CITATION: *Robinson v Institute for Aboriginal Development Inc* [2010] NTMC 058

PARTIES:	MICHAEL ROBINSON
	v
	INSTITUTE FOR ABORIGINAL DEVELOPMENT INC
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Worker Health
FILE NO(s):	20940006
DELIVERED ON:	17 September 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	3 August 2010
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

WORKERS COMPENSATION – Failure to bring claim within time prescribed by s 104(3) of the *Workers Rehabilitation & Compensation Act* – no power to extend time limits for bringing the proceedings

REPRESENTATION:

Counsel:

Worker:	Mr O'Loughlin
Employer:	Mr Crawley

Solicitors:

Worker:	Halfpennys
Employer:	Cridlands

Judgment category classification:	A
Judgment ID number:	[2010] NTMC 058
Number of paragraphs:	41

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

No. 20940006

[2010] NTMC 058

BETWEEN:

MICHAEL ANTHONY ROBINSON
Worker

AND:

INSTITUTE FOR ABORIGINAL DEVELOPMENT INC
Employer

REASONS FOR DECISION

(Delivered 17 September 2010)

Ms Sue Oliver SM:

1. By application dated 23 November 2009 the worker has applied for an order in respect of a claim for compensation under Part V of the *Workers Rehabilitation and Compensation Act*.

2. The worker seeks a declaration that those proceedings are not barred for failure to make the claim within the time limit set by s 104(3) of the Act.

Steps and time limits applicable to the bring of a claim for compensation before the Work Health Court

3. The bringing of a claim for compensation under the Act and the responses to a claim by an employer are governed by strict procedural steps and time limitations. In *Maddalozzo v Maddrick* (1992) FLR 159 at 162 Mildren J described the statutory scheme as a "minefield of time limitations" and in *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 220, his Honour observed that with the introduction of mediation as a pre condition to

making an application to the Work Health Court that the “pathway” to the Court is longer and more tortuous than ever. Understanding the scheme is not assisted by the fact that the “pathway” is not dealt with by way of sequential provisions in the Act.

4. The first step is a requirement that notice of the relevant injury has, as soon as practicable, been given to or served on the worker's employer (s 80). Proceedings for recovery of compensation are not maintainable unless notice of the injury is given before the worker has voluntarily left the employment in which he or she was injured (s 182(1)) and within six months after the occurrence of the injury or, in the case of a disease, the incapacity arising from the disease; or in the case of death, within six months after advice of the death has been received by the claimant. The worker’s claim was made on or about 29 May 2001 for an injury alleged to have been sustained on or about 12 May 2001. Once a claim for compensation is received, an employer is required to make a decision either accepting liability for the compensation, deferring the acceptance of liability for the compensation; or it may dispute liability for the compensation. The decision must be notified within ten working days after receipt of the claim (s 81). In this matter, the decision was deferred on or about 5 June 2001 and then the worker was provided with a notice of decision disputing liability for compensation under s 85 on 20 July 2001.

5. Having received a notice that disputes liability, the next requirement is that the worker may apply to the Work Health Authority to have the dispute referred to mediation (s 103D). If the dispute is a dispute as to liability for compensation, then the worker must make the application for mediation within 90 days of receiving the s 85(8) statement. On receipt of the application, the Authority has seven days to refer the dispute to a mediator. On or about 7 August 2001, the worker applied for mediation.

6. According to the Certificate of Mediation tendered, a mediation conference was held on 21 and 23 August 2001. The Certificate is dated 21 August 2001 (sic) and states in relation to outcome that there was "NO CHANGE" although noting further that the Insurer agreed to a one off lump sum payment with the details to be worked out between the parties.

7. Finally, if the attempt to resolve the dispute has been unsuccessful at mediation, the worker may then apply to the Court for an order for compensation (s 103J). Once again the application is subject to a time limitation. Section 104(3) requires that the proceedings be commenced within 28 days after the claimant receives the Certificate of Mediation issued under s 103J(2).

8. Clearly, the application for compensation made to the Court by the worker was not commenced with 28 days of the Certificate of Mediation being issued. It is over eight years from that date. However, s 104(4) provides that the failure to make a claim within the 28 day period shall not be a bar to the commencement 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.

The Employer's objection to the proceedings

9. The employer's position is that the application cannot proceed for three reasons. First, that a worker is only able to bring an application for compensation where an attempt to resolve the dispute by mediation has been unsuccessful. The employer argues that in this case, the mediation was successful in resolving the dispute. Secondly, that if the dispute is found not to have been resolved by the mediation, that the proceedings are nevertheless barred by the failure to make application within the 28 days required by s 104(3) and that the failure to do so is not one that can be excused by reason of the matters set out in s 104(4). Finally, the employer says that even if satisfied that the proceedings should not be barred for

failure to comply with the time limit set by s 104(3), that the Court has an overriding discretion to disallow an extension of time for bringing the proceedings on the basis of prejudice to the employer due to the lapse of time.

Was the mediation unsuccessful?

10. It is common ground that following and arising out of the mediation, the parties entered into a Deed of Agreement dated 30 August 2001 by which the worker agreed to accept payment of $10,000.00 for "rehabilitation expenses; permanent impairment; any claim by the Health Insurance Commission; Centrelink; costs …". The Deed is one commonly referred to as a "Hopkins Agreement".

11. Section 103J provides:

> "(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."

12. The employer says that to be successful, mediation does not necessarily need to lead to a change in the disputed decision, that all that is required is for the aggrieved party to cease to be aggrieved. In the present case, the employer says that the worker proposed a settlement whereby the employer would pay an amount to cover his medical expenses to date, the cost of a training course he wished to undertake, as well as his wages for the period of the training course and in that way, the mediation was successful because the dispute before the mediator was resolved to the worker's satisfaction as well as to the satisfaction of the employer. That settlement was made by way of the "Hopkins Agreement" referred to above.

13. In general terms, it might be true to say that when parties are engaged in a "dispute" over a matter and have been able to achieve a mutually acceptable outcome, that they have resolved the "dispute" between them because

neither remains aggrieved. However, the Act does not use the term “dispute” in that general sense. A “dispute” is given a specific and limited definition in s 103B for the purpose of all the provisions that deal with mediation. It provides:

> “For the purposes of this Division, a dispute arises where a claimant is aggrieved by the decision of an employer:
>
> (a) to dispute liability for compensation claimed by the claimant;
>
> (b) to cancel or reduce compensation being paid to the claimant; or
>
> (c) relating to a matter or question incidental to or arising out of the claimant's claim for compensation.”

14. The definition is specific and limited because mediation is the pre-condition to bringing an application for compensation before the Court. If the mediation arises from a dispute as to liability for compensation and at the conclusion of the mediation, liability is still not agreed, then notwithstanding what other matters might have been agreed between the parties, the “dispute” has not been resolved. The dispute is about liability and it is the question of acceptance of liability that must be resolved.

15. A simple example illustrates the fallacy of the employer’s argument. If an unrepresented worker were to attend mediation and agree to accept a payment in respect of a claim for which the employer did not accept liability but, subsequent to the mediation, and before any agreement was entered into or payment made, sought legal advice and decided on that advice not to accept the payment offered but to pursue the claim through the Court, then on the employer’s argument, the application to the Court could not be made because there had been a successful mediation. In my view such a position is untenable. It sits in direct opposition to the clear intent of the legislation that parties cannot contract out of its terms, a restriction that in my view is intended to prevent the sort of detriment that might arise from enforcing agreements reached by unrepresented workers with their employers and their

insurers. It would deprive a worker of the ability to have liability determined by the Court.

16. Even where the parties have, as in this case, entered a Deed of Agreement and payment of an agreed sum has been made, that act does not convert the mediation to a "successful" one. This is in my view made clear by the Certificate of Mediation which records the outcome as "NO CHANGE". In my view this clearly means "no change to the question of dispute as to liability." Subsequent agreements do not alter the outcome at the conclusion of the mediation. Once the Certificate is issued, the next step in the "pathway" is activated. The mediation was therefore, in terms of s 103J, an unsuccessful one.

Is the Court confined to considering the 28 days from the certificate of mediation for the purpose of the application of s104(4)?

17. Section 104(3) provides that applications for compensation are to be commenced within 28 days after the claimant receives the Certificate of Mediation. In this matter the application was not made for a further eight years.

18. Section 104(4) provides that "the failure to make a claim within the period specified in subsection (3) shall not be a bar to the commencement 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."

19. The worker claims that he had reasonable cause for failing to make his claim for compensation within the period of 28 days from the receipt of the Certificate of Mediation. It is the worker's position that in determining whether the failure was occasioned by reasonable cause, the Court is confined to a consideration of what occurred within that period and cannot include any consideration of what has transpired since then.

20. This position is based on a number of authorities to which I have been referred. In *Murray v Baxter* [1914] 18 CLR 622 the High Court considered whether a mistake of fact existed to excuse a failure to commence proceedings for the recovery of compensation under s 12 of the *Workers Compensation Act* 1910. Save for the actual time period, s 12 is in almost identical terms to s 104(4) of the *Workers Rehabilitation and Compensation Act*. Section 12 provided " Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable … unless the proceedings for recovering compensation with respect to such accident have been commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: Provided that … (b) the failure to commence proceedings within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from New South Wales, or other reasonable cause."

21. In a 2:1 decision, Isaacs and Gavan Duffy JJ held that where proceedings had not been commenced for a longer period than the six months specified, the period in which an excuse is required is that period of six months, and that any delay after the expiration of that period and the commencement of the proceedings cannot be taken into consideration. Their Honours said:

> "He [counsel for the respondent] contended that the whole period from the termination of the five months—that is, from about the beginning of October 1912—to the date when the action was commenced—viz., September 1913—must be covered by the plaintiff's excuse. To sustain that, it was necessary to contend, and learned counsel did contend, that "the failure" secondly mentioned in paragraph (b) of sec. 12 meant "the failure to commence proceedings before their actual commencement." But that is an impossible construction of the words of the paragraph, unless we proceed to virtually legislate. "The failure" secondly mentioned refers to "the failure" just previously mentioned, and that is "the failure to commence proceedings within the period above specified." You cannot imply a period where one is expressly "specified." The "period above specified" for the commencement of an action is expressly stated to be "within six months from the time of death";

> and "within" does not include a period "beyond." The Act distinctly states and limits within fixed termini a condition precedent; it permits that condition to be excused; if it is excused its effect ceases, and if we were to extend the limits specified we should be creating a different condition."

22. That decision has been followed, as indeed it must, by both this Court and by the Supreme Court in relation to s 104(4) and s 182(3), which is in similar terms to s 104(4), (see *HSE Mining Pty Ltd v Power* [2004] NTSC 32; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Quaylee v Grace Removals* unreported, Work Health Court 10 May 1995); *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 83) unless there is shown to be some reason by which the decision in relation to the comparable provision under consideration in *Murray v Baxter* might be distinguished. I see no reason for distinguishing the meaning.

Did the worker have reasonable cause for failing to comply with the 28 day time limit for making of his application to the Court?

23. The worker points primarily to the agreement tendered and recorded by way of Deed as providing reasonable cause for his not making application for compensation within the required 28 day period.

24. Section 186A of the Act prevents parties contracting in a way which purports to exclude or limit the application of the Act or to exclude or limit the rights or entitlements of a person under the Act. Any agreement that attempts to achieve that objective is, to that extent, null and void. The Deed between the parties contains agreement that the Deed is to be subject to the Act and in particular to s 186A and:

> "does not prevent or encumber any entitlement Robinson may have to bring another claim or proceeding for the same or similar relief as the claim, save, should Robinson bring another claim for the same or similar relief as the claim, the amount described in paragraph 2 of this deed, including interest calculated at the rate prescribed from time to time by the master of the Supreme Court of NT of Australia in respect of post judgement debts, shall become a debt due and

> payable ("the debt") by Robinson to IAD or QBE Insurance Australia Ltd, or, in the alternative, and at the option of IAD or QBE Insurance Australia Pty Ltd, the debt shall be credited in favour of IAD against any future award or determination of compensation."

25. The effect of that provision is that, unlike common deeds of settlement, the donee does not agree that on payment he or she will abandon all future claims against the donor but specifically preserves the right to pursue a claim for the same or similar relief subject to repayment of the monies given under the Deed. It is this preservation of the right to bring further action that prevents so called Hopkins Agreements running foul of s 186A (see *Hopkins v Collins/Angus & Robertson Publishers Pty Ltd* unreported decision Northern Territory Supreme Court, 21 May 1997).

26. There are two aspects to the Deed that give rise to there being reasonable cause for the worker not to have made a claim for compensation within 28 days of the Certificate of Mediation. The first is the fact of the "settlement" of the claim by way of the Deed. Why would the worker proceed to lodge a claim for compensation when he had agreed to accept a payment in settlement of the claim? There is simply no reason for him to take that action at that point in time, particularly because the Deed records that he may "bring another claim or proceeding for the same or similar relief as the claim" on repayment of the monies given under the Deed.

27. The second aspect is the circumstances that led to the worker agreeing to accept the payment to be made under the Deed, which is expressed both in the Deed at paragraph G., quoting from a report of a psychiatrist, Dr. Timney dated 30 July 2001, and in paragraph 6 of the worker's affidavit, again with reference to the same report of Dr. Timney. In summary in relation to his mental health status, Dr Timney, reported

> "His mood appeared moderately depressed and non-reactive and his affect was one of moderate anxiety with some lability and brief tearfulness…The history given indicates the presence of depressive

symptoms even before the performance appraisal meeting which resulted in him being uncertified (sic) unfit for work and his symptoms are typical of a major depressive episode of moderate severity"

28. In relation to prognosis Dr Timney said:

> "Generally the course of depression is over a period of 12-24 weeks, although the treatment can be protracted for a considerable time longer in cases where there is treatment resistance.
>
> I note that in his previous episode of illness Mr Robinson claimed to have been under treatment for approximately six years, although there were signs of significant improvement during this period"

29. In relation to prognosis, as recorded in the Deed, the report said:

> "I would expect Mr Robinson to recover from this episode of depression and be able to return to his pre-accident occupation as a health educator. My main reasons for expressing this opinion are that he appears motivated to return to his job, he has studied at university to allow himself to work in this field and generally the prognosis for recovery from an episode of depression of this severity is good."

30. I was referred by the employer to an email dated 14 January 2002 sent by the worker to a treating psychologist to whom he had been referred by the insurer QBE[1] in which Mr Robinson expresses his thanks for the assistance of that person and reporting the resolution of his claim by way of the agreement. Two letters are amongst the medical records associated with that email[2], one to the insurer QBE and one to Mr Robinson both dated 21 August 2001 from Michael Tyrell who appears to be the recipient of the

[1] Part of annexure B to the affidavit of Rachel Helen Schaefer dated 28 July 2010
[2] Also part of annexure B to the affidavit

email. Mr Tyrell's letter to Mr Robinson records "Recommended Rehabilitation" as follows:

> "You appear to now be seeing things clearly. You believe that you will not adapt adequately to the workplace while certain factors remain there. You have expressed an interest in learning to teach English as a second or foreign language (ES/FL). Were you to be offered some reasonable assistance to be retrained in this area (eg short ES/FL course training fees) you have said that you would probably gladly accept it and proceed. This would be more likely to be compatible with your makeup overall than is the present job.
>
> You will probably benefit from continuing with what appear to be relatively high doses of anti depressant medication for some months as recommended by your medical practitioner.
>
> Equally or more importantly, you would also do well to embark on a psychotherapeutic journey (say 8-12 sessions) with an experienced therapist to develop your emotional and cognitive resilience for the longer term and so to raise your "immunity" to depressive reaction under stress. **This would not reasonably be at the expense of the insurer**". (emphasis added)

31. To the insurer Mr Tyrell wrote in almost identical terms under the heading "Recommended Rehabilitation" as follows:

> "Mr Robinson appears to be now seeing the factors clearly and believes that he will not adapt adequately to the workplace while certain factors remain there. He has expressed an interest in learning to teach English as a second or foreign language (ES/FL). Were he to be offered some reasonable assistance to train in this area (eg short ES/FL course training fees) he would probably gladly accept it and

proceed. This would be more likely to be compatible with his makeup overall than is the present job.

He will probably benefit from continuing with what appear to be relatively high doses of anti depressant medication for some months as recommended by his medical practitioner.

Equally or more importantly, he would also do well to embark on a psychotherapeutic journey **in his own time and at his own expense** (emphasis added) with an experienced therapist to develop his emotional and cognitive resilience for the long term."

32. The mediation, at which it appears agreement was reached for the worker to accept a sum of money as "settlement" of his claim, was held on 21 and 23 August 2001 and the Deed entered into on 30 August 2001. On the basis of Dr Timney's report, there is strong evidence that he was still suffering from a "major depressive episode of moderate severity" both at the time of agreeing to a settlement at mediation and when entering the Deed of Agreement. Mr Tyrell's letters also support that finding and I note that Mr Tyrell recommended as continuation of the "high doses of anti depressant medication "for some months".

33. According to Mr Tyrell's letters, and supported by the workers subsequent email to him, the worker was motivated to take steps that would assist him to get back into the workforce. Mr Robinson appears, from his email, to have formed a strong therapeutic relationship with Mr Tyrell, whose letters have the appearance of "brokering" the settlement that was reached. It is not apparent as to why Mr Tyrell would suggest both to Mr Robinson and to the insurer that the ongoing therapy that he was recommending should be at Mr Robinson's expense.

34. Mr Robinson was not legally represented nor had he taken legal advice at that time of the settlement[3].

35. Mr Robinson has attached more recent medical reports to his affidavit. Dr Lester Walton's report dated 17 January 2008 relates to an examination of Mr Robinson on 11 December 2007. Mr Barry Kenny saw Mr Robinson in January this year and gave a report dated 25 January 2010. Both psychiatrists believe that he was suffering a disorder (*Kenny* – "Adjustment Disorder with anxiety and some secondary depression"; *Walton* – "chronic mixed anxiety/depressive disorder") at the relevant time.

36. In my view, the fact of the depressive disorder, the absence of legal advice and the support for the proposal apparently made by Mr Robinson to fund his retraining to teach English as a Second Language or Foreign Language by the person who was assisting him in therapy, combine to explain why he was prepared to accept the settlement made by way of the Deed and as a consequence of entering that Deed did not proceed to make his application within the required 28 day period. Combined, these matters provide reasonable cause to explain that failure.

Does the Court nevertheless have an overriding discretion to disallow the proceedings?

37. The employer says that prior to the enactment of subsection (4), s 104(3) was a procedural requirement capable of being the subject of an application for an extension of time pursuant to s 94(2) of the Act and that the addition of subsection (4) does not derogate from that power, but instead places a further restriction on the right of a Court to entertain an extension application. I take this to mean that the Court is required to do two things. First, to determine whether the failure to commence proceedings within the specified period of 28 days acts as a bar to the maintenance of the proceedings or can be excused for one or more of the reasons given in s

[3] See [2] Affidavit of Michael Anthony Robinson affirmed 19 July 2010.

104(4). If excused, the Court may then nevertheless determine whether to grant an extension of the time allowed and in that consideration may take into account the ordinary factors associated with such applications for an extension of time.

38. There are two difficulties with this argument. First, the power of the Court pursuant to s 94 is a power to expand or abridge "a time prescribed by or under this Part" as it thinks fit. Section 104(3) sets the time limit for the making of an application for compensation following an unsuccessful mediation. Section 104 is not in the same Part of the Act as s 94. Section 94 is in Part 6 of the Act. Section 104 is in Part 6A. Section 94 does not therefore have application to section 104. True it is, that prior to the introduction of the mediation provisions, sections 94 and 104 were in the same Part of the Act. However that is no longer the case and the Court is required to interpret the provisions of the Act in accordance with their clear meaning. There is no ambiguity in section 94 and it cannot have application to section 104 whatever might have been the situation at some previous time and under some previous structure of the Act. Secondly, no extension of time is required. The worker is not required to seek leave to make a claim for compensation outside the 28 day time limit from mediation. If the failure is not excused, the claim is barred. If the failure is excused, the worker requires no further order to allow the application to be made. As their Honours said in *Murray v Baxter* "the Act distinctly states and limits within fixed termini a condition precedent; it permits that condition to be excused; if it is excused, its effect ceases, and if we were to extend the limits specified, we should be creating a different condition".

39. To suggest that in addition to a consideration of the 28 day period in question, the Court should consider also what has transpired since in terms to a general discretion is to, in effect, add to the condition precedent. It would impose a subsequent condition not now supported by any provision in the Act. It would also, in my view, operate so that clause 4 of the Hopkins

Agreement which purports to allow for a claim to be made subject to re-payment of the monies paid under the agreement, would have more limited operation than it suggests. In effect, it would be saying "your further rights under the Act are not limited subject to re-payment and only when you can satisfactorily explain to the Court why the proceedings should be allowed at the time you seek to bring them".

40. The agreement carries no such proviso and if it did, that proviso would, in my view, be null and void because the Act does not restrict the right of application in that way.

Conclusion

41. The worker, Michael Anthony Robinson has shown reasonable cause as to why he failed to make application for compensation within 28 days of the Certificate of Mediation and is therefore not barred from commencing the proceedings.

Dated this day of 2010.

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Sue Oliver
STIPENDIARY MAGISTRATE