CITATION: *Prime v Colliers International (NT) Pty Ltd* [2006] NTMC 061

PARTIES:	DAVID PRIME v COLLIERS INTERNATIONAL (NT) PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20528796
DELIVERED ON:	28 June 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	25 May 2006
JUDGMENT OF:	Dr J A Lowndes

CATCHWORDS:

WORK HEALTH – SUMMARY JUDGMENT – MEDIATION AS A PRECONDITION TO COURT PROCEEDINGS – RELATIONSHIP BETWEEN s82 AND s182(1) & (3) – AMENDMENT OF PROCEEDINGS

ss82, 103J & s182(1) & (3) Work Health Act

Johnson v Paspaley Pearls Pty Ltd (1996) 5 NTLR 199 applied
Maddalozzo v Maddick (1992) 108 FLR 159 applied

REPRESENTATION:

Counsel:

Plaintiff:	Mr Morris
Defendant:	Ms Mangan

Solicitors:

Plaintiff:	Maleys
Defendant:	Lavan Legal

Judgment category classification:	A
Judgment ID number:	[2006] NTMC 061
Number of paragraphs:	24

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

No. 20528796

BETWEEN:

DAVID PRIME
Plaintiff

AND:

COLLIERS INTERNATIONAL (NT) PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 28 June 2006)

Dr LOWNDES SM:

1. On 15 May 2006 the employer filed an interlocutory application seeking summary judgment in its favour on the grounds that the worker had failed to comply with s 82(1) and (2) and s 103J of the *Work Health Act*. The application was supported by the affidavit of Kerry Robyn Wood sworn 15 May 2006. The application was brought pursuant to rule 21.02(1) (b) and (c) of the *Work Health Court Rules.*[1]

2. On 31 May 2006 the Work Health Court ordered that summary judgment be entered in favour of the employer and the worker's Statement of Claim be dismissed. On that day the Court indicated that its reasons for decision would be published in due course. Those reasons are contained herein.

[1] Rule 21.02 (1) (b) and (c) provides:
" A party may apply for judgment on relevant grounds, including the following:
….
the notice of defence filed in the proceedings discloses a good defence on the merits;
the other party has no real cause of action."

3. I propose to deal first with the argument that the worker failed to comply with the precondition for court proceedings contained in s 103J of the Act.

4. Section 103J (1) provides that a claimant for compensation is not entitled to commence proceedings unless there has been an attempt to resolve the dispute by mediation and that attempt has been unsuccessful. Subsection (2) requires the mediator, at the conclusion of a mediation, to issue to each of the parties a certificate stating that mediation has occurred, listing the written information provided to the mediator by the parties during the mediation process, setting out the recommendations (if any) of the mediator and stating the outcome of the mediation.

5. The employer argued that as there had been no attempt to resolve the dispute by mediation, the worker was not entitled to commence the present proceedings and accordingly there should be summary judgment in favour of the employer.

6. In paragraph 12 of his Statement of Claim the worker alleged that the worker referred the dispute to mediation on or about 13 September 2005. It was further alleged that mediation took place on or about 9 November 2005. Paragraph 13 states the outcome of the mediation and also sets out the various recommendations of the mediator.

7. Although the employer does not dispute the fact that the mediator issued a certificate of mediation on 9 November 2005 in compliance with s 103J(2) of the Act, the employer maintains that there has been no attempt to resolve the dispute by mediation. Specifically, in paragraph 9.2 of its Notice of Defence the employer says that it complied with the outcome of the mediation by paying the full cost of the worker's claimed medical and rehabilitation treatment to date and by appointing and referring the worker to a vocational rehabilitation provider so that the worker underwent a comprehensive assessment at the expense of the employer. In paragraph 14.3 the employer says that the worker failed to furnish the employer with

appropriate worker's compensations certificates, to let the insurer know of his contact address and to provide the insurer with details of his earnings for the 52 weeks prior to the injury. The employer claims that the purpose of the outcomes was to provide the employer with sufficient information to respond to the claim and for the parties to identify any dispute: see paragraph 14.4 of the Defence. The employer relies upon that set of circumstances to show that the worker commenced proceedings without endeavouring to resolve the dispute by mediation: see paragraph 14.5 of the Defence.

8. In my opinion, the precondition to the commencement of court proceedings was fulfilled and the worker was entitled to commence the present proceedings. The dispute was referred to mediation and mediation occurred. However, the process of mediation did not result in the resolution of the dispute, and was therefore unsuccessful. The recommendations of the mediator are no more than an advice or suggestion to the parties as to what course of action they might take in the future. The recommendations of the mediator do not form part of the process of mediation: any recommendations that a mediator might choose to make come at the *conclusion of a mediation*. Furthermore, the recommendations of a mediator do not have binding force. Failure to adopt the recommendations does not in itself have any consequences for the defaulting party. However, were an employer to adopt particular recommendations as to the institution of a rehabilitation program, and having set that process in train, the worker would be under a statutory obligation to undertake reasonable treatment and training, or assessment: see s 75 B of the *Work Health Act*. To that extent the recommendations of a mediator might have practical implications and impact upon the future course of a claim that has not resolved at mediation.

9. I would add that the argument put forward by the employer overlooks the requirement in s 104(3)that proceedings for compensation must be commenced within 28 days after the issue of a mediation certificate, which

was duly complied with by the worker. That requirement reinforces the view that the process of mediation is considered to be an end once the mediation certificate has issued and does not extend beyond that event.

10. Section 82 (1) of the Act provides, inter alia, that a claim for compensation shall be in the approved form and unless it is a claim for compensation under section 62, 63 or 73, be accompanied by a certificate in a from approved by the Authority from a medical practitioner or other prescribed person. Section 82(2) provides:

> "If the claim and certificate are not given or served at the same time the remaining document shall be given or served on the employer within 28 days after the first document is given or served and the claim for compensation shall be deemed not to have been made until the day on which the remaining document is given or served on the employer."

11. It was common ground between the parties that the worker had at no time given or served on the employer a certificate in the form envisaged by s82(1)(b) of the Act. There was also consensus between the parties that non –observance of the requirements of s 82(2) results in there being no valid claim: see *Johnston v Paspaley Pearls Pty Ltd* [1996] 5 NTLR 199 at 204.

12. However, the parties were in disagreement as to the effect of the decision in *Johnston v Paspaley Pearls Pty Ltd* on the determination of the employer's application for summary judgment.

13. The employer argued that as the worker had failed to make a valid claim the present proceedings could not be maintained, and there should be summary judgment in favour of the employer. Although this was not clearly articulated by counsel for the employer, it would seem that the employer was relying on what was said by Mildren J in *Maddalozzo v Maddick* (1992) 108 FLR 159 at 164:

> "…the scheme of the Act is that the right to bring a claim for compensation in the Court does not arise until after the claim has been made upon the employer and the employer has disputed liability under s85."

In that case His Honour also made the following observation at 165:

> "…unless a claim has been made under s82, which is deemed to be a notice of injury by virtue of s 80(2), and liability is disputed vide s85, no proceedings can be validly commenced. The right to commence proceedings, is, as I explained in *Perfect v Northern Territory* (1992) 107 FLR 428 conferred by s85(10) of the Act, and arises therefore relevantly for these purposes at the time when the employer disputes liability."

14. Notwithstanding that no valid claim had been made by the worker, counsel for the worker argued that the worker could invoke and rely upon the provisions of s 182(3) of the Act[2] and thereby successfully resist the employer's application for summary judgment. In that regard the worker sought to draw comfort from the following passage in the judgment of the Court of Appeal in *Johnston v Paspaley Pearls Pty Ltd (*supra at 205):

> "We should mention that in arriving at our conclusion that there are unlikely to be any significant consequences to a worker who fails to complete his claim by giving the remaining document within 28 days after the first, we have taken into account the very broad powers of the Work Health Court to excuse a failure to make a claim within 6 months after the occurrence of the injury, as set out in s 182(3)."

15. The employer's response was that the observations made by the Court of Appeal in *Johnston v Paspaley Pearls Pty Ltd* (supra) did not assist the worker: in referring to s182(3) of the Act, the Court of Appeal was merely adverting to the potential of a worker to invoke the excusatory provisions of that provision in fresh proceedings, in the event of earlier proceedings being

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[2] That provision reads:
"The failure to make a claim within the period specified in subsection (1) shall not be a bar to the maintenance of the proceedings if it is found that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause."

dismissed on account of non-observance of the requirements of s 82(1) and (2). The employer's position was that the present proceedings should be dismissed, leaving the worker with the option of starting again, though having to meet any objection under s182(1)(a) by establishing that his failure to comply with the requirements of s82(2) was due to "reasonable cause".

16. In attempting to resolve the diametrically opposed positions assumed by the parties, this Court is guided – indeed bound - by the judgment of Kearney J in *Paspaley Pearls and Johnston* (unreported decision of the Supreme Court of the Northern Territory delivered 7 June 1995). At page 38 of that judgment His Honour made the following observation:

> "It is true, as his Worship pointed out at p 20, that if compliance with the time limit in s 82(2) is mandatory, a worker who does not comply has "to make his claim afresh". I do not consider that that consequence is properly characterised as an "inconvenience" or an "injustice" in the circumstances. The worker must start again. If ultimately he is met by an objection under s 182(1)(a) he will have to establish that his failure to observe the s82(2) time limit was due to a "reasonable cause".

17. There is nothing in the judgment of the Court of Appeal in *Johnston v Paspaley Pearls Pty Ltd* (supra) that questions the validity of the observation made by Kearney J, that is to say, the need for a worker, who has failed to comply with the time limit prescribed by s 82(2) of the Act, to "make his claim afresh" and to "start again". The observation made by the Court of Appeal at {205], as referred to above, is consistent with the proposition that a worker must start again where he or she fails to observe the requirements of s 82 (1) and (2) of the Act.

18. The key determinant in this matter is that s182(1) of the Act contemplates a claim for compensation being validly made within the prescribed 6 months period. Similarly, s182(3) only operates to excuse a worker if he or she has made a valid claim outside the prescribed period. It does not assist a worker

who has made an invalid claim for compensation either within the 6 months period or outside that period. To do so would be inconsistent with the general scheme of the Act.

19. It follows that in light of the worker's non-observance of the requirements of s82(2) no valid claim for compensation was made by the worker and therefore the proceedings herein have not been validly commenced. Consistent with the observations made by Kearney J in *Paspaley Pearls v Johnston* (supra) the worker must make his claim afresh and start again. The worker cannot avail himself of the excusatory provisions of s 182(3) to salvage the present proceedings. However, those provisions will be available to the worker if he recommences proceedings – indeed he will be compelled to successfully invoke the provisions of 182(3) in order to maintain any such subsequent proceedings.

20. In my opinion, the employer has demonstrated to the satisfaction of the Court that it has a good defence on the merits such as to justify summary judgment being entered in its favour. Alternatively, it has been established to the satisfaction of the Court that the worker has no real or maintainable cause of action, thereby justifying summary judgment being entered in the employer's favour.

21. In the event that I erred in construing the effect of either Kearney J's judgment in *Paspaley Pearls v Johnston* (supra) or the judgment of the Court of Appeal in *Johnston v Paspaley Pearls* (supra), and the worker can in fact invoke the excusatory provisions of s 182(3) in the present proceedings to circumvent summary judgment, this was not, in my opinion, a case where the Court should have given the worker leave to amend his Statement of Claim.

22. There was no application before the Court seeking leave to amend the pleadings by including a claim for relief by way of s 182(3). Without such an application the Court was not obliged to consider the matter.

23. It is true that during the course of hearing the interlocutory application the Court suggested that, as the worker was contending that the effect of the decision of the Court of Appeal *Johnston v Paspaley Pearls* (supra) was that the worker could invoke the excusatory provisions of s 182(3) in the present proceedings, the worker might need to amend his Statement of Claim to include a claim for relief pursuant to that provision. To that suggestion, counsel for the worker replied that if the Court required the pleadings to be amended, then an application to amend would be made. However, it was not a matter of what the Court required. It would have been entirely inappropriate for the Court to require anything of the worker in the context of a contested interlocutory application being heard within an adversarial framework. The Court was simply bringing to counsel's attention the apparent inconsistency between the state of the pleadings and the argument, based on *Johnston v Paspaley Pearls*, being advanced on behalf of the worker in opposition to the employer's application for summary judgment. Whether or not an application to amend was to be made to the Court was entirely a matter for the worker, on the advice of his legal representatives.

24. I note that at the conclusion of the hearing the matter was adjourned for a period of 5 days before I delivered my decision on 31 May 2006. There was ample opportunity for the worker to consider his position during the adjourned period and had an application to amend been made before delivering my decision I would have heard that application. In the absence of any such application I proceeded to give my decision which was accompanied by short reasons that adopted the employer's analysis of *Johnston v Paspaley Pearls* (supra).

Dated this 28 day of June 2006.

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DR J A LOWNDES
STIPENDIARY MAGISTRATE