CITATION:	*Reynolds v Don Kyatt Spare Parts* [2012] NTMC 047
PARTIES:	KELLY ANNE REYNOLDS
	v
	DON KYATT SPARE PARTS PTY LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Interlocutory
FILE NO(s):	21232333
DELIVERED ON:	6 December 2012
DELIVERED AT:	Darwin
HEARING DATE(s):	26 November 2012
JUDGMENT OF:	J Johnson JR

CATCHWORDS:

SUB-SECTIONS 103D(1A), 103D(4) and 103D(5) OF THE *WORKERS REHABILITATION & COMPENSATION ACT* – where worker is confused by content of Notice of Decision but, having applied her mind to the mediation limitation period and attempted to clarify it, does nothing more - whether "other reasonable cause" made out.

REPRESENTATION:

Counsel:

Worker:	Mr Crawley
Employer:	Mr Liveris

Solicitors:

Worker:	NT Law
Employer:	Minter Ellison

Judgment category classification:	C
Judgment ID number:	[2012] NTMC 047
Number of paragraphs:	27

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

No. 21232333

BETWEEN:

KELLY ANNE REYNOLDS
Worker

AND:

DON KYATT SPARE PARTS PTY LTD
Employer

REASONS FOR JUDGMENT

(Delivered 6 December 2012)

Mr J JOHNSON JR:

1. This is an Application by the worker for an extension of the period of time in which to apply for the conduct of mediation.[1] Sub-section 103D(1A) of the Act prescribes that in circumstances where a worker is aggrieved by a decision of the employer to cancel or reduce compensation being paid to the claimant, he or she must apply to the Authority to have the dispute referred to mediation within 90 days of receiving the statement referred to in sub-section 69(1)(b).

2. On 27 October 2011 the worker received the employer's Notice of Decision dated 16 August 2011. The reason for the delay in the worker receiving the Notice was that it had been sent to the wrong address[2]. In her affidavit evidence adduced for the purposes of this application the worker avers that she became aware of the Notice, apparently as an attachment to an email from her husband, whilst she was interstate. It is important to observe that the Notice purported only to cancel payment of weekly benefits pursuant to section 69 of the Act.

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[1] Sub-section 103D(4) of the Act.

[2] That is: 3 Coolaroo Street, RAAF Base, Winnellie 0820, as opposed to the worker's correct address to which all other mail had been sent, of 3 Caloola Cres, Eaton 0820. No explanation for this error was proffered by the employer.

3. Shortly thereafter, on 1 September 2011, the employer wrote a letter to the worker, on this occasion to the worker's correct address. This letter made reference to a report of a Dr Andrews which the worker had never seen and was not attached, and ended in terms that:

> ... we wish to inform you that that no further medical or treatment costs will be met from the date of this letter.

4. As I understood Counsel for the worker today, an extension of time was also sought, to the extent that it may be necessary, for the worker to seek mediation of that dispute[3].

5. Upon that brief summation it will be seen that the time in which to apply for mediation of the employer's Notice of Decision expired on 24 January 2012, and the time in which to apply for mediation of the employer's letter of 1 September 2011 expired on or about 30 November 2011.

6. Both the Notice of Decision and the letter of 1 September 2011 included a statement which encouraged the worker to contact her case manager at TIO, Ms Nicole Adami, if she had any questions, and provided a personal email and telephone contact for that purpose.

7. At the hearing of the worker's application today the worker produced, apparently for the first time, an email dated 27 October 2011 which she sent to Ms Adami. The email advised that the worker had only that day received the Notice of Decision, and continued:

> I am letting you know as I wish to have the 90 days started from today being 27 October 2011. Please advise me by email of the decision.

8. Clearly then, the worker was aware of the 90 day time limitation which applied to any application which she may wish to make for mediation of the dispute, but was unclear as to when the mediation clock would start ticking.

9. This email is referred to in the worker's affidavit sworn on 7 November 2012[4] but was not annexed to it. In the event, the email went into evidence today without objection from the employer. The worker also avers in her affidavit (at par 75) that she made an indeterminate number

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[3] Section 103J.

[4] At par 74.

of follow-up telephone calls to Ms Adami to clarify the situation but that these telephone calls were never returned.

10. That evidence was somewhat contentious because in an affidavit sworn by Ms Adami on 23 November 2012 she avers that she has "found no record of any email in the nature of the email referred to by the worker at paragraph 74 of her affidavit", nor any "recollection of receiving any emails from the worker of the kind referred to at paragraph 74, nor any "recollection of receiving messages to return the worker's telephone calls and then failing to return her telephone calls".

11. Be that as it may, the principle contentions of the worker going to subsection 103D(5) were that:

> 71. I 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. I just assumed that the letter was confirming that my wages were ceased when I resigned from [the employer] and got the clearance certificate from Dr Brownscombe; which was the TIO requirement for me to start my new job.
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> 72. I did not understand what was being cancelled as I had stopped receiving my wages from [the employer] when I resigned. I was not aware that I had received weekly payments, as all payments came to me through [the employer] and I considered [these] to be wages. I had resigned and been paid all my wages. I was in a new job earning wages.
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> 73. I did not understand what it was all about and what was going on. I wanted to talk to [Ms Adami] so she could explain what was happening.

12. Thus, and whatever the evidence about emails and telephone calls may be, I accept the worker's evidence that:

- The Notice was sent to the wrong address and not received by the worker until some 10 weeks after its date of issue.
- By that stage she had, at the behest of the employer's insurer, resigned from the employer and been in alternative paid employment.
- In that intervening period she was not aware that she had received any weekly benefits either from the insurer or the employer and in her mind there was nothing therefore to be "cancelled".

- She had been in contact with the insurer in the intervening period in relation to the letter of 1 September 2011 and on her evidence no mention of any such Notice of Decision having been issued to her was made and she had not at that time received it (at par 66).

- As a result she did not understand the Notice.

- She did understand the mediation limitation period but was not clear when it commenced and attempted to contact her case manager by email and telephone for clarification, without success.

13. Mr Crawley also emphasised that the worker had been in discussions with the employer, her case manager and other service providers over a long period of time prior to her resignation from the employer on 12 August 2011. This was productive of a contention that the worker had some expectation that there would be follow-up communication from the insurer about the Notice of Decision. Further, it was said that the background facts of alleged mistreatment by her employer made the worker hesitant to re-engage.

14. As it transpired, it was not until the "new job" to which the worker refers in her affidavit came to an end in January 2012, and she was unable to find further employment post February 2012, that the worker again applied her mind to her workers compensation claim sufficiently to seek advice. At that time she contacted the law firm *NT Law* and was advised to apply for mediation forthwith. This she did on 24 May 2012 but was subsequently advised by the Authority that she was out of time and would have to apply to the Court for an extension of time. That application was filed on 30 August 2012 and is the application argued before me today by Mr Crawley and Mr Liveris, respectively Counsel for the worker and the employer. As I understood that argument, it centred exclusively upon the "other reasonable cause" limb of sub-section 103D(5).

The Law

15. For mine, the test to be applied in this jurisdiction to "other reasonable cause" is that articulated in the judgement of His Honour Mildren J in *Tracy Village Sports and Social Club v Walker*[5]:

> The test of reasonableness, it is to be noted, is an objective one. In *Commonwealth v Connors*, Northrop and Ryan said:

[5] (1992) 111 FLR 32 at page 41, with citations omitted.

> "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* Sholl 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 thing which might be expected to delay the giving of notice by a reasonable man.'"

Consideration

16. I have very carefully read the email which the worker wrote and sent to the employer on 27 October 2011, and par 74 of her affidavit in support of this application. I have looked at that material objectively and in the context of the worker's surrounding circumstances disclosed in her affidavit evidence more generally. I have carefully considered submissions on her behalf today. Having done all of that I feel compelled to the conclusion that, on the balance of probabilities, the worker did apply her mind to the mediation limitation period. By her email and in her evidence at par 74 of her affidavit she was very clearly asking the insurer to clarify when that limitation period commenced. I do not think it can therefore be said that she misconceived the importance of the limitation period or her true position thereafter. On the contrary, she asked for a specific response to her question about it and, and having received no such response, did nothing until her new employment came to an end and there was an imperative for her to follow up her workers compensation claim.

17. An alternative way to analyse the matter is this: as a matter of law the worker had 90 days post 27 October 2011 to further attempt to clarify her position and/or apply for mediation. She did neither. When I scrutinize the reasons advanced by the worker in her affidavit evidence and by her Counsel as to why she did neither of those things, it seems there are three central threads. The first is her confusion as to what the Notice actually meant. The second was her dissatisfaction with her prior treatment by the employer and, to some extent, by the insurer. This may have led to a reluctance on her part to re-enter the workers compensation space. Thirdly, it appears that at that time she was going well in her new job and felt confident about her future.

18. If that be right, the decision for me is whether any of these reasons individually, or in combination, meet the threshold test of "reasonable cause". In my opinion they do not.

19. Whilst I accept that the worker was confused as to what the Notice actually meant, and that the other reasons I have mentioned were no doubt playing upon her mind, the fact remains that she had applied her mind to the limitation period, recognised that it applied to her now that she had received the Notice, and then did nothing. In my opinion that is not a cause consistent with a reasonable standard of conduct, nor "the kind of thing which might be expected to delay the giving of notice by a reasonable man". Further, in my opinion, the fact that the worker did not receive a response to her initial email or telephone enquiry is not a "reasonable cause" on my understanding of the law. The onus was clearly upon the worker by the explicit terms of the Notice which she had read and to which she had applied her mind.

20. I will exercise my discretion and order accordingly.

21. I do not do so lightly. I retain considerable concern as to the validity of the employer's Notice of Decision given that it was infected by misaddress. But that issue was not advanced before me today as determinative in the context of "other reasonable cause". And, arguably, the worker is not precluded by my decision from making a fresh application for compensation if there has been a change of circumstances such that there is a chronologically new incidence of loss of earning capacity causally related to the primary injury.

22. Finally, I come to consideration of the employer's letter of 1 September 2011 purporting to cancel all further medical and treatment costs associated with the worker's claim. In my opinion, that letter is a nullity.

23. The employer accepted liability for the worker's claim for compensation on 26 August 2010[6], explicitly inclusive of "medical treatment and related expenses". By its letter of 1 September 2011 the employer was effectively creating a potential "dispute" if the worker was "aggrieved" by its decision to "cancel ... compensation being paid to the claimant"[7]. In my opinion, the employer was in such endeavour bound to provide the worker with formal notification of the dispute resolution provisions of Division 1

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[6] Annexure "KR-2 to the worker's affidavit.

[7] Section 103B.

of Part 6A of the Act and, in particular, that if she was aggrieved by the decision and wished to dispute it she could only do so by complying with the pre-condition mandated in subsection 103J(1). To do otherwise in my opinion is to avoid giving the worker proper notice of a critical component of the machinery of the Act by creating the impression that the decision was final and nowhere mentioning what the worker could do if she was aggrieved by it.

24. Thus, and whilst I accept the fact that cancellation of compensation for "further medical treatment or costs" would not appear to fall within the strict notice provisions of either section 69[8] or section 85[9], the employer was nonetheless in my opinion duty bound by the scheme of the Act to notify the worker of the subsection 103J(1) pre-condition in the event that she was aggrieved by, and wished to dispute, the decision contained in the letter of 1 September 2011.

25. It follows that, having been given no proper notice of her rights pursuant to Division 1 of Part 6A of the Act in relation to the cancellation of compensation for medical treatment and related expenses, the worker retains an entitlement to those expenses which have been reasonably incurred as a result of her accepted claim for compensation.

Findings

26. I find that the worker in this Application has not established a "reasonable cause" for her failure to apply for mediation within the period referred to in sub-section 103D(1A) of the Act. I do so on grounds that upon receipt of the employer's Notice of Decision the worker did apply her mind to the mediation limitation period and, having done so, knew the importance of it and of her true position thereafter.

27. I also find that the letter sent by the employer to the worker on 1 September 2011 purporting to cancel compensation for medical treatment and related expenses is a nullity for lack of notice of the provisions of Division 1 of Part 6A of the Act, and the worker retains an entitlement to those expenses which have been reasonably incurred as a result of her accepted claim for compensation.

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[8] Which relates only to "an amount of compensation" under Subdivision B of Division 3 of Part 5 of the Act.

[9] Which, on its face, relates only to an *ab initio* determination of eligibility for compensation.

Orders:

1. 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 is dismissed.

2. The employer's purported decision of 1 September 2011 to cancel compensation for medical treatment and related expenses is a nullity.

3. I will hear the parties as to the costs of this application and any other matters arising.

4. Certified fit for Counsel.

Dated this 6th day of December 2012

JULIAN JOHNSON
JUDICIAL REGISTRAR