

CITATION: *Harradine v Department of Health and Community Services* [2007]
NTMC 003

PARTIES: KATHRYN ANNE HARRADINE

v

DEPARTMENT OF HEALTH AND
COMMUNITY SERVICES

TITLE OF COURT: Work Health Court

JURISDICTION: Work Health Act. (Appeal from a decision of
the Judicial Registrar 7 November 2006)

FILE NO(s): 20616409

DELIVERED ON: 19 January 2007

DELIVERED AT: Darwin

HEARING DATE(s): 8 January 2007

JUDGMENT OF: Mr V M Luppino SM

CATCHWORDS:

Work Health Act – Costs on successful application for extension of time to apply for mediation – Application of r63.11(5) of Supreme Court Rules in conjunction with r23.02 of the Work Health Rules – Whether r63.11(5) of the Supreme Court Rules is inconsistent with the Work Health Act - Whether r63.11(5) of the Supreme Court Rules is inconsistent with common law.

Ritter v Godfrey [1920] 2KB 47; Golski v Kirk (1987) 14 FCR 143; Sola Optical Australia v Mills [1987] 46 SASR 364.

Work Health Act ss 95, 103D, 103J, 110, 114A; Work Health Rules rr 23.02, 23.03; Supreme Court Rules r 63.11(5)

D Pearce & S Argument, Delegated Legislation in Australia, 3rd Ed, 2005, LexisNexis Butterworths.

REPRESENTATION:

Counsel:

Appellant: Mr Morris
Respondent: Mr Hutton

Solicitors:

Appellant:

Halfpennys

Respondent:

Hunt & Hunt

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B

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22

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

No. 20616409

BETWEEN:

KATHRYN ANNE HARRADINE
Appellant

AND:

**DEPARTMENT OF HEALTH AND
COMMUNITY SERVICES**
Respondent

REASONS FOR DECISION

(Delivered 19 January 2007)

Mr V M LUPPINO SM:

Background

1. This is an appeal from a costs order made by the Judicial Registrar on 7 November 2006. The Judicial Registrar ordered the appellant to pay the respondent's costs in relation to a successful application by the appellant for an order pursuant to section 103D(5) of the Work Health Act ("the Act") extending the time for her to apply for mediation pursuant to section 103D of the Act.
2. Set out hereunder are the relevant statutory provisions. Firstly the relevant sections of the Act:

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.

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.
- (2) - (3) Omitted
- (4) A claimant who fails to apply for mediation within the period referred to in subsection (1A) may apply to the Court under section 104(1) for an extension of the period.
- (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.

103J Pre-condition to court proceedings

- (1) Subject to subsection (3), a claimant is not entitled to commence proceedings under Division 2 in respect of a dispute unless there has been an attempt to resolve the dispute by mediation under this Division and that attempt has been unsuccessful.

(2)-(3) Omitted.

110 Costs

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.

114A Appeal to magistrate

- (1) Subject to subsection (2), a person affected by an order made or a thing done by the Registrar or a Judicial Registrar under this Act may appeal against the order or thing to a magistrate of the Court.
- (2) No appeal lies to a magistrate of the Court from the making, variation or revocation by the Registrar or a Judicial Registrar of an interim determination under section 107.
- (3) An appeal under subsection (1) is to be by way of a hearing de novo.

3. Secondly the relevant Work Health Court Rules namely:

23.01 Omitted.

23.02 Application of Supreme Court Rules

Subject to the Act, these Rules and practice directions issued by the Chief Magistrate, Order 63 of the *Supreme Court Rules* applies with the necessary changes to this Part.

23.03 Power and discretion of Court

- (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.

23.04 – 23.12 Omitted.

4. Lastly, Supreme Court Rule 63.11(5) which provides:

“Where a party applies for an extension or abridgement of a time fixed by these Rules or for an order fixing, extending or abridging time, he shall pay the costs of and occasion to buy the application.”

5. The relevant extracts from the decision of the Judicial Registrar are now set out namely:

“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.

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."

6. As I see it the matters turn on:

1. whether rule 63.11(5) of the Supreme Court Rules applies and whether that mandates a particular costs order;
2. Whether or not the extension of the time granted to the appellant was a "procedural indulgence".

7. Given the clear statement in rule 23.02 of the Work Health Court Rules, the issue raised by the first limb is whether rule 63.11(5), being delegated legislation, is inconsistent with the Act or the common law. The issue of "procedural indulgence" in the second limb arises because if rule 63.11(5) does not apply, the order for costs is still discretionary and it must be judicially exercised. There is relevant law based on the concept of a procedural indulgence which can impact on the exercise of the discretion.

8. The first limb raises the issue of repugnancy of delegated legislation and statute law. A very succinct summary of the relevant principles can be extracted from D Pearce and S Argument, *Delegated Legislation in Australia*, 3rd Ed, 2005, LexisNexis Butterworths. In summary form those principles are:-

1. Delegated legislation cannot be inconsistent either with statute law or common law;
2. Delegated legislation can supplement the existing law and if the legislative intent is clear that the Act and the delegated legislation are both to be complied with, then the obligations are cumulative;

3. The principles have equal application where the delegated legislation are Rules of Court;
4. Where an Act expressly states that delegated legislation is to be regarded as if enacted in the Act, then the status of the delegated legislation is accordingly elevated;
5. Any qualification in delegated legislation of rights given by an Act will be regarded as an inconsistency;
6. An inconsistency must be clearly shown;
9. Were it not for the general principle that delegated legislation cannot be repugnant to the common law as well as to statute law, the matter would end there. I say this because the power to make Rules of Court appears in section 95(1) of the Act. This is set out above. Importantly that states that the Rules which are thereby authorised to be made cannot be "...inconsistent with this Part...". Section 110 of the Act does not appear in the same Part and consequently this would seem to suggest that the Act authorises Rules inconsistent with section 110. I query whether this was intended. If so, then implicitly the legislature intended that those particular rules must have at least equal status with the Act itself.
10. However, bearing in mind the precise provisions of section 110, in my view it is arguable that all section 110 does is to merely acknowledge that specific matters are to be taken into account by a Court when exercising its discretion as to costs. In my view, it is arguable that section 110 does nothing more than acknowledge the existence of the general discretion as to costs without restating the principle.
11. In that case the issue therefore is the question of the inconsistency between the relevant Work Health Court Rules (which by reason of rule 23.02 of the Work Health Court Rules includes rule 63.11(5) of the Supreme Court Rules) and the common law.

12. The common law position derives from *Ritter v Godfrey* [1920] 2KB 47. Essentially that case is authority for the proposition that costs are always in the discretion of the court and that it is usual, but not mandatory, for costs to be awarded to the successful litigant. The case goes on to say that it is necessary to show some ground for exercising a discretion to refuse costs to a successful litigant and that the discretion must be judicially exercised. That principle has been infinitely restated and applied such that its status as part of the general law cannot be disputed.
13. The issue then becomes the inter-relationship between that general principle and rule 63.11(5) of the Supreme Court Rules. In turn the issue is whether it is permissible for delegated legislation (rule 63.11(5) in this case) to qualify the usual rule as to costs. Unlike section 110 of the Act which merely specifically directs the court to have regard to various matters when exercising its discretion, rule 63.11(5) appears to be mandatory in its operation. In my view an inconsistency therefore arises. Had rule 63.11(5) merely stated, in much the same way as section 110 of the Act does, that certain matters were to be taken into account in the exercise of the discretion, then there would not be any inconsistency. The common law discretion would then still have application. Such a provision would supplement the existing law rather than be inconsistent with it. It would then be a simple matter for the Court to consider those matters in the overall exercise of its discretion. That may or may not see a departure from the usual order. Although *Ritter v Godfrey* acknowledges that in some cases it may be appropriate not to make the usual order as to costs in the exercise of the Court's discretion, the effect of rule 63.11(5) is to circumvent the discretion entirely where the circumstances referred to in that rule are made out. In that situation the common law discretion to award costs is rendered nugatory and clearly that is inconsistent with the common law. In my view such a position would only be permissible if there was a clear expression in

the Act that the Work Health Court Rules applied as if they been enacted in the Act itself or that the common law was specifically overturned.

14. Accordingly in my view rule 63.11(5) of the Supreme Court Rules cannot apply. That however is not the end of the matter. As the order as to costs is discretionary and as that discretion must be judicially exercised. further issues arise. In particular I refer here to the application of the principle concerning “procedural indulgence”.
15. This principle derives from *Golski v Kirk* (1987) 14 FCR 143, where at page 157, Ryan J said:

“Costs are, of course, discretionary, ... it is usual for a party seeking an indulgence to pay the costs for the application, especially where, as here, the application throws up a difficult legal question.”
16. In *Golski v Kirk*, the procedural indulgence was an amendment to the statement of claim, albeit one which introduced new facts and involved the question of an amendment after the expiration of the applicable limitation period. In the current case, the order sought was an extension of time to take a step which was a pre-requisite to the commencement of proceedings.
17. I am alert to this distinction but I am not entirely convinced that it makes a difference. Whether or not the current matter involves a “procedural indulgence”, as that term is used in *Golski v Kirk* or not, is not the issue. Either way it still remains a question of the proper and judicial exercise of the discretion. Even if it is a procedural indulgence, *Golski v Kirk* does not mandate a particular exercise of the discretion. The fact that a procedural indulgence is granted must be weighed up with all other relevant matters.
18. In my view there are ample reasons why this matter should not be regarded as a procedural indulgence as that term has come to be used for costs purposes. I agree with the submission of Mr Morris that the sort of indulgence referred to there is in relation to procedures such as an amendment to pleadings, leave to take a step, leave to extend the time to

take a procedural step, e.g., the filing of a defence or a list of documents. I consider that where the matter relates to the obtaining of an extension of the time for taking of a preliminary step which is a pre-condition to instigation of proceedings, it is an entirely different matter, particularly where, as in this case, the default necessitating that step is intricately tied in with the cause of action giving rise to the substantive proceedings.

19. Irrespective of that, a proper exercise of the discretion is required. Relevant considerations here are the findings of the Judicial Registrar in relation to the decision to grant the extension to the appellant. In that decision the Judicial Registrar accepted the explanation given for the delay by the appellant in taking the appropriate step. Indeed it is clear that the Judicial Registrar was influenced by findings which reflected that the very injury the subject of the appellant's claim was directly related to her inability to comply with section 103D of the Act. In those circumstances and given also that the extension of time had to be obtained as a preliminary order, the order of the Judicial Registrar that the appellant was to pay the respondent's costs was inappropriate in my view. It seems clear also that the Judicial Registrar was of the view that rule 63.11(5) of the Supreme Court Rules applied and mandated such an order. I suspect that the Judicial Registrar would not have made that order if she did not feel constrained by rule 63.11(5).
20. On the other hand, if the appellant is ultimately unsuccessful in her claim, then it is inappropriate that the respondent should have to pay the costs for the application for the preliminary order simply because the appellant was successful in obtaining that order.
21. All things considered I consider that the appropriate order is one in accordance with *Sola Optical Australia v Mills* [1987] 46 SASR 364 namely, that the costs of the application for the extension of the current proceedings

should abide the result in the substantive proceedings and that should be based on 100% of the Supreme Court scale. I so order.

22. I will hear the parties as to the costs of the appeal.

Dated this 19th day of January 2007.

V M Luppino
STIPENDIARY MAGISTRATE