Dickin v NT TAB Pty Ltd [2003] NTSC 119

PARTIES:	GAIL DICKIN
	v
	NT TAB PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM WORK HEALTH COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 6 of 2003 (20201609)
DELIVERED:	5 December 2003
HEARING DATES:	16, 17 October 2003
JUDGMENT OF:	ANGEL ACJ

CATCHWORDS:

APPEAL – Work Health – memorandum of agreement to pay compensation entered into by the parties – agreement recorded pursuant to s108 Work Health Act - held to be judgement of the Court - estoppel - whether entering agreement estopped the Employer later alleging that the worker's original incapacity was not work related - whether Form 5 Notice to discontinue payment of compensation valid – whether Form 5 Notice complied with the requirements of s69(4) Work Health Act – notice did not "fully" inform worker of reason compensation payments were to cease – notice ambiguous and invalid – appeal allowed

Work Health Act NT, ss 69, 108, 116

Normandy NFM Ltd v Turner [2002] NTSC 29, applied

REPRESENTATION:

Counsel:

Appellant:	S Southwood QC and O Downs
Respondent:	P Barr

Solicitors:

Appellant:	Priestley Walsh
Respondent:	Hunt & Hunt

Judgment category classification:	B
Judgment ID Number:	ang2003012
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2003012

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Dickin v NT TAB Pty Ltd [2003] NTSC 119
No. LA 6 of 2003 (20201609)

BETWEEN:

GAIL DICKIN
Appellant

AND:

NT TAB PTY LTD
Respondent

CORAM: ANGEL ACJ

REASONS FOR JUDGMENT

(Delivered 5 December 2003)

[1] This is an appeal pursuant to s 116 Work Health Act NT.

[2] The appellant worker commenced employment with the respondent employer in or about 1981. In November 1995 in the course of her employment the appellant was carrying a "fairly large box" of pens with strings attached when she tripped and fell. She fell forward on top of the cardboard box she was carrying. As a result of the fall she sustained injuries to her elbow, shoulder and neck. She never returned to her employment after the fall.

[3] The appellant claimed compensation on the basis of incapacity arising from her injuries. Following her claim for compensation the respondent employer

agreed to pay weekly compensation. The parties entered a memorandum of agreement which was executed by the parties and dated 3 July 1997. That agreement was in the form contemplated by s 108 Work Health Act NT whereby the respondent employer agreed to pay weekly compensation to the date thereof and continuing. That agreement between the parties was in proceedings numbered 9600706 and was recorded by the Work Health Court on 7 July 1997 pursuant to s 108 Work Health Act NT in resolution of the appellant's claims. The agreement recorded that the appellant worker had sustained an injury on or about 28 November 1995, the injury being described as "stress, depression, anxiety; injured elbow, injured shoulder, aggravation of pre–existing whiplash condition", and the agreement further provided that the respondent employer would pay weekly payments of compensation until cancellation or reduction of those payments in accordance with the Work Health Act.

[4] On or about 8 January 2002 the respondent, in purported pursuance of s 69 Work Health Act, caused a Form 5 Notice to be served upon the appellant notifying her that the compensation payments would cease 14 days thereafter. The relevant reasons for cancellation of compensation given in the Notice were as follows:

- "You have ceased to be incapacitated for work as a result of your work–related injury of 28/11/1995.

- As per the attached certificates from Dr Timney and Dr Kutlaca both dated 17/12/2001".

Each attached medical certificate certified "that the Worker has ceased to be incapacitated for work as a result of the work injury."

[5] The appellant commenced proceedings in the Work Health Court challenging the validity of the Form 5 Notice and claimed payment of weekly compensation from the date of cancellation of payments and payment of medical, pharmaceutical and other like expenses from 8 January 2002 to the date of application.

[6] Paragraph 7 of the appellant worker's particulars of claim was in the following terms:

> "On 3 July 1997 the Worker and the Employer executed a memorandum of agreement pursuant to the Work Health Act (NT) ("the agreement"). Pursuant to the agreement the Employer, amongst other things, accepted liability for the claim and the injuries set out in the agreement, and made payments of weekly compensation and other compensation in accordance with the *Work Health Benefits Act* to the Worker thereafter until a date in January 2002."

[7] The respondent employer admitted the allegations pleaded in paragraph 7 of the worker's amended statement of claim save and except that it denied it accepted liability for the injuries set out in the agreement.

[8] The respondent employer also pleaded in its amended defence as follows:

> "5. The Employer admits that the worker was previously incapacitated for work in respect of certain injuries for which she claimed compensation, but says that the worker is no longer incapacitated for work as a result of those injuries. In the alternative, the Employer says that if the Worker is incapacitated for work, such incapacity is not as a result of an injury arising out of or in the course of the Worker's employment with the Employer.

5A. Further, the Employer denies that the Worker suffered an exacerbation, acceleration and recurrence or deterioration of a pre–existing anxiety condition on 28 November 1995 whilst in the course of her employment with the Employer as pleaded in particular 5.7 of the Worker's Amended Statement of Claim.

5B. In the alternative to 5A, if the Worker did suffer an exacerbation, acceleration and recurrence or deterioration of a pre–existing anxiety condition on 28 November 1995 whilst in the course of her employment with the Employer as pleaded in particular 5.7 of the Amended Statement of Claim, this did not cause her to be incapacitated for work.

5C. In the alternative to 5B, if the Worker did suffer an exacerbation, acceleration and recurrence or deterioration of a pre–existing anxiety condition on 28 November 1995 whilst in the course of her employment with the Employer as pleaded in particular 5.7 of the Amended Statement of Claim, and the worker was incapacitated for work, she is no longer incapacitated as a result of this injury.

Further, as to the alleged exacerbation, acceleration and recurrence or deterioration of a pre–existing anxiety condition, the Employer refers to s 80(1) of the *Work Health Act* and says that the Worker is not entitled to compensation therefore because the Worker failed to give notice or serve notice of such injury as soon as practicable on the Employer."

[9] The respondent employer denied that the appellant worker was entitled to any of the remedies claimed or any remedies at all and in an eleventh hour amendment immediately before trial made a counter-claim in the following terms:

"13. At some time prior to 8 January 2002 the Worker ceased to be incapacitated for work as a result of her work–related injury of 28 November 1995.

14. The Employer seeks a declaration or ruling that the Worker was no longer incapacitated for work as a result of her work–

related injury of 28 November 1995 from on or before 8 January 2002".

[10] The appellant did not file a defence to the counter-claim.

[11] In that state of things a trial was had in the Work Health Court. The Chief Magistrate delivered judgment on 17 June 2003. He said he was satisfied that the respondent worker had established on the balance of probabilities that the worker as at "6 January 2002" (sic) suffered from no physical injury or incapacity which related to her fall at work in November 1995, that she did not suffer from any incapacitating psychiatric illness as a result of her fall or aggravate any pre–existing condition by her fall, that the worker's appeal against the respondent's decision to cease payments failed and that should he be wrong in holding the Form 5 Notice valid "then the employer has successfully made out the case in the counter-claim." He did not identify "the case in the counter-claim" or give any reasons for his conclusion.

[12] Counsel for the appellant argued the appeal on four broad bases. First, it was argued that the Form 5 Notice was invalid in failing to comply with requirements of s 69 Work Health Act. It was argued there was no proper certification as required by the Act in that the medical certificates accompanying the Notice were not contemporaneous and that the certification was erroneously based on an assessment of psychiatric factors without regard to the appellant's physical injuries. Secondly, it was argued that the respondent employer was estopped from disputing that the

appellant's injuries and incapacity were work-related in virtue of the compromise agreement concluding the previous proceedings pursuant to s 108 Work Health Act. Thirdly, it was argued that the Chief Magistrate erred in law in ordering the appellant worker to repay interim benefits she had been paid by the employer in the absence of any express provision in the Work Health Act for recovery of such payments. Fourthly, it was argued that the Chief Magistrate erred in law in failing to give reasons as to why he upheld the respondent's counter-claim. It was argued that the counter-claim simply mirrored the reasons stated in the Form 5 Notice and that as the Form 5 Notice failed for non compliance with s 69 Work Health Act, the counter-claim ought necessarily fail with it, for otherwise the statutory requirements of s 69 Work Health Act could be readily circumvented and compliance with s 69 for practical purposes would be otiose.

[13] Counsel for the appellant submitted that given the terms of the agreement recorded pursuant to s 108 Work Health Act, the respondent could not contest:

(a) that the appellant worker had sustained an injury at work, and

(b) that as a result thereof she was totally incapacitated for work.

Having agreed that state of affairs and having agreed to pay compensation, the only way the respondent employer could stop payment of compensation was to give a proper notice pursuant to s 69 accompanied by evidence that the appellant worker's incapacity had ceased. It was not open for the

respondent, it was argued, to contend that there was another non work-related cause for the respondent's incapacity or that there was no injury. In particular the respondent's counter-claim was confined to cessation of incapacity; it did not allege the appellant did not suffer injury on 28 November 1995 or that the appellant worker was not incapacitated as a result of any injury on 28 November 1995 or that the worker's current incapacity was caused by factors other than the injury of 28 November 1995. All the counter-claim alleged was that the appellant worker was presently fit for work. In particular the issues pleaded in paras 5, 5A, 5B and 5C of the amended defence set forth above were not raised in the counter-claim.

[14] The Work Health Court is a court of record bound by the pleadings, subject, of course, to the way the parties conduct their case. It is elementary that parties on appeal where they have conducted a case on issues beyond the pleadings cannot thereafter treat the pleadings as governing the area of contest. Unfortunately, as the transcript of proceedings discloses, there was a good deal of confusion as to the area of contest. That confusion had its genesis in the respondent's s 69 Work Health Act notice to the appellant.

[15] Counsel for the appellant worker in the court below argued that the employer was estopped by the recorded compromise agreement from contesting that the worker suffered total incapacity as a consequence of a work-related injury. The Chief Magistrate held the respondent was not so estopped and the employer was permitted to conduct a case that any current incapacity of the worker – a matter itself in contest - was caused

by factors other than the injuries sustained on 28 November 1995. The appellant, given her counsel's submissions, inter alia, on estoppel, can not be regarded as a willing participant in that course.

[16] I am of the opinion there has been a miscarriage of justice in this case and that the proceedings miscarried because the respondent's Form 5 Notice did not comply with the requirements of s 69(4) Work Health Act. That section provides:

> "(4) 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. "

[17] The respondent's notice did not "fully" inform the worker of the reason her payments were to cease. It ambiguously asserted that the appellant had "ceased to be incapacitated for work as a result of (her) work-related injury of 28/11/1995". It did not say, let alone "fully" inform the appellant:

(a) That the appellant was no longer incapacitated ie that she had recovered her capacity, or

(b) That the appellant was incapacitated but as a result of something other than her admitted work-related injury of 28 November 1995.

The notice fails for ambiguity. As in *Normandy NFM Ltd v Turner* [2002] NTSC 29, this notice in its terms purports to assert a state of affairs. It asserts nothing "to enable the worker to whom the statement is given to

understand fully why" she was paid compensation in full before the notice and is to be paid no compensation fourteen days after the notice. If I may be pardoned for saying so, s 69(4) 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. This notice demonstrably fails to do this. In addition the Form 5 Notice was not properly verified by contemporaneous medical certificates. I agree with the submission that in the present case there was no effective certification.

[18] The defence to the worker's claim for reinstatement of payments pleaded matters which were not "fully" set forth in the Form 5 Notice. Those matters were therefore irrelevant to the status of the notice and ought to have been disregarded or struck out. The Chief Magistrate was led into error as appears from paras 8 and 33 of his reasons for judgment which were respectively in the following terms:

> "8. Essentially therefore the task of the court (by agreement of counsel) is to determine whether Ms Dickin was incapacitated at all on 8 January 2002. It is agreed that no question of partial incapacity arises in this case. The onus, which is accepted by the employer is to prove on the balance of probabilities that on 8 January 2002 the worker was neither totally nor partially incapacitated within the context of Part V of the Act as a result of the work-related injuries sustained on 25/11/95. On the pleadings the parties have agreed that if it is proved the worker was partially incapacitated at that time then the worker is nevertheless entitled to full payments of compensation to date and continuing until lawfully stopped or varied."

> "33. The question may in fact be academic since, when it all boils down, this case relates to the question of cessation of benefits actually being paid as at 8 January 2002. The real question and issue in dispute (absent the legalese) is whether on 8 January 2002 there was any incapacity for work and if so did that incapacity arise out of or in the course of the workers employment as alleged."

[19] As may be seen the Chief Magistrate considered the real question to embrace not only whether as at 8 January 2002 the worker was incapacitated but in addition the irrelevant question whether that incapacity arose out of or in the course of the worker's employment. The latter question was irrelevant to the validity of the Form 5 Notice because the notice did not "fully" inform the appellant of that question and the question of causation was not squarely raised in the medical certificates or in the counter-claim. It was therefore, as I have said, irrelevant to the proceedings. Furthermore the compromise agreement recorded with the Work Health Court had the effect of a judgment of that Court. The Work Health Court is a court of record: s 93 Work Health Act. In view of s 108(6) Work Health Act the recording of the agreement constituted, in effect, a consent judgment. The respondent was thereby estopped from alleging that the worker's initial incapacity was not work-related.

[20] The s 69 notice being invalid, it follows that cancellation of existing payments could only be by reason of some justification outside the terms of the notice. The respondent could only raise a case outside the terms of the notice, if at all, by way of counter-claim or separate proceeding. The present counter-claim did not raise any such case but was confined to

the issue of whether the worker was incapacitated. The counter-claim did not raise the issue whether the worker's present incapacity was caused other than by her original injury.

[21] The Chief Magistrate did not give reasons for allowing the counter-claim. That in itself is an error of law warranting the setting aside of his orders. This litigation has run off the rails because of the respondent's failure to define the real issues by an appropriate s 69 Work Health Act Notice. If the respondent wishes to agitate a causation issue it shall have to serve a fresh s 69 Work Health Act notice clearly spelling out the matters it seeks to raise in order to justify cancellation of payments. The appellant worker is entitled to no less. She is also entitled to payments of back weekly payments due and reinstatement of continuing weekly payments and medical expenses incurred and continuing until lawful cancellation or reduction pursuant to the provisions of the Work Health Act.

[22] The appeal is allowed with costs. I shall hear the parties as to the form of orders.

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