CITATION:	*Harradine v Department of Health & Community Services* [2006] NTMC 086
PARTIES:	KATHRYN ANNE HARRADINE v DEPARTMENT OF HEALTH AND COMMUNITY SERVICES
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	20616409
DELIVERED ON:	7th November 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	6th November 2006
JUDGMENT OF:	Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – Costs – Extension of Time – Section 110 Work Health Act, Rule 63.11(5) Supreme Court Rules , Rule 23.02 and 23.03 Work Health Rules

Ritter v Godfrey [1920] 2 KB 47 at 52
Sola Optical Australia Pty Ltd v Mills [1987] 46 SASR 364
*Golski v Kirk (*1987) 14 FCR 143

REPRESENTATION:

Counsel:

Worker:	Mr Morris
Employer:	Ms Cheong

Solicitors:

Worker:	Halfpennys
Employer:	Hunt & Hunt

Judgment category classification:	C
Judgment ID number:	[2006] NTMC 086
Number of paragraphs:	20

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 7th December 2006)

Judicial Registrar Fong Lim:

1. On the 7th of September 2006 the Worker was successful in her application for an extension of time to request a mediation pursuant to section 103D of the Work Health Act and costs were reserved of that application.

2. The parties came before me to argue the matter of costs.

3. Section 110 of the Work Health Act gives that court discretion to order costs as follows:

> In awarding costs in a proceeding before the Court, the Court shall take into account the efforts of the parties made before or after the making of the application under section 104 in attempting to come to an agreement about the matter in dispute and it may, as it thinks fit, include as costs in the action such reasonable costs of a party incurred in or in relation to those efforts, including in particular the efforts made at the directions hearing and any conciliation conference.

4. The Work Health Rules also set out the procedure regarding costs in Rule 23.03:

> (1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.
>
> (2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.
>
> (3) In exercising its discretion under this rule in relation to a proceeding commenced under section 104 of the Act, the Court must have regard to the matters referred to in section 110 of the Act.

5. It should also be noted that the Supreme Court cost rules also apply in Work Health matters (see Rule 23.02).

6. The Worker's submission is that as she has been successful in her application for an extension of time she should be awarded costs and she relies on the "general rule" that costs follow the event. Lord Sterndale MR in *Ritter v Godfrey* [1920] 2 KB 47 at 52 stated the principle simply:

> "There is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial."

7. This principle has been upheld through the years and through many courts, what is important to note however is that the discretion still lies with the court whether or not costs should be ordered.

8. The Worker has since my earlier decision applied for a mediation with the NT Worksafe and commenced new proceedings in this court for a determination of her claim for weekly benefits.

9. The Employer does not accept that the Worker should have commenced separate proceedings in any event as the extension of time issue was a

preliminary issue to be dealt with before the Worker could commence her proceedings and it should have been dealt with as part of the "substantive proceedings". Even though this is an attractive proposition from a case management point of view I cannot accept this view either. The Application for an extension of time under section 103D of the *Work Health Act* is a proceeding within itself. The result of that proceeding affects whether the Worker can pursue a claim for benefits under the Act, if the court is against the worker in an application under section 103D then the matter is at an end.

10. It is submitted by the Worker's counsel that should I not be minded to order costs for the Worker an alternative order could be made that the costs be costs in the cause. I was referred to the decision in *Sola Optical Australia Pty Ltd v Mills* [1987] 46 SASR 364 as the authority for this option. In Sola Optical's case the Plaintiff commenced an action outside of the 3 year limitation period set by the Limitation Act and was successful in convincing the court that there were material facts that had come to light subsequent to the expiry of the limitation period and subsequently the time was extended. The Plaintiff was allowed to maintain its action. The Court at first instance ordered that the Defendant pay the Plaintiff's costs of the successful application for extension of time because there had been a dispute between the Defendant and the Plaintiff as to whether the issue of the extension of time should be heard as a preliminary issue and the Court found that the Defendant's insistence at having the extension of time issue dealt with as a preliminary matter was "misconduct, or vexatious or oppressive conduct". The Court of Appeal overturned that decision and found that costs should be costs in the cause. Chief Justice King ruled that the consideration of costs should be reviewed in the context of the whole litigation. His Honour found that had the extension of time not been dealt with as a preliminary issue and the extension was obtained but the action failed then it would be "unthinkable that the respondent would have been awarded costs of the issue

as to extension of time" (page 373) therefore found that the order should be costs in the cause. The majority agreed.

11. While a costs in the cause order may seem like an attractive option the present case can be distinguished from the *Sola Optical case*. In the present matter the court is not dealing with an application for extension of time within a proceeding it is dealing with an extension of time for a condition precedent before a proceeding can commence. This application is a proceeding in itself and the cause is the extension of time that has been granted if I were to make a costs in the cause order the effect would be to be ordering that the Employer pay the Worker's costs of the proceeding.

12. The alternative suggested by the Employer is that the costs be costs in the substantive proceedings. In the present matter that suggestion may make some sense because the worker has since commenced separate proceedings for weekly benefits but in general terms there is no guarantee that a "substantive proceedings" will be later commenced and if not that would make a nonsense of such an order.

13. Any order for costs must be made within these proceedings.

14. The Worker submits there are no special circumstances which justify a costs order against her in fact the circumstances are such that the Employer chose to oppose her application and therefore should bear the costs consequences of opposing that application. Of course the Employer rejects that submission and brings the court's attention to the application was in fact made necessary by the Worker's original default.

15. That the application required me to reserve my decision and give written reasons should indicate to all concerned that the arguments required thought and therefore this is not a matter where the Employer can be criticised and indeed penalised for choosing to oppose the application. It was not a matter

where it was clear the Worker would be successful and the Employer has just put the Worker to proof just to be difficult.

16. In my view the special circumstance which could warrant a costs order contrary to one where costs follow the event is that the Worker has applied for an indulgence from the court. The usual course where a person who applies for a procedural indulgence eg an extension of time is that person will usually be required to pay those costs see *Golski v Kirk (* 1987) 14 FCR 143 at 157. This exception is reflected in the Supreme Court Rules Order 63.11(5) :

> (5) Where a party applies for an extension or abridgement of a time fixed by these Rules or by an order fixing, extending or abridging time, he shall pay the costs of and occasioned by the application.

17. In my view this rule means that if a party applies for an extension of time fixed by the rules or there is an order fixing, extending of abridging time (whether under the rules or not) then that party should pay the costs of that application.

18. Order 63.11(5) of the Supreme Court Rules applies to this application through rule 23.02 of the Work Health Rules.

19. It is plain to me that as the original default was the Worker's and that required her to make the application to the court for an extension of time by the operation of Order 63.11(5) and the common law she should pay the Employer's costs of this application.

20. My orders are:

    20.1 The Worker pay the Employer's costs of and incidental to this application to be taxed in default of agreement.

    20.2 Those costs are not to be payable until such time that proceedings no 20626846 between the Worker and the Employer are resolved by agreement or by order of the court.

20.3 The percentage of the Supreme Court scale for the application is fixed at 100%.

Dated this 7th day of September 2006

_____

Tanya Fong Lim
JUDICIAL REGISTRAR