Swanson v Northern Territory of Australia [2006] NTSC 88

PARTIES:	SWANSON, Kenneth Don v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 49 of 2005 (20214796)
DELIVERED:	16 NOVEMBER 2006
HEARING DATES:	2 & 3 NOVEMBER 2006
JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	Work Health Court, 20214796, 22 December 2005

CATCHWORDS:

WORKERS' COMPENSATION
Workers' compensation – appeal – notice by employer under s 69 Work Health Act – appeal by worker going beyond notice – ambit of appeal – counterclaim – validity of Work Health r 9.05 – rule valid – counterclaim permitted – appeal dismissed.

Work Health Act, s 69, s 94, s 95 and s 103J; *Work Health Rules*, r 8.02 and r 9.05

Taylor v Guttilla (1992) 59 SASR 361; *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452, applied.
South Australia v Tanner (1989) 166 CLR 161; *March v Stramare* (1991) 171 CLR 506; *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797, considered.

Disability Services of Central Australia v Regan (1998) 8 NTLR 73, followed.

REPRESENTATION:

Counsel:

Appellant:	J Waters QC & M Doyle
Respondent:	J Tippett QC

Solicitors:

Appellant:	Povey Stirk
Respondent:	Collier and Deane

Judgment category classification:	A
Judgment ID Number:	Mar0626
Number of pages:	52

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

Swanson v Northern Territory of Australia [2006] NTSC 88
No. LA 49 of 2005 (20214796)

IN THE MATTER OF the Work Health Act

AND IN THE MATTER OF an appeal against decision in the Work Health Court, Alice Springs

BETWEEN:

SWANSON, Kenneth Don
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 16 November 2006)

Introduction

[1] This is an appeal against a decision of a Magistrate sitting as the Work Health Court. Following the hearing of an appeal by the appellant worker against the cancellation of weekly payments of compensation, the learned Magistrate found that although the appellant had suffered a mental injury in the course of his employment, the injury was the result of reasonable administrative action by the respondent employer and, therefore, was not a

compensable injury pursuant to the provisions of the Work Health Act ("the Act").

[2] The appellant's right to appeal is limited to questions of law: s 116. In substance, the appellant argued that the learned Magistrate erred in law in permitting the respondent to enlarge the ambit of the hearing beyond the issues raised by the respondent's appeal. Other errors, said to be errors of law, are also alleged and the appellant challenges the validity of Rule 9.05 of the Work Health Rules ("the Rules").

Background

[3] The appellant was born on 28 January 1947. He is a fully qualified high school teacher and from January 1986 was employed as a teacher by the respondent.

[4] In February 2001 the appellant was employed at a high school in Alice Springs. Information was received by staff at the school concerning the conduct of the appellant in the course of his duties as a teacher. On 27 February 2001 the Assistant Principal, Mr Peter Swan, spoke with the appellant about the information.

[5] It is common ground that following the conversation the appellant sought medical treatment and was certified unfit for work. A claim by the appellant for compensation pursuant to the Act was admitted by the respondent. Commencing 27 February 2001 weekly payments were made to the

respondent pursuant to the provisions of the Act on the basis of total incapacity.

[6] On 30 May 2002 the respondent served on the appellant a notice pursuant to s 69 of the Act cancelling compensation payments on the ground that the appellant was no longer incapacitated for work. The notice was effective from 14 June 2002. It was from that decision of the respondent to cancel payments pursuant to s 69 that the appellant appealed to the Work Health Court seeking that weekly payments of compensation be reinstated from 14 June 2002. After a hearing in which a number of witnesses gave evidence for the respondent, but the appellant did not give evidence and did not call any other evidence, the Magistrate made the decision to which I have referred and against which the appellant now appeals.

Pleadings

[7] In order to deal with the complaints about the conduct of the hearing, it is necessary to have regard to the pleadings which were before the Magistrate. The Amended Particulars of Claim were as follows:

> "1. The Worker is a fully qualified high school teacher, who had been in the employ of the Employer since January 1986. Born on 28 January 1947, the Worker is now 58 years of age.
>
> 2. On 27 February 2001 and in the course of his employment with the Employer at Anzac High School, Alice Springs, the Worker at the request of the Assistant Principal, Mr Peter Swan, attended at his office. The Assistant Principal informed the Worker of an allegation that he had sexually harassed three girl students at the school.

3. As a result of being informed of the allegation, the Worker suffered a work-related injury, namely, an adjustment disorder with anxiety. He suffered and continues to suffer stress-related symptoms associated with such a disorder which has become chronic. Additionally he suffers from a superimposed major depressive order on an intermittent basis.

4. The Worker forthwith sought treatment from his medical practitioner and was diagnosed as aforesaid and certified unfit to return to work. He was referred for counselling.

5. Since 27 February 2001, the Worker has been partially or totally incapacitated for employment and totally incapacitated for duties involving teaching.

6. Shortly after being certified unfit for work, the Worker made a claim for compensation pursuant to the *Work Health Act (NT)*, which claim was admitted by the Employer on the basis of the Worker's total incapacity.

7. At the time of the injury the Worker was in receipt of his normal weekly earnings of $1,090.25 (gross) per week. He continued to receive payment on the basis of total incapacity until cancellation of his entitlement.

8. The Worker endeavoured to return to work pursuant to return to work programs organised by the Employer and its rehabilitation provider, APM.

9. On 30 May 2002 the Employer purported to cancel payment of compensation pursuant to section 69 of the *Work Health Act (NT)*, effective 14 June 2002 upon the basis that the Worker was no longer incapacitated for work.

10. The Worker appeals from the Employer's decision to cancel benefits pursuant to the Act.

11. The Worker seeks the following orders:

    (a) that his appeal be upheld and that as a consequence, weekly payments of compensation be resumed from 14

June 2002 and that the Worker be entitled from that date to such other benefits, including treatment and rehabilitation expenses as may arise;

(b) that the Employer pay the Worker's costs of these proceedings;

(c) such further or other orders as the Court deems just."

[8] The respondent filed a Notice of Defence and Counterclaim. The particulars were in the following terms:

"**Particulars of Defence and Counterclaim**

In response to the Worker's Statement of Claim the Employer pleads as follows:

1. The Employer admits paragraph 1.

2. The Employer admits paragraph 2 save that the Employer denies that an allegation was made by Assistant Principal Peter Swan that the Worker had sexually harassed three girl students at the school. The Worker was asked by Assistant Principal Swan to attend his office in order to speak about a delicate matter. In the Assistant Principal's office the Worker was informed that three female students had raised issues in writing. The Worker was advised by Mr Swan that he needed to know what the girls were feeling so that he was aware of the situation and to ensure that the Worker did not place himself in any difficult situations with the girls. Mr Swan advised the Worker at that time that neither he nor any staff believed that any untoward behaviour had been engaged in by the Worker and that his contact with female students when teaching ball room dancing was appropriate.

3. The Employer denies the allegations set out in paragraph 3 and further says that if the Worker suffered an "adjournment ((sic) adjustment) disorder with anxiety" as a result of being informed of written complaints from three female students then such condition arose as a result of reasonable administrative

action being taken by the Employer in connection with the Worker's employment and is therefore not a compensable injury pursuant to the provisions of the Work Health Act.

4. The Employer admits paragraph 4 but does not admit that any condition claimed by the Worker was correctly diagnosed nor that such a condition rendered the Worker unfit for work.

5. The Employer denies paragraph 5.

6. The Employer admits paragraph 6 that the Worker's claim for compensation was initially accepted by the Employer but in so doing the Employer was under the honest but mistaken belief that the Worker's claimed condition was a work injury and not a condition resulting from reasonable administrative action taken in connection with the Worker's employment.

7. The Employer admits paragraph 7 to the extent that the Worker's normal weekly earnings as of 27 February 2001 were $1,019.25 gross per week. The Employer denies an incapacity for employment occurred on 27 February 1001.

8. The Employer admits that the Worker engaged in return to work programmes organised by the Employer and its rehabilitation provider, APM. Further, the Employer asserts that the Worker unreasonably failed to participate in the workplace based return to work programmes arranged for him and thereby breached his obligations pursuant to the provisions of Section 75B of the Work Health Act.

9. The Employer admits that it served a notice on the Worker pursuant to Section 69 of the Work Health Act on 30 May 2002 cancelling the Worker's benefits on the grounds that he was no longer incapacitated for work. The Employer denies that the Worker is entitled to any compensation from 14 June 2002.

10. As to paragraphs 10 and 11 the Employer denies that the Worker is entitled to any compensation pursuant to the provisions of the Work Health Act.

11. The Employer seeks the following declarations and orders:

i. The Worker's appeal of the decision to cancel benefits be dismissed;

ii. A declaration that the Worker has not been partially or totally incapacitated for employment since 14 May 2002

iii. A declaration that the Worker is fit to return to his pre-injury employment and has been so fit since 14 May 2002;

iv. A declaration that if the Worker had suffered a mental injury that such injury is as a result of reasonable administrative or disciplinary action on behalf of the Employer and is therefore not a compensable injury pursuant to the provisions of the Work Health Act; and

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

[9] The appellant filed a Reply objecting to the pleadings in paras 2, 3, 6, 7, 8 and 11(iv) of the Defence and Counterclaim on the basis that the matters pleaded were not relevant to the issue of the Notice of Cancellation which was challenged by the appellant's claim:

"**Reply**

The Worker objects to all of the pleadings comprised within paragraphs 2, 3, 6, 7, 8 and 11(iv) of the Employer's Amended Defence dated 28 July 2005 upon the ground that the allegations as to the Worker's conduct and other matters comprised therein do not form the basis of, nor could be made relevant to, the notice of cancellation pursuant to s.69 of the *Work Health Act* dated 30 May 2002, the subject of this appeal."

Grounds 1 and 2

[10] Grounds 1 and 2 of the appeal assert that the Magistrate erred in law in determining that the appellant's Statement of Claim raised matters other

than the question "of the appropriateness of the cancellation of weekly payments pursuant to the respondent's notice pursuant to s 69(1)" of the Act. The grounds also assert that the Magistrate erred in law in failing to have any or adequate regard to the submission of counsel for the appellant at the commencement of the hearing that the appellant was confining the appeal to a challenge to the respondent's notice pursuant to s 69 to cancel the weekly payments. In substance, counsel for the appellant submitted that the pleadings did "no more than follow Form 9A of the Rules in setting out the circumstances relating to the cancellation and the worker's opposition to it" and that the transcript demonstrates that counsel repeatedly made clear that the only issue the worker sought to ventilate was the appeal against the decision to cancel the payments pursuant to s 69.

[11] Regardless of whether the appellant's pleadings went beyond the issue of the cancellation of weekly payments pursuant to s 69, the appellant also faced the problem that r 9.05 of the Rules provides for filing of a counterclaim. The respondent filed a Notice of Defence and Counterclaim which agitated issues wider than the cancellation of weekly payments pursuant to s 69. In order to meet this difficulty, before the Magistrate and on this appeal the appellant argued that r 9.05 is invalid and that, for other reasons, the Counterclaim was not properly before the Magistrate. As will appear later in these reasons, however, in my opinion r 9.05 is valid and the Counterclaim was properly before her Honour thereby enabling the respondent to defend the claim on grounds other than those related to s 69.

In these circumstances, the appellant's complaint that the Magistrate erred in permitting the respondent to agitate issues beyond s 69 must fail. However, as submissions were addressed to the effect of the appellant's pleadings and this question would be relevant if I am in error as to the validity of r 9.05 and the effectiveness of the Counterclaim, I will deal with it.

[12] The procedure for a worker claiming compensation by reason of injury in the workplace is set out in Division 5 of Part V of the Act. Pursuant to s 85, upon receiving a claim for compensation an employer is required to accept liability for the compensation, defer accepting liability or dispute liability. In the case of a claim for weekly payments of compensation, where an employer accepts liability s 85(2) requires that the payments be commenced within three working days after accepting liability.

[13] Section 69 is an important procedural provision. It enables an employer to unilaterally cancel or reduce weekly payments of compensation, but it also provides significant protection for workers by requiring the employer to give notice of intention to cancel or reduce payments and to provide a statement setting out various matters, including the reason for the proposed cancellation or reduction. Section 69 is in the following terms:

> "(1) Subject to this Subdivision, an amount of compensation the 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.

(2) Subsection (1) does not apply where -

(a) the person receiving the compensation returns to work or dies;

(aa) the person receiving the compensation fails to provide to his or her employer a certificate under section 91A within 14 days after being requested to do so in writing by his or her employer;

(b) the medical certificate referred to in section 82 specifies that the person receiving the compensation is fit for work on a particulate date, being not longer than 4 weeks after the date of the injury in respect of which the claim was made, and the person fails to return to work on that date or to provide his or her employer on or before that date with another medical certificate as to his or her incapacity for work;

(c) the payments of compensation were obtained by fraud of the person receiving them or by other unlawful means; or

(d) the Court orders the cancellation or reduction of the compensation.

(3) 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 statement under subsection (1) shall be accompanied by the medical certificate of the medical practitioner certifying that the person has ceased to be incapacitated for work.

(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."

[14] In the following passages of her reasons, the Magistrate found that although the appellant had not gone beyond the issue of cancellation of compensation payments in the manner in which the appellant conducted the hearing, nevertheless the Statement of Claim raised other issues thereby enabling the employer to "widen the scope of the issues to be decided" [3] – [8]:

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

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

69. Cancellation or reduction of compensation

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

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

[5] Notwithstanding the finding in paragraph 3 of this decision, the appeal in paragraph 10 and the remedy sought in paragraph 11(a) of the amended statement of claim do raise matters other than the question of compensation pursuant to Part V, Division 3, subdivision B of the *Work Health Act*. In Paragraph 10, the worker appeals the decision to cancel benefits pursuant to the

> Act. Benefit is defined to include an advantage of any kind (*s. 3 Work Health Act.)* The appeal does not limit itself to the cancellation of payments of compensation. The section relating to weekly payments of compensation are located in Part V, Division 3, Subdivision B. The order sought in Paragraph 11(a) is that the appeal be 'upheld and that as a consequence, weekly payments be resumed from 14 June 2002 and that the Worker be entitled from that date to such other benefits, including treatment and rehabilitation expenses as may arise.' Benefits are being claimed other than from *subdivision B* of Division *3* of *Part V* (for example from *subdivision D* of *Division 3* and from *Division 4*). Had paragraph 11(as) ended with a full stop after '2002' that would not have been the case.
>
> ……..
>
> [7] I rely upon the Northern Territory Court of Appeal cases of *Disability Services v Regan 8 NTLR 73* and *Ansett Australia v Van Nieuwmans [1999] NTCA 138* in finding that the Worker has gone beyond the appeal of the cancellation of the payments of compensation pursuant to Section 69 in his pleadings.
>
> [8] That the Worker conducted his case differently is not determinative of the issue. The amended statement of claim goes beyond a *Section 69* appeal of the cancellation of payments of compensation. A reading of the amended statement of claim as a whole demonstrates that. As a consequence, the Employer is entitled to widen the scope of the issues to be decided, as it seeks to do in its amended notice of Defence and counter claim, and by the way it conducted its case."

[15] It is common ground that the appellant endeavoured to confine the appeal before the Magistrate to a determination of the issues raised under s 69. The respondent was dux litis. In his opening, counsel for the respondent first outlined the facts and the respondent's case that the appellant was fit to

return to teaching duties. Counsel then identified the employer's case that the injury arose out of reasonable administrative action in advising the respondent of information received from female students about the respondent's conduct. In response, counsel for the appellant stated that the appellant's appeal was confined to the cancellation of weekly payments pursuant to s 69 and submitted that the respondent should not be permitted "to embark upon an entirely new inquiry". Counsel contended that the particulars of claim had not gone beyond the cancellation of payments and had not widened the issues in such a way as to permit the respondent to advance a case that the injury was not compensable.

[16] After hearing submissions from both counsel, the Magistrate indicated that she was not in a position to make a ruling and that she would hear the evidence subject to the objection. Counsel for the appellant informed her Honour that in those circumstances he wanted to make it "crystal clear" that he would not be asking questions relating to issues not relevant to the cancellation of weekly payments pursuant to s 69 because, if he asked such questions, he would be met with the assertion that he had widened the scope of the inquiry because he "chased the rabbit that they let out". Subject to one exception relating to cross-examination of a psychiatrist relevant to the question of whether the injury was the result of administrative action or the fact that allegations had been made by students, counsel for the appellant restricted his cross-examination in accordance with his intimation to the Magistrate.

[17] It is against this background that the Magistrate found that in the conduct of his case during the hearing the appellant "did not go beyond appealing the cancellation of compensation payments". That limited finding was plainly correct.

[18] The critical question is whether, notwithstanding the way in which the hearing was conducted, the Magistrate was correct in finding that by the Statement of Claim the appellant had "gone beyond" merely an appeal against the cancellation of payments of compensation pursuant to s 69. For the reasons that follow, in my view her Honour was correct.

[19] Section 69 is found in Pt V, Div 3, subdivision B of the Act and is concerned with weekly payments of compensation based upon "normal weekly earnings". Paragraph 11 of the Statement of Claim sought not only the resumption of weekly payments from the date of cancellation, but also an order "that the Worker be entitled from [the date of cancellation] to such other benefits, including treatment and rehabilitation expenses as may arise." The Magistrate was of the view that benefits were being claimed other than pursuant to subdivision B of Div 3:

> "Benefits are being claimed other than from subdivision B of Division 3 of Part V (for example from subdivision D of Division 3 and from Division 4)."

[20] Subdivision D of Division 3 is concerned with compensation for medical, surgical and rehabilitation treatment etc. Division 4 relates to rehabilitation and other compensation. Included in Division 4 is section 78 which

provides that in addition to any other compensation payable under Part V, an employer shall pay to a worker who suffers or is likely to suffer a permanent or long-term incapacity such expenses incurred by the worker for home and vehicle modifications and household and attendant care services "as are reasonable and necessary for the purpose of this Division".

[21] A similar pleading situation existed in *Disability Services of Central Australia v Regan* (1998) 8 NTLR 73. In a judgment with which Thomas and Priestley JJ agreed, Mildren J set out the facts as follows (75):

> "On 8 February 1996, the worker purported to appeal the employer's decisions to cancel her worker's compensation payments. However it is submitted by counsel for the appellant that the application to the Work Health Court went beyond a mere appeal. In the application, the worker alleged that – 'As a result of the injuries sustained in the course of her employment with the Employer, the Worker has been totally incapacitated for work since February 1994', or alternatively that 'the Worker has been partially incapacitated for work since February 1994', and sought reinstatement of her weekly compensation benefits 'from the date of cessation of payments in February 1995 to date and to continue in accordance with the *Work Health Act*,' as well as reinstatement of her other benefits under the Act. The employer, in its answer, denied these allegations and in particular denied – ' …that the Worker has suffered from any incapacity at all as a result of any injury arising out of or in the course of her employment with the Employer at any time' and sought reimbursement for all payments made. At the hearing, counsel for the worker submitted that the employer's answer raised issues which went beyond the Form 5 notice and that the employer was precluded from agitating those matters. The learned Chief Stipendiary Magistrate, Mr Gray CSM, did not rule on that point until judgment was delivered. His Worship concluded that the issues raised by the worker went beyond a mere appeal, and that therefore the employer was not confined to the grounds stated in the Form 5 notice, and could rely upon all of the matters pleaded in its answer.
>
> On appeal, Angel J held that his Worship was in error, and that if the employer wished to raise the whole issue of liability to be reopened

> it should have brought a substantial application under s104 of the Act. His Honour applied *Wormald International (Aust) Pty Ltd v Barry Leslie Aherne* (21/6/94, Mildren J, unreported) in which it was said that an employer was not entitled in proceedings by way of appeal under s 69 to rely on grounds other than those contained in the Form 5 notice. After considering the provisions of the Act and the decision of this Court in *Schell v Northern Territory Football League* (1995) 5 NTLR 1, his Honour concluded that the employer could either cancel payments under s 69 or bring a substantive application under s 104, but not both, and that if it had wished to challenge whether there was ever an injury at all, it should have proceeded with a substantive application and could not raise that issue in the answer to the worker's application."

[22] Against the background of those facts, Mildren J observed that had the worker merely appealed under s 69, the only question would have been whether the employer had established grounds stated in the notice of cancellation, but the worker's claim as pleaded was not so confined (75 – 76):

> "With respect, this overlooks the employer's submission that the worker had not confined her application to an appeal under s 69, but had widened the scope of the issues by her own pleadings. Had the worker merely appealed under s 69, the only question would have been whether the employer had established the grounds stated in the notice, the burden of proof in so doing resting with the employer. If the employer failed to establish these grounds, the effect of allowing the appeal would be that the employer would be required by force of s 69 to continue to make weekly payments of compensation until the employer was lawfully permitted to cease or reduce those payments, either by giving a fresh notice or by making a substantive application under s 104. No question would have arisen as to whether or not, after the date of the notice, the worker had ceased to be incapacitated or was only partially incapacitated. An appeal under s 69 calls into question only whether there has been a change in circumstances justifying the action unilaterally taken by the employer at the time the notice was given: see *Morrissey v Conaust Ltd* (1991) 1 NTLR 183 at 189; *AAT Kin's Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 189. Consequently the submission of counsel for the appellant was that the worker, by seeking orders for weekly compensation from the date of cessation of payments to date and continuing, broadened the

> scope of the issues to include the question of the worker's entitlements from the date of the Form 5 notice to the date of the hearing. Moreover, s 69 (and appeals under that section) relate only to the reduction or cancellation of weekly payments: see the opening words of s 69(1) which refer to 'an amount of compensation under this Subdivision.' The employer is not required to give a notice under that section to stop making payments under s 78 which is in a different subdivision of the Act. Clearly the worker's claim sought reinstatement of benefits payable under that section. In those circumstances the employer was no longer confined to the grounds stated in the Form 5 notice, but could raise by way of answer any other ground to resist the claim it wished, including whether there was ever any injury in the first place."

[23] As in *Disability Services v Regan*, the appellant's pleadings sought not only that the appeal against cancellation of payments under s 69 be upheld, but also that from 14 June 2002 the worker be entitled to other benefits payable under different sections of the Act. That pleading widened the scope of the appeal.

[24] In addition to the pleading relied upon by the Magistrate, counsel for the respondent referred to para 3 of the Statement of Claim which pleaded injuries different from the injury identified by the appellant in the original claim. In the notice of claim to the respondent dated 5 April 2001 (Exhibit E2) the appellant described the injury as "Extreme Stress". In para 3 of the Statement of Claim the appellant pleaded that the original work-related injury was "an adjustment disorder with anxiety". The pleading continued:

> "[The appellant] suffered and continues to suffer stress-related systems associated with such a disorder which has become chronic. Additionally he suffers from a superimposed major depressive [disorder] on an intermittent basis."

[25] By his pleading, the appellant asserted not only that the symptoms of the work related injury had become chronic, but that he had subsequently suffered a different injury. The pleaded injuries were different from the injury that was the basis of the claim for compensation and in respect of which the respondent had accepted liability and made weekly payments of compensation. The pleading amounted to an assertion that the appellant continued to be incapacitated by reason of injuries different from the original injury suffered on 27 February 2001.

[26] The appellant having chosen to plead a case beyond the cancellation of payments pursuant to s 69, the respondent through its pleading defended the claim on a wider basis including the complete answer that any injury suffered by the appellant was not a compensable injury because it was suffered as a result of reasonable administrative action. That answer was filed on 28 July 2005 and it was not until 26 August 2005, three days before the commencement of the hearing, that the appellant filed a reply objecting to the pleading of matters not relevant to the notice of cancellation pursuant to s 69.

[27] In these circumstances, putting aside the effect of the Counterclaim, when faced with a dispute as to the scope of the appeal there were two courses open to the Magistrate. Her Honour could have confined the appeal solely to issues arising under s 69 or she could have permitted the respondent to agitate wider issues. Whichever course her Honour followed, the party adversely affected by the ruling could have accepted the ruling or made

other applications. For example, the respondent might have sought an adjournment in order to bring a substantive application under s 104 seeking a determination that any injury suffered by the appellant was non-compensable. On the other hand, the appellant could have sought an adjournment to prepare to meet the wider case. Of course, on the assumption that the Counterclaim was validly before her Honour, this discussion is academic, but it demonstrates that options were reasonably open to the Magistrate and, whichever option her Honour chose, the decision would not have amounted to an error of law.

[28] There was material capable of supporting the decision that her Honour ultimately reached. In those circumstances, as no error of law was involved, grounds 1 and 2 must fail. Even if it could be said that a question of law was involved, for the reasons I have given in my view the Magistrate reached the correct conclusion.

Grounds 3 – 5

[29] In connection with the issues concerning the Counterclaim and r 9.05 of the Work Health Rules, grounds 3 – 5 assert that the Magistrate erred in law as follows:

(i) In entertaining the respondent's counterclaim "as if it were in the nature of an application for substantive relief under s 104" of the Act.

(ii) In failing to find that in the absence of a substantive application under s 104, the respondent was not at liberty to ventilate any

issue beyond the "appropriateness" of the notice pursuant to s 69 to cancel weekly payments.

(iii) In failing to find that the respondent's "purported counterclaim" was not able to be used as a vehicle to ventilate issues extraneous to the question of the notice pursuant to s 69 to cancel the weekly payments.

(iv) In failing to find that Rule 9.05 of the Work Health Rules "was invalidly enacted".

[30] The Work Health Court was established by s 93 of the Act. The essential powers of the Court are prescribed by s 94:

"**94. Powers of Court**

(1) The Court has power to hear and determine –

(a) claims for compensation under Part V and all matters and questions incidental to or arising out of such claims; and

(b) all other matters required or permitted by this Act to be referred to the Court for determination,

and such other powers as are conferred on it by or under this or any other Act.

(2) The Court may expand or abridge a time prescribed by or under this Part as it thinks fit."

[31] In addition to the essential powers found in s 94, incidental powers necessary for the conduct of proceedings are conferred by s 97 such as the power to summon and examine witnesses and cause production of documents.

[32] Section 95 provides that the Chief Magistrate may make rules and give practice directions. As there is a challenge to the validity of Rule 9.05 of the Work Health Rules, it is appropriate to set out the terms of s 95:

> "**95. Rules and procedures**
>
> (1) The Chief Magistrate, within the meaning of the *Magistrates Act*, may make such rules and give such practice directions, not inconsistent with this Part –
>
> (a) regulating the practice and procedures of the Court, including the practice and procedures to be followed in the registry;
>
> (b) regulating and prescribing the awarding, scales and taxation of costs (including disbursements and witnesses' expenses); and
>
> (c) regulating and prescribing all matters and things incidental or relating to any such practice or procedure or to such costs,
>
> as are necessary or convenient to be prescribed for the conduct of the business of the Court.
>
> (2) An amount provided in respect of a matter in a scale of costs in the Rules shall not exceed an amount prescribed as costs in respect of the same or a similar matter under the *Supreme Court Act*.
>
> (3) The Rules may impose or confer on the Registrar functions and powers in relation to the Court and proceedings before the Court and the Registrar shall perform those functions and may exercise those powers accordingly.
>
> (4) Subject to this Part, the practice and procedures of the Court in relation to a matter within its jurisdiction are in the discretion of the Court."

[33] Section 104 governs the commencement of proceedings for "the recovery of compensation" or "an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation" under Part V of the Act.

[34] The commencement of proceedings pursuant to s 104 is subject to the requirement in s 103J that "a claimant is not entitled to commence proceedings" under s 104 in respect of a dispute unless there has been an attempt to resolve the dispute by mediation and that attempt has been unsuccessful. A "claimant" is defined as a person "claiming or being paid compensation". Section 103J does not apply to an employer.

[35] Finally, it is appropriate to refer to s 110A which provides that the procedure in respect of proceedings commenced under s 104 is, subject to the Act, Regulations, Rules and practice directions, within the discretion of the Court. Section 110A(2) states that the proceedings shall be conducted with as little formality and technicality "as the requirements of this Act and a proper consideration of the matter permits".

Validity of Rule 9.05

[36] Rule 9.05 is one of a number of rules dealing with the form of pleadings, including r 8 which is the general rule governing the content and form of pleadings. Rule 8.02(1) authorises a party to include in a pleading a "counterclaim against any other party to the proceeding". In a plain indication that one of the purposes of the rules is to enable the Work Health

Court to determine all issues between the parties in the one proceeding, r 8.02(2) provides as follows:

> "(2) To enable the Court to determine all issues in dispute, a party may plead additional facts or matters to those raised in an application, an appearance or a decision made under section 69, 85 or 86 of the Act."

[37] Part 9 of the Rules is specifically directed to the pleadings by way of statement of claim, notice of defence and counterclaim. Division 1 containing r 9.01 relates to statements of claim and the information required in that pleading. Rule 9.03 and r 9.04 direct that a party served with a statement of claim must file and serve a notice of defence which is to be in accordance with the prescribed form and to contain "a concise statement of the defence or defences relied on" and "particulars of each defence". The relevant form instructs that the party defending the claim "must insert all the material allegations of fact (but not the evidence)" on which the party relies in defending the claim and making the counterclaim (if applicable).

[38] Rule 9.05 has been in operation since 1 August 1999 and provides for pleading by way of counterclaim:

> "**9.05 Counterclaim**
>
> (1) If –
>
> (a) an employer served with a statement of claim has a claim against the worker; or

(b) a respondent served with a statement of claim has a claim against the applicant,

he or she may counterclaim in the proceeding by completing the part of the notice of defence that relates to a counterclaim.

(2) A counterclaim is to contain –

(a) a concise statement of the nature of the claim;

(b) particulars of the claim; and

(c) a statement of the relief or remedy sought.

(3) The pleadings in a counterclaim are to comply with Part 8 but a failure to comply does not invalidate the counterclaim.

(4) These Rules apply to and in relation to a counterclaim as if –

(a) a reference in these Rules to a party who is the employer or respondent were a reference to the worker or applicant; and

(b) a reference in these Rules to a party who is the worker or applicant were a reference to the employer or respondent."

[39] The essence of the appellant's submission as to the invalidity of r 9.05 was set out in the written outline of submissions in the following terms:

> "The rule making power is to be found in s 95 of the Act. Rule 9.05.02 is inconsistent with the legislative scheme and impinges upon a substantive right to a degree that fails the 'reasonable proportionality' test of validity. See discussion in *Taylor v Guttilla* (1992) 59 SASR 361 at pp 366 – 368 per King CJ. The remarks of Mildren J in *Disability Services v Regan* (1998) 8 NTLR 73 at p 78 are obiter and the decision is distinguishable on its facts."

[40] At the time that *Disability Services* was decided, there was no provision in the Rules for a filing of a counterclaim. The Court of Appeal made a suggestion that the deficiency should be rectified (78):

> "Before leaving this appeal, it is desirable to mention briefly two other matters which were raised in argument ……. The second matter is that the Work Health Court Rules 1987 (NT) do not contemplate, and made no specific provision for, a counterclaim. In this case, the appellant sought in its answer to recover payments of compensation already made. The learned Chief Stipendiary Magistrate, although finding for the employer, did not consider this claim. This is not the subject of complaint here, but it illustrates a weakness in the Work Health Court Rules 1987 (NT) which perhaps should be addressed. It is understandable that, in proceedings in the Work Health Court, the parties will usually wish to litigate all outstanding issues. An employer who has served a s 69 notice, may subsequently decide after the employer has appealed, that the issues to be decided upon the appeal are too narrowly confined. At present, if the employer is in this position, the employer can bring its own substantive application and apply to have the two applications heard together. It may simplify hearings procedurally and focus proper attention on who bears the onus of proof if the Rules were amended to permit the employer to raise new issues by way of counterclaim."

[41] It is evident that the Court in *Disability Services* did not consider that rules providing for the filing of a counterclaim would be beyond the rule-making power found in s 95. However, that specific issue was not argued.

[42] I am unable to discern any reason why Rule 9.05 is invalid. A counterclaim is a recognised form of pleading which enables all outstanding issues between the parties to be raised in the one set of proceedings, including any claim that a respondent might assert against a plaintiff as opposed to merely a defence to the plaintiff's claim. A counterclaim is precisely the type of procedure contemplated by s 95.

[43] There is nothing in the terms of s 69 or any other provision of the Act which would exclude from the rule-making power in s 95 a power to make rules providing for the filing of a counterclaim in order to ensure that all outstanding issues between the parties are aired and determined in the one set of proceedings. Nor is the provision for a counterclaim and disposal of all outstanding disputes in the one proceeding precluded by the legislative scheme. Such provision in the Rules does not undermine any purpose of the legislative scheme.

[44] Counsel for the appellant referred to the decision of the South Australian Full Court in *Taylor v Guttilla* (1992) 59 SASR 361. The Court was concerned with a Local Court Rule which provided that each party deliver to any other party a full and true copy of every medical report received by the party or the party's solicitor relating to any injury or illness referred to in the pleadings upon which medical evidence might be relevant. The Court held that the rule was ultra vires the rule-making power because it destroyed the substantive right of legal professional privilege.

[45] In the course of his judgment, King CJ made the following observations (365):

> "It is necessary to determine the true character of the Rules. If, properly understood, it complies with the description of the authorised subordinate legislation, it is within power. It is therefore, as the Court held in *Cleland v Boynes*, a problem of characterisation. Subordinate legislation cannot, in the absence of express statutory power, repeal or amend a statute but, subject to that, *if the Rule under consideration is properly characterised as one regulating pleading practice or procedure, there is no reason in principle why*

> *the fact that it affects incidentally a legal right which would otherwise exist, should result in invalidity.*" (my emphasis).

[46] King CJ noted that the existence of effect upon substantive rights is "not necessarily determinative of validity" (366) and identified the "difficulty in any particular case" as determining "whether the Rule has passed so far into the field of substantive law as to have lost its procedural character".

His Honour continued (367):

> "The criterion for judging whether intrusion into substantive law or effect on substantive rights has deprived a Rule of its ex facie procedural character, which will be found most useful in the generality of cases, is that of proportionality."

His Honour then cited the following passage from the joint judgment of Wilson, Dawson, Toohey and Gaudron JJ in *South Australia v Tanner* (1989) 166 CLR 161 at 165:

> "In the course of argument, the parties accepted the reasonable proportionality test of validity (cf Deane J in *Commonwealth v Tasmania* (the Tasmanian dam case)), namely, whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose."

[47] Ultimately, King CJ concluded that the rule "directly abrogated" legal professional privilege with respect to a wide class of documents "disengaged from any connection which they might have with evidence to be given in the case" (367). His Honour classified the rule as amounting to an "invasion of the substantive right" which was "direct and substantial" (368). In those circumstances, King CJ was of the view that the rule could not be regarded

as "reasonably proportionate to the pursuit of the enabling purpose, namely the regulation of pleading practice or procedure" (368).

[48] Pressed to identify a substantive right adversely affected by r 9.05, counsel for the appellant was unable to identify any such right other than what he described as a "right to mediation" pursuant to s 103J. As I have said, that section provides that a "claimant" is not entitled to commence proceedings under Div 2 in respect of a dispute unless there has been an unsuccessful attempt to resolve the dispute by mediation. Section 103J is a procedural provision which requires the parties to undertake mediation before a worker is entitled to commence proceedings, including an appeal against a cancellation of payments pursuant to s 69. That mediation occurred. Assuming that s 103J confers a substantive right for present purposes, an assumption of doubtful validity, r 9.05 does not adversely affect that right. Rule 9.05 operates after the unsuccessful mediation and after the commencement of the proceedings at a stage in the proceedings when the operation of s 103J is spent and it has no application.

[49] Rule 9.05 is a procedural rule of the type contemplated by s 95. It does not impinge upon a substantive right and is "reasonably proportionate to the pursuit of the enabling purpose, namely the regulation of pleading practice or procedure".

Characterisation of Counterclaim

[50] In association with the general complaint that the Magistrate erred in entertaining the Counterclaim, the appellant submitted that the respondent's pleading "was neither a substantive claim pursuant to section 104 of the Act nor a true counterclaim". In essence the appellant contended that the pleading consisted only of denials and operated only as a defence. According to this contention, the pleading sets out no claim in substance and seeks only a declaration which is not a substantive remedy or relief.

[51] Rule 1.08 defines a counterclaim as "meaning a claim in a proceeding" by an employer against a worker or by a respondent against an applicant. Rule 9.05(2) provides that a counterclaim is to contain a concise statement of the nature of the claim, particulars of the claim and a statement of the relief or remedy sought.

[52] The "Notice" of Defence and Counterclaim filed by the respondent denied that the appellant suffered the injuries pleaded in para 3 of the Statement of Claim and, in the alternative, asserted that if the appellant suffered an injury it arose as a result of reasonable administrative action. A number of other assertions of fact were pleaded. In para 10 the respondent denied that the appellant was entitled to any compensation. In para 11 the respondent identified that it was seeking "the following declarations and orders". In substance the "relief or remedy" that the respondent sought was pleaded, namely, a determination that if the appellant suffered a mental injury it was the result of reasonable administrative or disciplinary action on behalf of the

respondent and was, therefore, not a compensable injury. This was a claim by the respondent against the appellant and the remedy sought was relief from the liability to pay compensation to the appellant.

[53] The fundamental purpose of pleadings is to assist in the fair and efficient administration of justice. By it's pleading, the respondent plainly identified the issues in dispute and the material facts upon which it relied. The pleading also plainly identified that for reasons specified in the pleading, independently of the questions arising under s 69, the respondent sought a determination that it was not liable to make payments of compensation. The respondent advanced a substantive claim which could stand on its own and which was properly placed before the Court by way of counterclaim. In addition, whether the "Notice" is viewed as a defence or counterclaim or both, it was more than adequate for the purposes of raising the issues in dispute and identifying the material facts on which the respondent relied and the remedy sought. This complaint flies in the face of s 110A(2) by endeavouring to rely upon a technicality. Independently of s 110A(2), the complaint is devoid of merit.

Ground 6

[54] Ground 6 complains that the Magistrate erred in law in finding that there was jurisdiction to make a declaration. By par 11.iv of the Defence and Counterclaim the respondent sought a "declaration that if the Worker had suffered a mental injury that such injury is as a result of reasonable

administrative or disciplinary action on behalf of the Employer and is therefore not a compensable injury pursuant to the provisions of the Work Health Act". The employer also sought declarations that the worker had not been partially or totally incapacitated for employment since 14 May 2002 and that the worker was fit to return to his pre-injury employment and had been fit to return to that employment since 14 May 2002.

[55] The Magistrate was of the view that the respondent was seeking "an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under [Part V]" of the Act: s 104. Her Honour found that there was no distinction between a ruling and a declaration.

[56] In substance, counsel for the appellant submitted that the Work Health Court has no jurisdiction to grant declaratory relief or relief of the type sought in par 11 of the Defence and Counterclaim because there is no provision in the Act conferring such a jurisdiction. Counsel contrasted that s 14(8) of the Local Court Act which specifically provides that the Local Court may "make a binding declaration of the rights of the party or parties of the claim".

[57] It is unnecessary to decide whether, as a matter of law, the Work Health Court possesses the necessary jurisdiction to make a "declaration". The Magistrate made a finding that the injury was the result of reasonable administrative action and was not compensable. As a consequence, her Honour ordered that the appellant's appeal against the cancellation of weekly payments be dismissed. The Magistrate acted within jurisdiction.

Counsel for the appellant acknowledged during submissions that the issue was of no practical consequence.

Ground 7

[58] Ground 7 is a complaint that the appellant was denied natural justice:

> "The learned Magistrate erred in law in failing to rule on the objections of the appellant's counsel to the evidence sought to be led by the respondent on matters outside the scope of the respondent's s 69(1) notice before embarking on the taking of such evidence and the determination of those matters, thereby failing to afford the appellant natural justice in the conduct of the hearing."

[59] In the written outline of submissions, the appellant's contention was expressed in the following terms:

> "By reserving her decision on these jurisdictional questions and relevance and admissibility of evidence until the conclusion of the taking of the evidence in the cause, the learned Magistrate effectively denied the worker a fair hearing.
>
> Further, the evidence that was taken was, in consequence of this flawed process, palpably incomplete and incapable of providing a sound platform for the making of findings on questions falling outside the issue of the appropriateness of the s 69 notice of cessation of payments."

[60] As I have said, following submissions at the outset of the hearing the Magistrate indicated she was not in a position to make a ruling as to the scope of the appeal and determined that she would hear the evidence subject to the objection. Notwithstanding the possibility that the Magistrate might find that the pleadings went beyond the cancellation of payments pursuant to s 69 and enabled the respondent to resist the appeal on grounds unrelated to

s 69, including the ground that the injury was not a compensable injury, counsel for the appellant made a forensic choice not to cross-examine the respondent's witnesses with respect to the wider issues.

[61] In addition to the question of whether the appellant's pleadings went beyond cancellation of payments pursuant to s 69, the appellant faced the difficulty that r 9.05 permitted the respondent to file a counterclaim. The appellant objected to the counterclaim on the basis that r 9.05 was not a valid rule and also on the basis that the Notice of Defence and Counterclaim did not, in its content, amount to a counterclaim and could not used as the vehicle to ventilate the wider issues. If those objections failed, regardless of any question of widening the issues under s 69, the respondent was entitled to advance answers to the appeal as set out in the Defence and Counterclaim.

[62] Faced with these difficulties, it was open to counsel for the appellant either to proceed in the manner chosen or to request rulings on the objections either before any evidence was called or, at the latest, at the conclusion of the evidence for the respondent. The former course was chosen. Had the latter course been chosen, and rulings given, the appellant could have determined whether he wished to cross-examine the respondent's witnesses with respect to the wider issues and call evidence. If the appellant felt that he was prejudiced because of a lack of opportunity to prepare to meet the wider issues, the appellant could have sought an adjournment for that purpose.

[63] In these circumstances, it cannot be said that the appellant was denied natural justice in the sense that because the Magistrate reserved her decision on "jurisdictional questions and relevance and admissibility of evidence until the conclusion of the taking of the evidence", the learned Magistrate "effectively denied the worker a fair hearing". It was within the hands of counsel to seek rulings or an adjournment or both, but counsel made a forensic choice not to do so.

Ground 8

[64] Ground 8 is a complaint that the Magistrate "erred in law" in admitting evidence that was not relevant to the proceedings and in using that inadmissible evidence as the basis for her Honour's decision that the injury suffered was not compensable under the Act. This ground necessarily fails as it is based upon the contention that the Magistrate erred in entertaining issues other than the cancellation pursuant to s 69.

Grounds 9 - 12

[65] Grounds 9 – 12 challenge the finding of the Magistrate that the appellant's injury was not a compensable injury under the Act because the injury was the result of the respondent's reasonable administrative action. That essential complaint is accompanied by assertions in grounds 10 and 11 that the Magistrate "erred in law" in failing to take into account evidence "which established that the appellant had suffered an injury arising out of or in the course of employment" and "the medical evidence in the context of whether

the disability was an injury within the meaning of s 3 of the Act". Those assertions found in grounds 10 and 11 do not raise matters of law and are utterly without substance. The Magistrate plainly had regard to all of the evidence.

[66] Ground 12 specifically asserts that the Magistrate "erred in law in failing to consider whether the disability arose out of or in the course of employment other than as a reasonable administrative action taken in connection with the worker's employment". Again, this ground does not involve a question of law and is totally devoid of merit. The Magistrate plainly considered all of the relevant issues.

Ground 9

[67] For present purposes, the relevant part of the definition of "injury" in s 3 of the Act is as follows:

> "injury" in relation to a worker, means a physical or mental injury arising … out of or in the course of [a worker's] employment
>
> …
>
> But does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment."

[68] In substance, the appellant contended that although the conduct of Mr Swan in informing the appellant of the allegations was reasonable and amounted to

an administrative action, the evidence did not support a finding that the injury was "the result of" such conduct or action. The appellant submitted:

> "The only finding open on the evidence as to the cause of the mental injury was the making of the allegations by the girls. It was the fact that the allegation was made and the nature of it; not the conduct of the messenger which gave rise to a compensable injury".

[69] The Magistrate considered the evidence of the various witnesses at some length. Her Honour noted that the appellant's Work Health Claim Form made "a direct link between the injury and the meeting that he had with Mr Swan on 27 February 2001 at approximately 10.15 am". That date and time was the occasion on which the appellant claimed that the injury occurred. Her Honour drew the following conclusion:

> "[While the] unsubstantiated allegations were the catalyst for the meeting, these are not said [in the claim form] to be the reason for the injury. The worker links the meeting time with the onset of the injury".

[70] Later in her reasons her Honour again referred to the appellant nominating the time of the injury as the time of the meeting with Mr Swan:

> "The time nominated by the worker that the injury was sustained was the time of the meeting with Mr Swan. Not only is this clear in exhibit E2, it is evident throughout the accounts given by the worker set out in the medical reports which are before me."

[71] Her Honour's ultimate conclusion was expressed in the following terms:

> "[71] The material that I have before me satisfies me that the worker did suffer a mental injury as a result of the meeting he had with Mr Swan. I cannot be satisfied that the injury manifested itself at the time of the meeting as asserted in E2. The worker did

> not demonstrate any symptoms of a mental injury which, on the evidence I have before me, was witnessed by Mr Swan. Mr Swan said that the worker said 'Thank you for letting me know', and then left the office. I am satisfied that the symptoms later manifested themselves and a mental injury was suffered."

[72] In considering the distinction drawn by counsel for the appellant between imparting the information and the fact of the allegations, it is appropriate to have regard to the appellant's pleadings. Paragraph 3 of the Statement of Claim pleaded:

> "*As a result of being informed of the allegation,* the worker suffered a work-related injury, namely, an adjustment disorder with anxiety …". (my emphasis)

[73] As I have said, the appellant did not give evidence. The Magistrate had before her the appellant's written notification of injury and claim for compensation signed by the appellant on 5 April 2001 (exhibit E2). In that form, the appellant recorded that the injury happened at "approximately 10.15 am" on 27 February 2001. He also nominated that time as the time at which the injury was reported to the assistant principal, Mr Swan, and as the time he stopped work. These entries were a clear reference to the meeting between the appellant and the assistant principal at which the appellant was informed of the information received by the assistant principal.

[74] In the claim form, the appellant described the incidents giving rise to the injury in the following terms:

> "I was teaching Ballroom Dancing to year 8 students in our school Hall. I suffered extreme emotional stress after accusation by three

> students of sexual harassment. Fortunately I was team teaching with another teacher otherwise this incident could have been much worse."

[75] The appellant was seen by a psychiatrist, Dr Timney, on 14 May 2002. In a report dated 20 May 2002, Dr Timney reported the following description given by the appellant:

> "Mr Swanson stated that, on 27 February 2001, he was called into the assistant principal's office at the Anzac Hill High School in Alice Springs and informed that three Year 8 students had made allegations about his conduct during a ballroom dancing lesson. Two students had apparently felt uncomfortable with the way they had been touched on the shoulder and a third student had complained that Mr Swanson had looked at her breasts.
>
> Mr Swanson said that these allegations had shocked and surprised him. He felt nervous and anxious when told of them and shortly afterwards became tearful and distressed.
>
> He discussed the allegations with another teacher, who advised him to go on 'stress leave' immediately and lodge a worker's compensation claim."

[76] According to Dr Timney, the appellant described his anxiety-based symptoms which included "preoccupation with thoughts about the allegations and a sense of outrage and embarrassment, with complaints of loss of self-esteem and self-worth". Dr Timney reported that the appellant "admitted to still feeling distressed when reminded of this incident, eg having to return for an independent medical review has made him recall what happened and this continues to raise issues of anger and resentment".

[77] Dr Timney expressed the view that the appellant initially suffered from a work-related injury, namely, an Adjustment Disorder with anxious mood. He was of the view that on 14 May 2002 the appellant was symptom free, but that he felt strongly about the allegations and what had happened.

[78] In oral evidence, Dr Timney described an Adjustment Disorder as "an identifiable range of psychiatric symptoms that follows on from a specific stressor". He described the stressor in the case of the appellant as "the allegation of misconduct within the workplace". In explaining the basis of his conclusion that the condition lasted for a maximum of six months, Dr Timney spoke of the range of symptoms experienced by the appellant, "particularly the anxious preoccupation with the events of being told about the allegations …". Later Dr Timney described the "original complaint" as "obviously serious and upsetting" for the appellant.

[79] During cross-examination, Dr Timney was asked about his diagnosis in comparison with that of Dr Brown. In the course of discussing the distinction between the respective diagnoses, Dr Timney said:

> "My diagnosis is that there was an initial period where has (sic) emotional distress of the circumstances of being told about the allegation, it produced an identifiable set of symptoms that met the threshold for the diagnosis of Adjustment Disorder … ."

[80] Dr Brown is also a psychiatrist. He saw the appellant on 8 December of 2003 and provided a report of the same date (exhibit E9). As to the history given to him by the appellant, Dr Brown reported as follows:

"Mr Swanson was teaching at Anzac Hill High School and had liked being a teacher but he was concerned about not being able to teach his subjects. (I note from the report of Mr P Lehmann that he had previously submitted two transfer requests which had been declined.)

Mr Swanson said that on 27 February 2001 he was called to the office of the Assistant Principal, Mr P Swan and was told that three female students had made allegations of improper conduct against him.

He said that Mr Swan then read him three 'evil' letters. 'These have destroyed me. He did not show me then!' One said that he looked at her breasts and the other two said that he touched them on the right shoulder. This had occurred when he was teaching ballroom dancing.

He said that he was professional and he was following the dance moves. Two of the girls did not want to dance with him and a female teacher danced with them. 'I don't think that I touched them. They did not allow me to dance!'

He said that normally he absorbs pressure but it builds up and then all of a sudden he lets it out. 'I exploded. I cried. I left. I have never been back since. I have never taught since!' He said that he was distraught and angry at the allegations. He had never had such a complaint before. It caused him to lose his self-confidence and self-esteem. He had been proud of his professional standing.

He said that Mr Swan lied to him. He knows this as before he read the letters he 'laughed sarcastically at me!' He had subsequently apologised to him and said he made a bad mistake but Mr Swanson did not believe him he had been sarcastic.

He said that he then had a 'big time' breakdown. It was like a volcano erupting in him. He said that he became too anxious to return to the school. He was very angry at how the allegations were managed and that the Principal did not show him any support. He was so angry that he had trouble talking about it. He felt that he could not face being in such a situation again. He could not trust teaching teenagers or the school's management. He believed that two female teachers had encouraged the students to write the letters. The Principal said that I over-reacted. 'I have a lot of anger there. I'm fed up!'."

[81] Later in his report, in discussing the diagnosis of an Adjustment Disorder and the requirement to identify precipitating stress, Dr Brown stated:

> "In Mr Swanson's case the precipitating stress was the allegations of inappropriate behaviour. His psychological symptoms were initially sustained for some months, as he was angry at the allegations and how the school handled them."

[82] Under the heading "Specific Questions", Dr Brown was asked to consider the "triggering event of Mr Swanson being unable to work". Dr Brown reported in the following terms:

> "Mr Swanson believes that the school was not supportive of him and that the students were encouraged to complain and that the Assistant Principal was sarcastic. He said that he could never teach teenagers again, as he could have no confidence that such false allegations would not recur. The triggering event was thus the students' allegations. However, this may well have provided an opportunity for him to leave teaching, as he was resentful of the Department of Education prior to the allegations. Only Mr Swanson knows the real triggering event."

[83] In oral evidence, Dr Brown was asked about the "triggering event":

> "Q. Now you go on to say that – you go on to say [in the report exhibit E9], 'The triggering event was thus the students' allegations,' and you go on to say, 'However this may well have provided an opportunity for him to leave teaching'. Now the triggering event being the allegations, was that the event of the allegations being relayed to him by a senior teacher?
>
> A. Yes, by the principal.
>
> Q. The fact that he was taken to that person's office and told of the allegations in – set out in the letters or at least documents completed by the students?

A. Yes, I understand that there were three complaints that he was – I don't think he was shown them, I think it was read to him or something like that.

Q. And it's that event that you refer to as the trigger: is that right?

A. Yes. Yes. Because he was working prior to that."

[84] Cross-examination then commenced and, after initial difficulty of hearing, and referring back to the commencement of his cross-examination, counsel took up the question of the "trigger":

"Q It was touching on the very matter that was just being discussed and I was putting to you that it was the fact that the allegations were made rather than when they were made or by whom they were made that was the triggering event, wasn't it?

A. The – yeah, being informed of allegations was the trigger of the events.

Q. Yes?

A. Like no allegations, no (inaudible).

Q. So you attached no particular significance in your identity of the triggering event to the place or the exact time or anything of that sort? It was really just the substance of the – substance of the allegations that were made that was the triggering event?

A. Well anything has relevance. It was made by a principal who probably expected to be (inaudible) to you by a principal. If it was made in a very threatening or angry manner well that would have some – some relevance. Obviously if it was done in a – he said it was done in – he interpreted it as being done in a sarcastic manner. That would have some relevance.

Q. So?

A. The allegations were the main issue. That these allegations that he had in fact looked at – some sort of sexual harassment, I suppose, looking at a girl and touching the girl, of a serious – a serious import.

Q. That was the main?

A. Yes, that's what I thought, but obviously the second part of that was – also had some (inaudible)."

[85] In re-examination, Dr Brown was asked about an answer in which he spoke of symptoms "sustained by anger at what had occurred". Asked what he meant by anger at "what had occurred", Dr Brown answered:

> "The anger that he'd been accused of (inaudible) sexual harassment of three girls. The anger that it had been investigated rather than his word was accepted. The anger at the subsequent rehabilitation plans which he had and there was anger, I think, that he couldn't continue to work in the Department of Information as well on a rehab plan."

[86] In the light of the evidence to which I have referred, the Magistrate was required to determine whether the respondent had proved that the injury was suffered by the appellant "as a result of" reasonable administrative action taken in connection with the appellant's employment. The respondent was required to prove that the injury "was the result of" the actions of the vice-principal in asking the appellant to attend at the vice-principal's office, informing the appellant of the fact of the allegations and content, discussing how the appellant should respond and advising the appellant that no action would be taken by the school. In this context the challenge to the finding of the Magistrate necessarily gives rise to consideration of the meaning of the phrase "as a result of" as that phrase is used in s 3.

[87] Counsel for the appellant contended that the phrase should be read as meaning "caused", but not in accord with the way in which the concept of causation is generally understood having regard to the decision of the High Court in *March v Stramare* (1991) 171 CLR 506 and other like authorities. Acknowledging that, speaking generally, a single cause amongst multiple causes can often satisfy the test of causation, counsel observed that the adoption of the test of causation in *March v Stramare* would be adverse to a worker because it would deny a worker compensation if reasonable administrative action was one of a number of causes, but nevertheless satisfied that general test of causation. Counsel urged that given the beneficial nature of the legislative scheme, a stricter construction should be favoured to the extent that the reasonable administrative action must be the sole, or at least the predominant, cause of the injury. There must be no other significant cause of the injury. This construction, it was said, would promote the purposes of the Act and the legislative scheme.

[88] The alternative view advanced by counsel for the respondent was that the phrase simply means what it says or, to use another form of words, means "as a consequence of". If the result of the meeting with the appellant was the onset of an injury in the form of stress and an anxiety disorder, the injury was a result of the reasonable administrative action and it matters not that the fact of the allegations might also be an operating cause of the injury.

[89] The starting point for the construction of the definition of "injury" is the ordinary and natural meaning of the words in the context in which they are used. It is appropriate to bear in mind the observations of Heydon J in *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at [33]:

> "[33] To begin consideration of issues of construction by positing that a 'liberal', 'broad', or 'narrow' construction will be given tends to obscure the essential question, that of determining the meaning the relevant words used require."

[90] The phrase "as a result of" is not a technical phrase. It is a phrase of ordinary English language which the wider community, untroubled by legal concepts of causation, would not regard as ambiguous. Consistent with the ordinary and natural meaning of the phrase as it would be understood by the wider community, "result" is defined by the Oxford English Dictionary to include the following:

- "The effect, consequence, issue or outcome of some action, process, design etc".
- "To arise as a consequence, effect, or conclusion from some action, process, etc."

[91] In the context of the New South Wales Worker's Compensation Act (1987), the phrase "results from" was considered by the New South Wales Court of Appeal in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452. Section 2(1) of the New South Wales Act provided for payment of

compensation "if the death results from an injury" and also identified the amount payable if the worker died at a specified time "as a result of such an injury".

[92] In a judgment with which Sheller and Powell JJA agreed, Kirby P discussed the meaning of the phrase "results from" under the heading "The Abiding Problem of Causation". After observing that "the courts have not spoken with an entirely clear voice" on the subject of causation, his Honour addressed the phrase "results from" (461):

> "The phrase "results from", which is the formula to be applied both under the 1926 and 1987 workers compensation statutes, involves the use of ordinary English words. Dictionaries suggest that it means "to arise as a consequence … to end or conclude in a specified manner". The expression is not a term of art. It is an ordinary English phrase. But in its application in the present context, it is appropriate to take into account the reflections of distinguished judges. Unfortunately, those reflections have not always been consistent. It is also appropriate to take into account the fact that the phrase appears in a compensation statute. Such a statute should not be construed narrowly, for it provides benefits which are extremely important to those affected. By the same token, the statute may not be construed unrealistically so as to stretch unreasonably the burdens imposed upon employers and their insurers. Those burdens require a relevant employment connection, as defined in the statutes, before compensation will be held payable."

[93] Later, Kirby P spoke of "a commonsense evaluation of the causal chain" (463 – 464):

> The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase "results from", is not now accepted. By the same token, the mere proof that certain events occurred which

> predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death "results from" a work injury. What is required is a commonsense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death "results from" the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death "resulted from" the work injury which is impugned."

[94] The judgment of Kirby P in *Kooragang Cement* has been consistently cited with approval: *Jones v Devonfield Enterprises* (1995) 5 TAS R 345; *Isley v Wattyl Australia Pty Ltd* (1997) 75 FCR 1; *Holden Pty Ltd v Walsh* (2000) 19 NSWCCR 629; *State of Tasmania v Robertson* (2001) 10 TAS R 60; *Cole v P & O Ports Ltd* [2002] WASCA 157; *McAuliffe v Comcare* [2002] FCA 769.

[95] As I have said, counsel for the appellant contended that although the phrase "results from" should receive a beneficial construction for the purposes of determining whether an injury to a worker resulted from the worker's employment such as to entitle the worker to compensation, because the phrase is used in s 3 of the Act to create an exemption from liability to pay compensation, a construction favourable to the worker should be given to

the phrase such that the exemption only applies if the reasonable administrative action is the sole or predominant cause of the injury. In my opinion, however, that construction is contrary to the ordinary and natural meaning of the words and contrary to "the meaning the relevant words used require".

[96] It is appropriate to consider the history of the definition of "injury" and the policy underlying the exemption. Prior to 1991, the definition of "injury" in the Act did not contain an exemption from liability to pay compensation where an injury sustained in the course of employment was the result of reasonable administrative action. That exception was introduced by an amendment in 1991. In the second reading speech, the Minister for Lands and Housing identified the policy of the amendment in the following terms:

> "Also, a constraint is placed on the definition of 'injury and disease' to exclude an injury or disease suffered by a worker as a result of reasonable administrative action taken in connection with his or her employment. This would ensure that managers are able to manage their workers effectively without a worker being able to take compensation leave because he or she is stressed by being disciplined for a misdemeanour or for missing out on a job promotion. This section is modelled on a similar clause in the Commonwealth Act."

[97] The legislature plainly recognised that it was putting in place a restriction on the right to compensation for injuries sustained in the workplace. It is not uncommon for beneficial legislative schemes to include express restrictions or constraints. As Heydon J observed in *Victims Compensation v Brown* in the context of a legislative scheme providing compensation for victims of crime [29]:

> "The introduction of caps and limitations upon recovery, usually justified by reference to supposed affordability, has been a relatively common feature of Australian compensation legislation in recent times."

[98] While affordability may have been an influencing factor, it appears that the legislature recognised that employers must be able to manage their businesses and employees and implement administrative and disciplinary decisions affecting their employees without unnecessarily being placed at risk of liability for compensation should an injury be suffered as a consequence of administrative or disciplinary action. However, the exemption does not apply to every act of an employer. It applies only to "administrative" and "disciplinary" acts. In addition, workers are given a degree of protection by the primary requirement that the administrative or disciplinary action be "reasonable".

[99] A construction in which the phrase is given its ordinary and natural meaning is consistent with the evident purpose of the exemption and the legislative policy underlying the exemption. Such a construction does not lead to an absurd or harsh result. If, contrary to my view, it be thought that the result would be harsh or unduly favourable to employers, as Heydon J noted in *Victims Compensation v Brown* [29]:

> "Even if it were considered harsh or anomalous, it could not be said that this would be fatal to the construction urged by [the respondent] if the text otherwise required that construction."

[100] Unless required by the facts of the appeal, it is both unnecessary and inappropriate to undertake a further analysis of the phrase "as a result of". In my opinion that phrase should be given its ordinary and natural meaning. A causal link is required between the administrative or disciplinary action and the injury, but such action does not have to be the predominant or sole cause of the injury. Whether the injury sustained by the appellant was "as a result of" the reasonable administrative action is a question of fact to be determined from the evidence applying a "commonsense evaluation of the causal chain".

[101] In my opinion, the finding of the Magistrate was correct. No doubt the fact of the allegations operated on the mind of the appellant and could be regarded as a "cause" of his injury. However, the summoning and imparting of the information was also a cause and the injury was "a result of" that reasonable administrative action. The effect or consequence of the summoning and imparting of the information was the suffering of the injury. At the least, the evidence was capable of supporting the Magistrate's conclusion and no error of law is involved.

Ground 13

[102] Ground 13 asserts that the Magistrate "erred in law in failing to make adequate findings, or give adequate reasons, in support of her decision that the worker's disability arose from reasonable administrative action on the part of the respondent". In the written outline of submissions, the bald

assertion is made that “there was a failure to give adequate reasons and this constitutes an error of law”.

[103] The Magistrate was not obliged to discuss legal issues such as the construction of the phrase “as a result of”. Her Honour dealt with the evidence at length, gave adequate reasons for her findings and applied the statutory formula. This complaint is without substance

Conclusion

[104] The appeal is dismissed. The cross appeal was not pressed and is dismissed.
