey & Cole Pty Ltd (2002) 171 FLR 31
Collins Radio Constructors Inc v Day No 80 of 1996, Supreme Court of the Northern Territory
Collins Radio Constructors Inc v Day (1998) 143 FLR 425
Dicken v NT TAB Pty Ltd [2003] NTSC 119
Cheryl Anne Newton v Masonic Homes Inc [2009] NTSC 51
Rupe v Beta Frozen Products [2000] NTSC 71
Swanson v Northern Territory of Australia [2006] NTSC 88
Joanne Catford v Laminex Group Pty Ltd, 7 April 2017, No 21703568, Work Health Court at Darwin
McIntyre v Tumminello Holdings, 15 September 2004, No 20312425 Work Health Court at Darwin
Rodney Phillip Corrie v Metcash Trading Limited, 3 February 2014, No 21112528, Work Health Court at Darwin
Rodney William Schloss v Quality Plumbing and Building Pty Ltd [2015] NTMC 012

REPRESENTATION:

Counsel:

Worker:	Mr Michael Grove
Employer:	Mr Ben O'Loughlin

Solicitors:

Worker:	Ward Keller
Employer:	HWL Ebsworth Lawyers

Judgment category classification:	B
Judgment ID number:	007
Number of paragraphs:	50

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

No. 21748195

BETWEEN:

JOANNE CLAIRE CATFORD

Worker

AND:

LAMINEX GROUP PTY LTD

Employer

REASONS FOR DECISION

(Delivered 22 March 2018)

JUDGE ARMITAGE:

1. In 2012 the Worker was employed as a sales assistant by the Employer. On or about 9 February 2012, while at work, the Worker suffered an injury to her left shoulder. Her claim for compensation was accepted by the Employer and she has received weekly payments of compensation since that time.

2. On 9 June 2017 the Employer, pursuant to section 69 of the Return to Work Act 2016 (the Act), gave written notice (the Notice) cancelling the Worker's weekly payments. This was the second such notice issued by the Employer. The validity of the first notice was considered in earlier proceedings between the parties. In those earlier

proceedings Dr Lowndes CJ held the earlier Notice was invalid and granted summary judgment in favour of the Worker[1].

3. The Worker commenced the current proceedings in the Work Health Court on 9 October 2017 by filing a Form 5A Application. The Worker has filed her statement of claim[2], the Employer has filed a notice of defence and counter claim[3], and the Worker has filed a reply, an amended defence to the counterclaim.[4]

4. On 10 January 2018 the Worker made an interlocutory application seeking summary judgement and an order that the counterclaim be struck out or dismissed. The interlocutory application was supported by an affidavit of Michael John McKillop Grove sworn 10 January 2018. Mr Grove's affidavit annexed the documents relevant to the application including the Notice and its accompanying documents. The court heard submissions from both parties on 8 February 2018. During the course of those submissions it became apparent that there was a further accompanying document which had been provided to the Worker with the Notice but which was not annexed to Mr Grove's affidavit. The missing document appeared to be a standard form of document titled "Work Health Court". Neither party objected to me receiving that additional document, and that document was received by consent and considered as part of the documentation accompanying the Notice. Finally, during submissions it became apparent that there was a further document, referred to in the accompanying document titled "Rights of Appeal [and] Mediation" which was not part of the Notice or accompanying documentation given to the Worker. This document was also provided to me by consent of the parties and was titled "NT WorkSafe Bulletin Mediation Process for Workers Compensation" (the Bulletin).

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[1] *Joanne Catford v Laminex Group Pty Ltd*, 7 April 2017, No 21703568 In the Work Health Court at Darwin
[2] Filed on 5 December 2017
[3] Filed on 22 December 2017
[4] Filed 9 January and 18 January 2018 respectively.

5. There was no dispute between the parties that Work Health Rule 21.02 allowed for summary judgement[5]. However, the Employer submitted the power should not be exercised in the circumstances of this case.

6. There were two issues for determination.
   A. Was the Employer's section 69 notice of cancellation of weekly compensation payments a valid Notice?
   B. Should the counterclaim be struck out?

A. <u>Was the Notice valid?</u>

7. The Worker challenged the validity of the Notice. The Worker submitted that the notice was inherently and objectively ambiguous and that it did not comply with the strict legislative requirements of section 69 of the Act.

8. The Employer submitted that the Notice did comply with the requirements of section 69 of the Act.

9. Courts in the Northern Territory have upheld the need for strict compliance with the requirements of section 69 of the Act for a Notice to be valid[6]. Though the precise words of the statute need not necessarily be used[7], the language used in the Notice must objectively8 and clearly convey the reason for cancelling weekly payments in "sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced"[9]. As to the nature and scope of the detail required, in *Dicken v NT TAB Pty Ltd*[10] Angel J (considering earlier legislation in the same terms as the current section) held:

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[5] Employer's written submissions filed in court on 8 February 2018 at [4].
[6] *Collins Radio Constructors Inc v Day* (1998) 143 FLR 425 at pp429-430 per the Court: Kearney A-CJ, Mildren J and Gray A-J; followed by Dr Lowndes CM in *Rodney Phillip Corrie v Metcash Trading Limited,* No 21112528 in the Work Health Court at Darwin, 3 February 2014, at [46] and by Mr Neill JMR in *Rodney William Schloss v Quality Plumbing and Building Pty Ltd* 2015 NTMC 012 at [83];
[7] *Collins Radio Constructors Inc v Day* at p 430
[8] *Cheryl Anne Newton v Masonic Homes Inc [*2009] NTSC 51 per Mildren J at [16]
[9] Section 69(4) *Return to Work Act*
[10] [2003] NTSC 119 at [17]

> "If I may be pardoned for saying so, section 69 (4) of the Work Health Act means what it says. A notice must unambiguously spell out why a current payment regime should change in clear terms that a lay reader can fully and readily understand."

10. Section 69(1) provides:

> 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:
>
> (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:
>
> (i) setting out the reasons for the proposed cancellation or reduction;
>
> (ii) to the effect that, if the worker wishes to dispute the decision to cancel or reduce compensation, the worker may, within 90 days after receiving the statement, apply to the Authority to have the dispute referred to mediation;
>
> (iii) to the effect that, if mediation is unsuccessful in resolving the dispute, the worker may appeal to the Court against the decision to cancel or reduce compensation;
>
> (iv) to the effect that, if the worker wishes to appeal, the worker must lodge the appeal with the Court within 28 days after receiving a certificate issued by the mediator under section 103J(2);
>
> (v) to the effect that the worker may only appeal against the decision if an attempt has been made to resolve the dispute by mediation and that attempt has been unsuccessful; and
>
> (vi) to the effect that, despite subparagraphs (iv) and (v), the claimant may commence a proceeding for an interim determination under section 107 at any time after the claimant has applied to the Authority to have the dispute referred to mediation.

11. Where an employer asserts a worker is no longer incapacitated for work, section 69(3) of the Act requires that the Notice be accompanied by a "statement of fitness for work of the medical practitioner certifying that the person has ceased to be incapacitated for work" (the "Statement of Fitness for Work").

12. Section 69 (4) provides:

> For the purposes of subsection (1) (b), the reasons set out in the statement referred to in that subsection shall provide sufficient detail to enable the worker to whom the statement is given to understand fully why the amount of compensation is being cancelled or reduced.

13. The contents of the Notice, the Statement of Fitness for Work and any other accompanying documents, such as a medical report, all work together to properly inform a worker as to the reason for an intended change in their compensation payments.

14. In my view the Notice and accompanying documents in this case failed to strictly comply with the requirements of section 69 of the Act and the Notice is invalid. To understand the reasons for this view it is necessary to refer to the contents of the documents annexed to Mr Grove's affidavit.

15. The first document was a document titled "Notice of Decision and Rights of Appeal". It appeared to be some form of standard form document but the source of this document was not identifiable on the face of the document. It read as follows –

> "Advice to the Worker of rejection, cancellation or reduction of Workers Compensation and advice of the Worker's right to dispute the decision.
>
> **It is important that you read all of this Notice of Decision carefully.**
>
> Dear Ms Catford,
>
> With regard to your claim for payments of benefits, (claim number 992223200428), as prescribed under the *Return to Work Act* you are hereby advised that your employer Fletcher Building Australia acting on the advice of Allianz Australia Ltd hereby:
>
> **Cancels payment of weekly benefits to you pursuant to section 69 of the *Return to Work Act*. The cancellation will be effective in 14 days from your receipt of this notice.**
>
> The reasons for this decision are:
>
> (a) You were employed with the Employer as a sales representative;
> (b) You suffered a rotator cuff tear with your Employer on 9 February 2012 (**work-related injury**);
> (c) You have undergone treatment and rehabilitation for your work –related injury in accordance with the Act.
> (a) You were examined by Orthopaedic Surgeon, Dr Steven Andrews (**Dr Andrews**) on 17 October 2016.

(b) Dr Andrews has provided a Statement of Fitness for Work – Final Certificate dated 18 April 2017 (**Certificate**) on the basis that you have ceased to be incapacitated for work.
(c) Further, Dr Andrews provided a report dated 3 January 2017 **(Medical Report).**
(d) The Medical Report states:
(i) you have made a reasonable recovery; and
(ii) you are able to return to your full time role as a sales representative.
(e) In accordance with the opinion of Dr Andrews, Allianz has determined you have ceased to be incapacitated for work and therefore, your entitlement to payments of weekly benefits is cancelled.

Enclosures

(f) We enclose (*) the following documents:
(i) Report of Dr Andrews dated 3 January 2017;
(ii) Final Medical Certificate of Dr Andrew dated 18 April 2017.

Signed: [Illegible signature without typed name of signatory] Dated: 9 June 2017"

16. Accompanying the Notice was the Statement of Fitness for Work as required by section 69(3) of the Act. The Statement of Fitness for Work was dated 18 April 2017. The Employer's name is recorded as "Laminex". Under the heading "Medical Assessment" the date of examination is noted as 17 October 2016. The Statement of Fitness for Work presents a choice of three tick-a-box options. Dr Andrews ticked a box next to the words "The worker has ceased to be incapacitated for work". Under a heading "Grounds for the opinion of medical assessment" Dr Andrews wrote:

"Joanne reports some ongoing symptoms but this would not prevent a return to normal duties currently."

17. The Statement of Fitness for Work presented as a pro forma document. Section 69(3) of the Act does not refer to any approved form of a Statement of Fitness for Work. However the pro forma used in this instance is available on the NT WorkSafe website[11].

18. The Notice was accompanied by a Medical Report prepared by Dr Andrews in letter format to Ms Longman of Allianz Workers Compensation. The Medical Report was dated 3 January 2017 and reads as follows:

[11] www.worksafe.nt.gov.au/pdf%20Conversion/statement-of-fitness-for-work-final-certificate-pdf

"Re: Mrs Joanne Catford (nee Fuller)

Thank you for your email dated 21 December 2016 requesting clarification on Joanne's return to work.

In your email you state: "It is a little bit confusing because my report questions asked Steve if she could return to that of a bank teller (her most recent job) however the company Allianz insure is Laminex. Therefore I need to know if she could return to her preinjury role, that of sales rep with Laminex?"

My understanding is that prior to Joanne's original injury she was working as a sales rep. She has since made a reasonable recovery and returned to full time work as a bank teller. She is having some ongoing symptoms and has come to see me again. I do not think there is anything further that can be done for her shoulder at the current time. I have written in my report that I feel Joanne would be able to return to her full time role as bank teller. I think she would also be able to return to her full time role as sales rep. although I expect that in any role moving forward, she would likely to have some ongoing symptoms.

Additional Comments
I would recommend that this report should not be released directly to the patient. It contains complex medical information and may be liable to misinterpretation by a lay reader. This may cause undue stress or adverse psychological effect. If required, it would be appropriate to release this document to the patient's treating doctor for discussion."

19. The Notice was accompanied by two further documents which appeared to be standard form documents. The first was titled "Rights of Appeal [and] Mediation". The second was titled "Work Health Court". Both contained information about the process for disputing a Notice. Neither document disclosed on its face the origin of its apparently pro forma design; nor did they claim on their face to be in any approved form as required by section 69 (1) (b). The source of these documents does not appear to be the NT Worksafe website. The "Rights of Appeal" document, however, provided the following relevant information:

"Further Information and Assistance

For more information regarding the mediation process, please refer to the attached information bulletin prepared by NT WorkSafe."

The parties located the Bulletin[12] and, although this was not an accompanying document to the Notice, provided it to me for consideration.

20. Section 69(1) (b) of the Act requires that the worker be given a statement in the approved form containing the information referred to in subparagraphs (i) – (vi). Section 3 of the Act defines the terms "approved form" and "Authority":

> "Approved form means a form approved by the Authority for the purposes of the provision in which the expression occurs."
>
> "Authority means the Work Health Authority continued under the *Work Health Administration Act*."

NT WorkSafe is the administrative and regulatory arm of the Northern Territory Work Health Authority, the statutory body established under the Work Health and Safety Act 1999 and continued under the Work Health Administration Act 2016[13].

21. The Worker further referred me to Regulation 13 of the Return to Work Regulations. Regulation 13 provides that if an employer gives a worker a statement pursuant to section 69(1) (b) of the Act, the employer must also give the worker a copy of the statement [which is to be attached to any application by the worker for mediation] and a copy of the approved information bulletin explaining the mediation process.

22. The Bulletin titled "NT WorkSafe Bulletin Mediation process for workers compensation", contains the following footnote: "www.worksafe.nt.gov.au Approved information bulletin pursuant to Return to Work regulation 13 for mediation process for workers compensation (V1.5-1 October 2015)". The Bulletin contains information addressing Section 69(1) (b) subparagraphs (ii) – (vi). I am satisfied this is the "statement in the approved form" required to be given to the Worker under section 69(1) (b) of the Act. As it was not given to the Worker in this case, I am satisfied that the Notice did not comply with the requirements of section 69 and is invalid.

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[12] NTWorkSafe Bulletin "Mediation process for workers compensation", www.worksafe.nt.gov.au, Approved information bulletin pursuant to Return to Work regulation 13 for mediation process for workers compensation (V1.5-1 October 2015)

[13] s4

23. On the topic of invalidity, a number of other matters were also raised by the Worker.

24. Before moving to more substantive issues, I note in passing that the Notice is presented in multilevel paragraphs. The subparagraphs are denoted by small case letters (a), (b) and (c) etc. In this Notice the subparagraph lettering is replicated. There are two subparagraphs each denoted by the letters (a), (b) and (c). Whilst this is likely a typographical/formatting error, this error in and of itself makes this Notice somewhat confusing and more difficult to understand.

25. Moving onto more substantive issues, firstly, the named Employer in the proceedings is Laminex Group Pty Ltd. The Employer is referred to as Laminex in both the Statement of Fitness for Work and the Medical Report. However, the Notice nominates the employer as "Fletcher Building Australia". Who or what this entity is or how it is said to be the relevant Employer is not explained in the document or elsewhere. It seems likely the incorrect Employer's name was inserted in this Notice. However it came to be there, that the Employer was incorrectly named would likely have resulted in confusion on the part of the Worker as to who was cancelling her compensation and in what capacity they were making that decision. Further confusion stems from the fact that the named Employer was purportedly acting on the advice of Allianz Australia Ltd. No explanation was provided in the Notice as to who Allianz Australia Ltd is or in what capacity they were providing advice to the purported Employer concerning the cancellation of compensation.

26. In *Newton v Masonic Homes Inc*[14] Mildren J discussed the circumstances when a Statement of Fitness for Work was required pursuant to section 69(3). His Honour held that a Statement of Fitness for Work was required in each of the following circumstances:

   (i) Where the worker was totally incapacitated and receiving weekly benefits based on total incapacity and it is asserted that the worker is no longer totally incapacitated,
   (ii) Where the worker was partially incapacitated and was receiving weekly benefits and the employer asserted the worker was no longer partially incapacitated, and

[14] [2009] NTSC 51 at [13] and [14]

(iii) Where the worker was partially incapacitated and the employer asserted the worker had made a partial recovery so as to be fit for some work, which, because of the operation of section 65, no longer entitled the worker to weekly benefits.

27. In *Corrie v Metcash Health Court*[15] Dr Lowndes CM held that for a Notice to be valid:

> "The notice and accompanying notice[16] needed to make it clear that the worker had regained a full capacity for work without suffering from any limited ability to undertake unpaid[17]work (i.e. partial incapacity)."[18]

28. In this case, although Dr Andrews ticked a box asserting that the Worker had ceased to be incapacitated for work, the grounds provided on the document for that opinion gave rise to the possibility that the Worker remained partially incapacitated but no longer entitled to weekly benefits because of the operation of section 65 (the third option identified by Mildren J). In my view the potential contradiction between the statements "has ceased to be incapacitated" and the report of ongoing, unspecified symptoms, makes the document ambiguous as to the basis for cancelling the compensation and ambiguous as to whether or not the Worker had ceased to be incapacitated for work. In the Medical Report Dr Andrews uses the following terms; "reasonable recovery", "ongoing symptoms", and "in any role moving forward she is likely to have some ongoing symptoms". The ambiguity as to the extent of the Worker's recovery and capacity for work is, in my view, only compounded when one considers the Medical Report.

29. Further, in *Corrie v Metcash Health Court*[19] Dr Lowndes CM considered the adequacy of a notice and accompanying certificate which stated that the worker was "no longer incapacitated as a storeman". His Honour stated:

> "If weekly benefits are to be cancelled for the reason that the worker has ceased to be incapacitated for work, then it must be on the basis that the worker has ceased to be not only totally incapacitated, but also partially incapacitated- that is to say he or she no longer has a limited ability to actually undertake paid work in

[15] [2014] NTMC 003
[16] Which I understand to be an accompanying Statement of Fitness for Work
[17] Which I conclude is a typographical error and should read "paid"
[18] *Corrie v Metcash Health Court* at [65]
[19] [2014] NTMC 003

> the labour market in which he or she was working, or might reasonably be expected to work."[20]

His Honour held that the wording in both the notice and the certificate qualified the cessation of incapacity for work because work in the "full sense" was not limited to the worker's immediate past employment but included "any part of the labour market in which he might reasonably be expected to work".[21]

30. In *Corrie v Metcash Health Court*[22] Dr Lowndes CM continued and held that the term "storeman" was in and of itself ambiguous. Dr Lowndes said:

> "The meaning conveyed by the use of the word "storeman" in the section 69 notice and accompanying medical certificate is not clear and unambiguous. It is not clear whether the medical certificate is certifying that the worker is no longer incapacitated for work as a storeman performing the same range of activities that he was actually performing during the course of his immediate pre-injury or that he is no longer incapacitated for work as a storeman in the sense generally understood."[23]

31. In this case, what did Dr Andrews mean when he wrote the words "normal duties"? What did he understand the worker's "normal duties" to be? Was Dr Andrews giving a qualified opinion referable to the worker's immediate pre-injury employment only or was he giving an unqualified opinion encompassing work in the "full sense"? In my view, the term "normal duties" without further explanation or clarification is inherently ambiguous. Even more so, when there is no evidence of any history having been taken from the Worker as to what her work duties involved. However, could this ambiguity be resolved by reference to the Notice document or by reference to the attached Medical Report?

32. At paragraph (d) the Notice refers to the Medical Report in order to assert:

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[20] *Corrie v Metcash Health Court* at [56]
[21] *Corrie v Metcash Health Court* at [57] – [59]
[22] [2014] NTMC 003
[23] *Corrie v Metcash Health Court* at [62]

(i) “you have made a reasonable recovery; and
(ii) you are able to return to your full time role as Sales Representative”

The Notice appears to assert that Dr Andrews was referring to the Worker’s normal duties as a sales representative. However, in my view, that representation appears inconsistent with the contents of the Medical Report. The Medical Report points to there being earlier correspondence between Allianz Workers Compensation and Dr Andrews concerning whether the worker could return to “her most recent job” “that of bank teller”. The Medical Report presents as some form of clarification or addendum to that earlier correspondence. It appears there had been a request for Dr Andrews to now consider the position of sales representative which was apparently previously overlooked in an earlier report. The earlier correspondence or any earlier medical reports were not attached to the Notice in these proceedings so it is not known whether or how that correspondence may have clarified these issues.

33. Accordingly, in my view, it is unclear what Dr Andrews envisaged when he used the words “normal duties” in the Statement for Fitness for Work. It is not clear that he was in fact referring to the Worker’s pre-injury employment of sales representative. It seems possible, particularly in light of the earlier proceedings involving these same parties that Dr Andrews was in fact referring to the Worker’s post-injury employment of bank teller. In my view the ambiguity is patent.

34. In the earlier proceedings involving these parties and the validity of an earlier Notice Dr Lowndes CJ said:

> “The problem with the Notice’s reliance on the worker’s fitness to return to full time work as a bank teller is that the worker’s immediate pre-injury employer was not a bank, nor was her then occupation that of a bank teller. At the time of her injury the worker was employed by Laminex Group Pty Ltd as a sales representative. The assertion in the Notice that the worker is fit to return to her work as a bank teller, being her most profitable employment, is inconsistent with the worker having ceased to be incapacitated for work. That assertion is inconsistent with

the worker being capable of returning to full time employment in all forms of employment for which she has previous experience, including a sales representative and a dental nurse." (References deleted)[24]

35. In my view, the problem identified by Dr Lowndes CJ has not been rectified in the current Notice. When one reads the Notice, Statement of Fitness for Work and Medical Report together, there is no clear or unqualified opinion that the Worker is capable of returning to full time employment in all of its forms for which she had previous experience. I adopt the words used by Dr Lowndes CJ as being equally applicable to this case, namely:

> "Viewed objectively, the reasons for cancelling payments set out in the Notice are jumbled, muddied, inconsistent and confusing, and therefore fail to provide sufficient detail to enable the worker to understand fully why her payments were being cancelled.

As there must be strict compliance with the provisions of section 69 the Notice cancelling payments must be found to have been invalid."[25]

36. The chronology in the documents gives rise to a further matter of concern. Dr Andrews examined the worker on 17 October 2016 and documented the existence of "ongoing symptoms" at that time. The Medical Report is dated 3 January 2017, the Statement of Fitness for Work is dated 18 April 2017 and the Notice is dated 9 June 2017. Accordingly, there was close to 8 months between the medical examination in which the doctor noted that the worker had "ongoing symptoms" and the Notice of cancellation of weekly compensation. There was no contemporaneous medical assessment to determine whether or not there had been any change in the Worker's symptoms, or whether or not any such change might have affected the Worker's capacity to return to work. Whilst the facts in this matter are different to those in *Rupe v Beta Frozen Products*[26], the criticisms raised in that case concerning reliance on a dated medical assessment are pertinent to this case. In that case, Riley J adopted the

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[24] *Catford v Laminex Group Pty Ltd* at [36]
[25] *Catford v Laminex Group Pty Ltd* at [37] and [38]
[26] [2000] NTSC 71

critical observations of the Magistrate at first instance, noting the following comments of the Magistrate:

> "In this case, and in almost all cases, I cannot imagine that it would be appropriate for a medical certificate to be given without having some current process of assessment."[27]

37. Riley J further held that even though the doctor had completed a certificate which complied with the form required by section 69 of the Act, in truth the certification of fitness was mere speculation by the doctor and so in substance the certificate did not comply with the requirements of section 69.
His Honour said:

> "It cannot be known what opinion [the doctor] may have formed had he examined the worker on or near the date of his certificate."[28]

38. Particularly in light of Dr Andrews noting "ongoing symptoms" at the time of assessment, in my view the delay between his assessment of the Worker on 17 October 2016 and the Statement of Fitness for Work on 18 April 2017, results in there being in substance a failure by the Employer to comply with the requirements of section 69.

39. Finally, I note the "Additional Comments" at the end of the Medical Report. Dr Andrews cautioned against the Medical Report being given to the Worker because it "contains complex medical information and may be liable to misinterpretation by a lay reader…If required, it would be appropriate to release this document to the patient's treating doctor for discussion". I agree with Dr Andrews, there is much room for ambiguity and misinterpretation in the Medical Report and it would not have assisted the Worker to fully understand why her compensation payments were being cancelled.

40. In my opinion, the Notice clearly failed to comply with the requirements of section 69 of the Act and the Notice was invalid.

B. Should the counterclaim be struck out?

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[27] *Rupe v Beta Frozen Products* at[11]
[28] *Rupe v Beta Frozen Products* at[17]

41. The Employer submitted the counterclaim was sufficiently pleaded and should not be struck out and helpfully made the following submissions:

> "The Court may strike out a pleading where there is some defect in a pleading which will embarrass the opposite party who does not know what is alleged against him or her, as where the pleading is unintelligible, ambiguous, vague or too general: *Vo v Nguyen* [2013] VSC 304."[29]

42. In summary the Employer pleaded the following in its counterclaim:

    (i) That the Worker has ceased to be incapacitated for work as a result of the work related injury and has no ongoing entitlement to weekly compensation.
    (ii) Further and/or alternatively, the Worker is able to earn an amount to be determined by the Court.

43. Whilst the first pleading may amount to a general statement of claim, the second pleading is no more than a bare assertion.

44. Grant on Civil Procedure Northern Territory summarised "material facts" as follows:

> "Material facts are those necessary to formulate a complete cause of action. The statement of claim must state with sufficient clarity the case that must be met. Material allegations of fact are not to be expressed in terms of great generality. A pleading must inform the defendant of the case that must be answered and set out with particularity sufficient to enable any eventual trial to be conducted fairly to all parties and without embarrassment" (citations omitted)[30]

45. The first pleading is too general, lacks any material facts and fails to formulate a complete cause of action.

46. The second pleading makes it clear that the Employer does not seek to limit its position to one of complete recovery by the Worker. The second pleading leaves open the possibility that the Worker has partially recovered and is capable of being employed and earning an income. However, the Employer has failed to plead any of the material facts on which it must necessarily rely as part of such a pleading and as is required by Rules 8.01, 8.06 and 9.05(b) of the Work Health Court Rules. For

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[29] Employer's written submissions filed 8 February 2018 at [7]
[30] At [5.13.109]

example, the counterclaim fails to plead what the Worker's pre injury indexed weekly earnings were, what employment the Worker is now said to be capable of undertaking or in what circumstances, or what her earning capacity is now said to be. The Worker was entitled to a properly pleaded statement of the Employer's position. Without the necessary material facts being pleaded, in my view the Employer failed to plead or "formulate a complete cause of action".

47. In my view, the counterclaim is embarrassing and vague in that it fails to clearly and unambiguously inform the Worker of the case that must be met. I am satisfied that the counterclaim should be struck out.

48. In support of the strike out application Mr Grove went further and submitted that section 69(2) (d) did not give rise to a substantive cause of action and did not provide a foundational basis for the counterclaim. This submission appears to be against the weight of authority[31]. However, given that I was satisfied the counterclaim should be struck out on another ground, it was not necessary for me to determine this issue nor did I consider appropriate for me to do so when dealing with the matter by way of interlocutory application for summary judgement.

Orders

49. The Court orders:
    (i) Summary judgement in favour of the Worker
    (ii) That the Employers counterclaim be struck out

50. I will hear the parties in relation to any consequential orders.

Dated this 22 day of March 2018

[31] See *Swanson v Northern Territory of Australia* [2006] NTSC 88 per Martin (BR) CJ at [42] and [43]; *Collins Radio Constructors Inc v Day* No 80 of 1996 In the Supreme Court of the Northern Territory per Martin CJ at p 6; *Alexander v Gorey & Cole Pty Ltd* (2002) 171 FLR 31 at [30] per The Court of Martin CJ, Mildren and Bailey JJ; *NT Tab Pty Ltd v Dicken* [2004] NTCA 8 per Mildren, Thomas and Riley JJ at [24], and *McIntyre v Tumminello Holdings* No 20312425 In the Work health Court at Darwin, delivered 15 September 2004 per Mr Lowndes SM at [52]

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Elisabeth Armitage

LOCAL COURT JUDGE