CITATION: *Harradine v Dept of Health & Community Services* [2006] NTMC 074

PARTIES:	Kathryn Anne Harradine
	v
	Department of Health & Community Services
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20616409
DELIVERED ON:	7th September 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	4th September 2006
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – Request for mediation – extension of time- section 103D Work Health Act

Tracy Village Sports and Social Club v Pamela Mavis Walker [1992] 111 FLR 32

Van Dongen v Northern Territory of Australia [2005] NTCA 6

REPRESENTATION:

Counsel:

Worker:	Mr Morris
Employer:	Ms Cheong

Solicitors:

Worker:	Halfpennys
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 074
Number of paragraphs:	43

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

No. 20616409

BETWEEN:

Kathryn Anne Harradine
Worker

AND:

Department of Health and Community Services
Employer

REASONS FOR JUDGMENT

(Delivered 07 September 2006)

Judicial Registrar Fong Lim:

1. The Worker had an accepted claim for work health benefits for a psychiatric injury incurred at work in early 2005. The Employer accepted liability and paid the worker benefits until her benefits were ceased on the 25th of August 2005 by the Employer. The court has not been provided with any evidence as to why the benefits were ceased.

2. Pursuant to section 103D the Worker had 90 days from the cessation of benefits to make an application for a mediation of the dispute and failed to do so within that time. Section 103D reads as follows:

> 103D. Application for and conduct of mediation
>
> (1) A claimant may apply to the Authority to have a dispute referred to mediation.
>
> (1A) If the dispute relates to a decision specified in section 103B(a)

> or (b), the claimant must apply under subsection (1) within 90 days of receiving the statement referred to in section 85(8) or 69(1)(b) respectively.
>
> …….
>
> (5) The Court may extend the period if it is satisfied the failure to apply within the period was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause.

3. The Worker claims that she had reasonable cause for the delay and relies on section 103D(5) for her application for an extension of time.

4. Counsel for both parties accept that when the court is considering whether the Worker had reasonable cause for delay the appropriate period to consider is the 90 days in which the Worker had to apply for a mediation.

5. The most recent authority considering this issue is Van Dongen v Northern Territory of Australia [2005] NTCA 6. The Court of Appeal , Martin(BR) CJ, Mildren J and Riley J presiding, considered an appeal by the worker to set aside the Magistrate's decision at first instance to refuse an extension of time pursuant to section 182(3) of the Act. The Worker suffered a mental injury during his employment but did not make a claim regarding that injury until after the expiry of the 6 months time limit. The worker claimed that he had reasonable cause for the delay and that is he did not have any loss of earning capacity until later and that he was waiting to see if he got better before he made the claim. The evidence was that the worker did in fact have a partial incapacity to work he just didn't notify the Employer.

6. The Court of Appeal found that when considering the relevant period it must consider the 6 months subsequent to the injury, see Tracy Village Sports and Social Club v Walker [1992] 111 FLR 32 and that to assess the reasonableness of the cause of delay the court must consider all of the circumstances of the case. The worker's appeal was disallowed. Riley J summarised the analysis succinctly as follows:

> "It is clear that each case must be assessed on upon its own facts and circumstances. Contrary to the submission of the appellant the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of the worker must be considered in order to determine whether reasonable cause is established. It would be an artificial exercise to do otherwise."

7. In Tracy Villiage Sports and Social Club v Walker [1992] 111 FLR 32 his honour Justice Mildren confirmed that the test of reasonableness was an objective test and quoted their honours Northop and Ryan in Commonwealth v Connors [1989] 10 AAR 395 as follows:

> "As was said by the court in *Black v City of South Melbourne [1963] VR 34 at 38* when considering "reasonable cause": "the inquiry here appears to be of a much wider kind justifying a more liberal attitude. The reasonable cause appears to us to mean some act or omission which operated to prevent the giving of notice and which was an act or omission which was in the circumstances reasonable. In *Quinlivan v Portland Harbour Trust*[1963] VR 25 at 28, Sholl J, used these words: the sub- section means to refer to a cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, of the kind of thing which might be expected to delay the giving of notice by a reasonable man."

8. The Worker relied on her brief affidavit of the 1st of March 2006 which does not address the 90 day period specifically. She states that she has been suffering depression (no time frame advised) and that condition required her to leave the Northern Territory to be closer to her family and friends. The Worker says this move was made upon the recommendation of her doctor. She further states that she was "extremely stressed and confused" and it was that condition that led to her resignation on the 1st of September 2005.

9. The Worker goes on to say that she didn't decide to see a solicitor about her matter until December of 2005 when she received a letter from the NTWorksafe which advised her she would have to apply for an extension of time.

10. The Worker does not specifically explain in her affidavit what her situation was between the cessation of benefits and the expiry of the 90 day period, about the 25th of November 2005.

11. Counsel for the Worker referred the Court to the report of Dr Gilandas (as annexed to the affidavit of Peggy Cheong) in support of the Worker's claim that she was suffering so badly from depression and anxiety until December 2005 that she didn't have the ability to deal with her work health claim.

12. Dr Gilandas' report is dated the 27th of July 2005 and arises out of an examination on the same day. At that time the Worker had been off work since April 2005 even though she had been certified fit for restricted duties from the 14th of June 2005.

13. Dr Gilandas describes the worker as being embarrassed and uncomfortable about putting the Worker's compensation claim, but could not think of an alternative. So it is clear that at that point the Worker was able to deal with her claim for Worker's Compensation even though "embarrassed and uncomfortable". The Worker was diagnosed by doctor as having an adjustment disorder with depressed mood.

14. It is clear that Dr Gilandas saw the Worker's difficulties as minor and would be resolved with time and some treatment. At page 12 of his report he states:

> "Adjustment Disorder is a minor psychiatric syndrome that is relatively easy to resolve"

15. Counsel for the Worker suggested the court infer from Dr Gilandas report that the Worker needed to go to Adelaide before she was able to become well. He referred to a prediction of Dr Gilandas on page 11 of his report:

> " I predict that this unhappy and lonely middle- aged woman will eventually solve her own problems by returning t Adelaide where she longs for the comfort and emotional support of her friends and family."

16. Counsel argued that thefact that the worker did not apply for a mediation until after moving to Adelaide is an indication that she wasn't well enough to do so until she had made the move.

17. I am not of the view that I can make that assumption based on Dr Gilandas' report. Even though the doctor was not required to turn his mind to the issue of whether the worker's mental illness prevented her from making her application for a mediation his prognosis of resolution of the Worker's problem is not predicated on her moving back to Adelaide. In the last paragraph of his report Dr Gilandas says:

> "Prognosis is good. Adjustment Disorders tend to resolve quickly when an individual is removed from what they perceive to be a stressful environment"

18. In the body of his report that Doctor suggests that the worker was never suited to work in remote communities and that his view was to put the Worker back to work without the requirement to go to remote communities. He suggests:

> "The most practical therapeutic intervention is to reassign her to her comfort zone of more routine clerical duties that do not require long hours and the attendant isolation, described above."

19. In my view the when the doctor was referring to the "stressful environment" he was referring to the duties which required the worker to work in remote communities not remaining in Darwin.

20. It is also evident from the medical certificates signed by Dr Forrest (the Worker's general practitioner) that he was convinced that she could return to work from early July 2005 as long as it did not include work on remote communities.

21. Dr Forrest issued a series of certificates from July to end of August certifying the Worker fit to return to work on restricted duties. The

restriction placed on the Worker's return to work was set out in the 1st July certificate as follows:

> "Avoid positions requiring travel to remote communities because of the extended hours involved."

22. Dr Forrest issued two certificates subsequent to the one in July and they were on the 9/8/05 covering the period the 9/8/05 – 23/8/05 and on the 12/8/06 covering the period 12/8/05 – 26/8/05 both times he placed only one restriction on the duties as above. These certificates were issued on the required Work Health medical certificate form.

23. Curiously however Dr Forrest then issues as certificate on the 16th of August 2005 certifying the worker "unfit for her normal work" for a period 16/8/05 – 19/8/05 from "the same cause on 15/8/05". This certificate was in a different form and there is no evidence produced by the Worker or the Employer as to what the "same cause" was that made the Worker unfit for work for that short period of time.

24. The Employer argued that I should infer that as the certificate is not in the Work Health form then the "same cause" must have been something unrelated to the work injury.

25. That is an assumption that I am prepared to make because the doctor was well aware of the possible return to work program for the worker having seen her just 4 days before issuing the work health certificate certifying her fit to work. The doctor was clearly aware of the procedures regarding a work health claim and in my view would have properly rescinded his previous certificate if he was of the belief the worker was no longer fit to return to restricted duties due to her work injury. It should also be noted in the earlier certificates issued (in March and April of 2005) by Dr Forrest regarding the worker's mental illness he was not shy of specifying the illness and symptoms to the employer whereas the certificate of the 16th August 2005 does not disclose the illness.

26. In her affidavit Ms Cheong describes a series of return to work programs organised for the Worker in July, August and September 2005 none of which were attended by the Worker. The second placement was to commence on the 22nd of August 2005, after the certificate of the 16th of August had expired. Apparently the worker did not attend and neither party has provided the court with any explanation as to why not. The third placement was to commence on the 15th of September 2005 which the Worker did not attend and again no evidence was produced by either the Employer or the Worker as to why she did not attend. The Worker had apparently already tendered her resignation on the 1st of September 2005.

27. In my view neither the Employer nor the Worker have made full disclosure about what steps were taken to communicate to the Worker the availability of the return to work programs and what correspondence or communication the Worker had with the Employer or rehabilitation provider regarding her ability or otherwise to attend the program.

28. I accept that the Employer did provide the Worker with correspondence or communication of the consequences of failing to attend the work placement especially the third time after she had failed to attend the first two. The worker refers to a letter in the history given to Dr Chaudhary which apparently advised her of her breach of the "work health rehab program" The Worker has not stated in her affidavit that she was advised of the work placements and was unable to attend because her mental health failed her at the time. She doesn't address this issue at all in her affidavit.

29. The Worker does produce an affidavit of Cathy Spurr annexing a report from consultant psychiatrist Dr Chaudhary who examined the Worker on 24th January this year. On the basis of his examination and the history given to him by the Worker he states that:

> "Retrospectively for the history obtained from Ms Harradine I believe she was completely incapable of working during that time,

> was constantly teary and had difficulty concentrating and making any valued judgments. She ended up cornering herself as she felt stigmatised by the WorkCover situation and losing her job and potential income by handing in her resignation"

30. The Employer made the observation that Dr Chaudary's opinion should be considered very carefully as it is based on the history provided by the worker Dr Chaudary cannot say with certainty what the worker's mental health was for that period he can only surmise.

31. I accept that with all psychiatric assessments the doctor relies heavily upon what the patient tells him and that must be taken into account when accepting the doctor's opinion. In the body of the report Dr Chaudary elaborates on his observations of the Worker. It is helpful to repeat what the doctor observed:

> "I reviewed Ms Harradine on the 24th of January 2006. She at the time was too traumatised to event describe what had transpired in her work situation. She came to see me because she was having constant teariness, anxiety attacks, poor sleep, reduction in appetite and concentration with fluctuating diurnal mood variation. She reported her energy was very low and that she had become extremely indecisive. Although she described her mood to be five on a scale of zero to ten on the day I reviewed her she described her mood fluctuating between two to three for a period prior to seeing me.
>
> Ms Harradine was unable to describe the whole set of scenarios that had happened in Darwin prior to her moving to Adelaide. She had was is classically described as avoidance towards any situation which leads to triggering of traumatic memories……She was very disabled and unable to function on a day to day level."

32. It is clear that Dr Chaudary observed the worker at the time of her interview with him to be very disabled because of her condition and he accepts that as an indication of how she had been in the past. While the doctor cannot say for certain that in the relevant 90 day period the Worker was as disabled as she was in her interview he can, based on his professional training and what he observed, indicate that is it believable that the worker was unable to deal with the Work Health issue.

33. Of particular note is the Worker's reported view on the necessity of her work health claim. Dr Gildaris noted that the Worker was "uncomfortable and embarrassed" by her work health claim, Dr Chaudhary notes that the worker has "shame and guilt surrounding the stigma of being on WorkCover.

34. Given all of the above and despite the paucity of evidence from both the Employer and the Worker as to the situation between August and November of 2005 it is my view open to the court to find that the Worker had reasonable cause for her delay in applying for a mediation.

35. It is clear that between the time that her benefits were cancelled (of which there is no evidence but I am advised by counsel the relevant date was the 25th of August 2005) and the time she contacted NTWorksafe in December 2005 the Worker had suffered a mental illness that probably affected her ability to make rational decisions. The worker obviously felt some stigma at having to press on with a work health claim and that was enough to aggravate her feelings of self worthlessness.

36. The Employer asks the Court to infer from the fact that there is no evidence of the Worker seeking medical help in the relevant period that in fact she was not unwell at all in that time. Although there is an indication on page 3 of Dr Chaudhary's report that she continued to see Dr Forrest regularly after she received the notice for cessation of benefits in August 2005.

37. It is in my view equally open to the Court to infer that the reason the Worker didn't seek medical help was because of her condition. That is, she was so depressed and anxious that she was not able to make the rational decision to seek help. In conjunction with the conclusions of Dr Chaudhary it is my view that scenario is more likely. The Worker may have been functioning a high level in all areas except that of making decisions about her work health claim. The Worker could have been able to function relatively normally except when she was faced with a decision or situation within her work health claim. The Worker may have managed day to day

living and be able to attend doctors appointments to get medical certificates which confirmed her fit for restricted duties but once the time came nearer to go back to work she may have found that more difficult. Against this background it is possible that while the Worker was well enough to book an airfare to Adelaide she may not have been well enough to put in a request for a mediation because her decision making abilities may have been affected by the decision to cease her benefits.

38. Dr Chaudhary states that one of the symptoms of the worker's stated illness is avoidance behaviour and in my view it is probable that the prospect of going back to work triggered this avoidance behaviour that is failure to attend the return to work programs and failure to request a mediation.

39. There is no evidence that Worker's mental health improved significantly once she had removed herself from Darwin. Counsel for the Worker would have the court accept that proposition as evidenced by the fact that once in Adelaide the Worker was able to make enquiries regarding a mediation a month later. I accept that indicates that the worker felt well enough to make those enquiries but I cannot make the assumption that it is the move that has caused the improvement, it may just be that her medication was working.

40. The fact that the worker felt the need to consult with Dr Chaudhary after receiving the letter from NTWorksafe indicates that the Worker's mental health was still very much in the balance at that stage. It is my view that the evidence shows that it is most likely the Worker's mental health, was at the relevant time, unstable with various matters triggering more severe episodes of depression. It is evident from the doctors' reports that the Worker responds well to medication but does have a reactive depressive illness and can therefore be affected by events in her life.

41. I accept that the Worker did not cope very well with the uncertainty created by the Work Health rehabilitation process and while willing to return to work found it stressful. I accept that on the balance of probabilities the

Worker's mental health was such that it prevented her from make rational decisions about her work health claim including the requirement to request the mediation within 90 days. I note that when the worker did make that request in December she was approximately one month out of time.

42. There is no explanation of the further delay in making this application which was filed by the worker's Adelaide solicitors in June of this year however I note that the Employer makes no particular complaint about that delay nor is there any specific prejudice claimed apart from the prejudice arising from the passing of time.

43. In light of the above I order the following:

43.1 The time for requesting a mediation pursuant to section 103D of the Work Health Act is extended to 14 days from today.

43.2 Costs reserved.

Dated this 7th day of September 2006

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Tanya Fong Lim
JUDICIAL REGISTRAR