CITATION:	*Johnston v Artback NT: Arts Development & Touring Inc* [2010] NTMC 071
PARTIES:	MARGARET JOHNSTON v ARTBACK NT: ARTS DEVELOPMENT & TOURING INC
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	20830195
DELIVERED ON:	23 December 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	6, 7, 8, 9, 10 & 13 December 2010
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORK HEALTH - PRE-ACTION MEDIATION – THE STATUTORY SCHEME – PRE-CONDITION TO COURT PROCEEDINGS

Workers Rehabilitation and Compensation Act ss 69 (1)(b), 82 (1), 85(8), 103B, 103C, 103D, 103 J, 182(3)
Murwangi Community Aboriginal Corporation v Carroll [2000] NTMC 25 followed
Evans v Northern Territory of Australia No 9405778 31 January 1996 followed
Prime v Colliers International (NT) Pty Ltd [2006] NTSC 83 applied
Ju Ju Nominees Pty Ltd v Carmichael [1999] 9 NTLR 1 discussed

REPRESENTATION:

Counsel:

Worker:	Mr O'Loughlin
Employer:	Mr Cole

Solicitors:

Worker:	Halfpennys
Employer:	Minter Ellison

Judgment category classification:	B
Judgment ID number:	[2010] NTMC 071
Number of paragraphs:	76

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

No. 20830195

[2010] NTMC 071

BETWEEN:

MARGARET JOHNSTON
Worker

AND:

ARTBACK NT: ARTS DEVELOPMENT & TOURING INCORPORATE
Employer

REASONS FOR DECISION

(Delivered 23 December 2010)

Dr John Allan Lowndes SM:

THE ISSUES ARISING AT THE HEARING

1. This matter was listed for hearing on 6, 7,8, 9, 10 and 13 December 2010. After the commencement of the hearing and during the course of the worker's case several issues arose which required the Court's immediate attention and determination.

- **Amendment of the Statement of Claim**

2. Mr O'Loughlin, counsel for the worker, sought leave to amend the worker's Statement of Claim by adding the following paragraph and particulars:

> Pursuant to s 103D(4) the worker seeks an order to extend the period to apply for mediation to 18 June 2010 or some such other date as the Court sees fit.

Particulars

The worker had reasonable cause for the failure to apply within 90 days of the receipt of the s 69 notice ("the relevant period") because:

1. The worker had no legal representation over the relevant period;

2. The worker was suffering from the consequences of the injury during the relevant period including:

   (a) cognitive deficits;

   (b) difficulties with forward planning;

   (c) difficulties with processing information.

3. The worker wrongly believed she was not incapacitated or wrongly believed she was going to recover and restore her pre-injury capacity.

3. As it stood, the Statement of Claim alleged that following a claim for compensation in relation to a work related injury in 1999 the employer accepted liability for the claim. Subsequently, by Notice of Decision dated 19 September 2002 the employer cancelled the worker's benefits. The Statement of Claim alleged that the Notice of Decision was invalid.[1]

4. The Statement of Claim went on to allege that the worker sought reinstatement of her benefits by way of a letter from the worker's solicitors to the insurer dated 10 March 2008. It was alleged that the employer, through its insurer, failed to reinstate the worker's benefits. There was also a plea that "the worker remains totally incapacitated for employment".

5. By way of relief, the worker sought the following orders:

[1] The grounds for the invalidity are particularised as:
(a) At the time of the service of the Notice of Decision the worker was totally and/or partially incapacitated for employment.
(b) At the time of service of the Notice of Decision Dr Reid refused to certify that the worker was no longer incapacitated for work.

(a) Payment of weekly benefits as for total and/or partial incapacity from 19 September 2002 to the current date and continuing;

(b) In the alternative, payment of weekly benefits as for total and/or partial incapacity from 10 March 2008 to the current date and continuing;

(c) Payment of past, present and future hospital, medical, pharmaceutical and like expenses;

(d) Interest pursuant to s 89 and s 109 of the *Workers Rehabilitation and Compensation Act*; and

(e) Costs.

6. The proposed amendment came as no surprise, for it was patently clear from paragraph 8.2 of its Defence that the employer was asserting that "if the notice of decision dated 19 September 2002 was invalid, which is denied … the worker is not entitled to dispute the validity of the notice of decision as the worker failed to apply for mediation within 90 days of receiving the notice of decision dated 19 September 2002". That pleading was more than ample alert that if the worker wished to proceed to dispute the validity of the notice then she would have to seek an extension of time pursuant to s 103D(4) of the *Workers Rehabilitation and Compensation Act*. One suspects that the failure to amend the Statement of Claim earlier in the proceedings was either an oversight on the part of the worker or due to a misapprehension that an application to extend time could be made without the application being the subject of a formal pleading.

7. The Court has a discretion to allow a party at any stage of a proceeding to amend his or her pleading in a manner and on terms as the Court considers appropriate: see Rule 8.08(2)(b) of the *Work Health Court Rules*. In the exercise of its discretion the Court is guided by Rule 8.08(1) which states that "amendments are to be made to the pleadings that are necessary for determining the real questions at issue between the parties …".

8. The Court considered that the proposed amendment was necessary to enable a real question in controversy to be decided. In my opinion, allowing the amendment would not prejudice the employer. In the exercise of the Court's discretion I gave the worker leave to amend the Statement of Claim in the proposed manner.

- **The Amendment of the Defence**

9. During the course of hearing the worker's application to extend time pursuant to s 103D(4) Mr Cole, counsel for the employer, raised a number of arguments. Those arguments were to the effect that the commencement of the present proceedings was premature, the worker not being entitled at the time to commence those proceedings.

10. In light of those arguments the Court drew Mr Cole's attention to the possible need for the employer to amend its Defence. Accordingly the employer sought to amend its Defence by adding the following five paragraphs:

> Further, the employer says the worker is not entitled to commence proceedings disputing the notice of decision dated 19 September 2002 for the reason that the requirements of section 103J of the *Workers Rehabilitation and Compensation Act* have not been met in that there has not been an attempt to resolve the dispute by mediation, and that attempt has been unsuccessful.
>
> Further, the worker was required to make a claim for reinstatement of benefits pursuant to section 82 of the *Workers Rehabilitation and Compensation Act* and failed to do so.
>
> Further, the worker has failed to receive a statement pursuant to section 85(8) of the *Workers Rehabilitation and Compensation Act* in relation to any reinstatement of benefits.
>
> The worker has failed apply for a mediation within 90 days of receiving a statement pursuant to section 85(8) of the *Workers Rehabilitation and Compensation Act* as required by section 103D(1A) of the Act.
>
> The worker is not entitled to commence proceedings for reinstatement of her benefits for the reason that the requirements of section 103J of the *Workers Rehabilitation and Compensation Act* have not been met in that there has not been an attempt to resolve the dispute by mediation and that attempt has been unsuccessful.

11. Under objection from the worker's counsel, I granted leave to the employer to amend its Defence in the manner proposed. I considered that the issues raised a jurisdictional issue and went to the entitlement of the worker to commence the present proceedings pursuant to s 103J(1) of the Act. Furthermore, the issues were inextricably linked to the worker's application for extension of time pursuant to s 103D(4) of the Act. In my opinion it was necessary to allow the amendments sought by the employer in order to determine whether the Court had jurisdiction to entertain the present proceedings.

WAS THE WORKER ENTITLED TO COMMENCE THE PROCEEDINGS?

12. The employer's Amended Defence squarely raises the worker's entitlement to bring the present proceedings.

13. In order to determine the entitlement of the worker to commence the proceedings, it is necessary to begin with an examination of the statutory scheme and the role of pre-action mediation within that framework.

- **The Statutory Scheme**

14. Part 6A of the *Worker's Rehabilitation and Compensation Act* deals with dispute resolution by way of the process of mediation.

15. According to s 103B of the Act a dispute arises where a claimant (being a person claiming or being paid compensation) 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.

16. Section 103D(1) provides that a claimant may apply to the Work Health Authority to have a dispute referred to mediation. Subsection (2) goes on to provide that if the dispute relates to a decision to dispute liability for compensation claimed by the claimant or to cancel or reduce compensation being paid to the claimant, the claimant must apply to have the dispute referred to mediation within 90 days of receiving the statement referred to in s 85(8) or 69(1)(b) respectively. No time limit applies to a dispute relating to a matter or question incidental to or arising out of a claim for compensation.

17. Section 103J(1) deals with the pre-condition to court proceedings:

> Subject to subsection (3), a claimant is not entitled to commence proceedings under Division 2 [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.

18. A failure to comply with s 103J(1) creates a procedural bar to the commencement of proceedings under the *Workers Rehabilitation and Compensation Act*. If proceedings in respect of a dispute are premature, then the proceedings insofar as they relate to that dispute are liable to be struck out.

19. Division 1 of Part 6A draws a clear distinction between three discrete categories of dispute. In my opinion, the distinction serves two purposes.

20. First, the distinction is made to assist in identifying the nature of the dispute that is referred to mediation. If an employer decides to dispute liability for compensation claimed by a claimant then the employer is obliged to notify the claimant of that disputed liability in accordance with s 85(8) of the Act. If the claimant is aggrieved by that decision, the claimant must apply for mediation within the specified 90 day period. If such an application is made

[2] Subsection (3) provides an exception in that a claimant is entitled to commence proceedings for an interim determination of his or her entitlement to compensation under s 107 at any time after he or she has applied under s 103D to have the dispute referred to mediation.

then the parameters of the dispute referred to mediation are set by the s 85(8) notification and the subsequent application for mediation. Similarly, if an employer decides to cancel or reduce compensation being paid to a claimant, the employer is obliged to notify the claimant of that decision in accordance with s 69(1)(b) of the Act. Again, if the claimant is aggrieved by that decision, the claimant must apply for mediation within the 90 days. In the event of such an application being made, it is the s 69(1)(b) notice and the subsequent application for mediation that define the nature and scope of the dispute that is to be mediated.

21. The application for mediation plays a pivotal role in defining the nature and scope of the dispute.[3] Division 1 of Part 6A contemplates that the nature and ambit of the dispute referred to mediation will be addressed in the application for mediation pursuant to s 103D(1). It is difficult to conceive of an application for mediation which does not identify the nature of the dispute sought to be referred to mediation.

22. One would also expect that in most cases a claimant's solicitors would write to the employer's insurer regarding any dispute before applying to have the dispute referred to mediation. For example, in the recent case of *Arthur Leslie Boland and Northern Territory of Australia* [2009] NTMC 019 the worker's solicitors, prior to making a request for mediation, wrote to the insurer raising a number of issues, including commencement of payments of weekly benefits, motor vehicle modifications, medical and pharmaceutical treatment and rehabilitation needs under s 78 of the Act, including attendant care services. By way of further example, as a prelude to mediation, the solicitors for the worker in these proceedings wrote to the insurer seeking a reinstatement of workers.[4]

[3] This is particularly the case in relation to disputes arising under s 103B (1) (c) of the Act. The referral of such disputes to mediation has no time limit and is not triggered by the service on a claimant of a statutory notice, which can be instrumental in defining the nature and scope of a dispute.
[4] The content of that correspondence is discussed later in these reasons for decision.

23. A major issue in these proceedings concerns the identification of the dispute that was referred to mediation prior to the commencement of the proceedings. That issue is dealt with in the next part of these reasons for decision.

24. Another aspect of the dispute resolution process that warrants consideration is the actual process by which a dispute may arise under s 103B of the Act.

25. As noted earlier, a dispute arises under s 103B where a claimant is aggrieved by a decision of an employer in relation to one of the matters referred to in subsections (a), (b) and (c). It is self-evident that in order for a claimant to be aggrieved by a decision of an employer the employer must have made a decision. A decision by an employer to dispute liability for compensation claimed by a claimant depends upon a claim for compensation being made. A dispute in relation to liability for compensation claimed can only arise if a claim is made pursuant to s 82 of the Act, and pursuant to s 85(8) the employer notifies the claimant that it is disputing liability for the compensation claimed. Similarly, in order for a claimant to be aggrieved by a decision to cancel or reduce payments of compensation – and hence a dispute - the employer must notify the claimant of the cancellation or reduction in accordance with the provisions of s 69(1)(b) of the Act. This legislative scheme is reinforced by the provisions of s 103D(1A) which require a claimant to apply to have the dispute referred to mediation within 90 days of receiving notification either pursuant to s 85(8) or s 69(1)(b).

26. A dispute relating to a decision specified in s 103B(c) is treated somewhat differently. In order for a claimant to be aggrieved by a decision relating to or arising out of his or her claim for compensation – and hence a dispute – the claimant must have made a claim for compensation in the first place. It is noted that disputes relating to a decision of this type are also treated differently in that no time limit applies to the referral of such disputes to mediation.

27. The disputes specified in s 103B(a), (b) and (c) have one thing in common: they are all triggered by some mechanism, whether it be a claim for compensation and/or a statutory notice of some description.

28. Section 103B establishes a regime for the bringing into existence of a dispute that is capable of being referred to mediation pursuant to s 103D(1) of the Act. A peripheral issue that arose in *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 83 was whether a worker could merely write a letter to his employer requesting payments of compensation, and if the employer denied liability, the worker could go straight to mediation; and, if that was unsuccessful, bring proceedings in the Work Health Court pursuant to s 103J(1) of the Act. Mildren J held that if that were so it would "make much of the elaborate machinery provided by the Act for the bringing of claims and requiring them to be considered by employers within strict time limits otiose".[5] His Honour stated:

> The lodging of a claim form is still the triggering mechanism which brings to life the chain of events which will result in the claim being either accepted or rejected and, if rejected, mediated and, if that is unsuccessful, litigated. In my opinion the worker must… strictly comply with the requirements of s 82 and the time limits required by s 80 and s 182(1) (as well as other relevant time limits) …
>
> … the expression "dispute liability for compensation" in s 103B(a) is so close to the expression "dispute liability for compensation" found in s 85(1)(c) that I think it is clear that the draftsman had in mind, when referring to "dispute liability for compensation claimed by the claimant" in s 103B (a), that a claim had been made in accordance with s 82 which had been disputed in accordance with s 85(1)(c). A letter written to an employer is not "a claim" because s 82(1)(a) requires a "claim" to be "in the approved form".

29. In its Amended Defence, and during the course of oral submissions, the employer argued that the worker was not entitled to commence the present proceedings because there had been no attempt to resolve the dispute that had been referred to mediation; and therefore the Court could not be satisfied that there had been an unsuccessful attempt to resolve the dispute by mediation. The employer sought to rely upon the absence of a mediation

[5] [2006] NTSC 83 at [22].

conference and nil attendance of the parties at such a conference[6] as evidence of the absence of an attempt to resolve the dispute by mediation. The argument advanced by the employer raises a fundamental issue about the operation of the dispute resolution process established under Division 6A of the Act.

30. In the normal course of events, it is difficult to see how there can be an attempt to resolve a dispute at mediation without conducting a mediation, which usually entails the parties to the mediation participating in a mediation conference convened by the mediator for the purposes of attempting to resolve a dispute. However, it is important to closely examine the dispute resolution process established by Division 6A in order to determine whether the usual understanding of the mediation process has been altered or modified by statute.

31. As there is no definition of "an attempt to resolve the dispute by mediation" in s 103A of the Act, one must then determine the meaning of that phrase by applying the established principles of statutory interpretation.

32. Much of what I am about to say is derived from the decision of Mr Trigg SM in *Murwangi Community Aboriginal Corporation v Carroll* [2000] NTMC 25.

33. Section 103C(2) makes it clear that the function of a mediator is to promote the resolution of disputes between claimants, employers and employer's insurers. According to s 103C(3) a mediator, in promoting the resolution of a dispute, has the following powers:

- to conduct discussions with each party; and
- where it appears to the mediator likely to assist in the resolution of the dispute, to convene a conference and require the parties or any of them to attend; and

[6] See the Certificate of Mediation.

- to require a party to the dispute to provide to the mediator or another party to the dispute specified materials in the party's possession or control; and

- to require that information to be provided within a specified time; and

- to do any other things that are necessary or convenient to be done for the purpose of resolving the dispute.

34. Section 103C(4), inter alia, requires the mediator to act promptly and impartially in performance of his or her function and the exercise of his or her powers.

35. Section 103D(3) provides that within 21 days after receiving a referral a mediator must to do the following:

    - attempt to resolve the dispute;

    - advise the claimant and the employer's insurer of the outcome of the mediation;

    - if the mediator has been unable to resolve the dispute – advise the parties of further proceedings that may be commenced and the time within which to commence them.

36. Division 6A substantially alters our general understanding of the mediation process. It fetters the process in that it requires the mediator to attempt to resolve the dispute within 21 days after a referral. Within that very narrow time frame the mediator must exercise one or more of the powers conferred on him or her by s 103C(3) of the Act. It is clear that a mediation conference is within the absolute discretion of the mediator, being dependant upon his or her assessment of the likelihood of a conference assisting in the resolution of the dispute.

37. As observed by Mr Trigg SM in *Murwangi Community Aboriginal Corporation and Carroll* (supra) the attempt to resolve a dispute must be made within the 21 day period, and within that period the mediator must

advise the claimant and employer's insurer of the outcome of the mediation. Again, as observed by Mr Trigg, a section 103J certificate must be issued by a mediator within the 21 day period and should be issued "at the first when it becomes clear within that period that the mediation has been unsuccessful or secondly, at the end of that 21 day period if no resolution has been made".[7]

38. I respectfully adopt Mr Trigg's observations as well as the reasons he gave for the need for the mediation process to be undertaken within the statutory 21 day period:

> That is in my view crucial, because there is pursuant to s104(3) a 28 day time limit which commences to run from the date the claimant receives a certificate issued under 103J. If a worker is not legally represented at all and goes through the mediation and if a mediator were to simply adjourn it off without advising workers of their rights, then workers might be without that money or recourse to the courts for extended periods of time. In my view it is not intended to be like that…
>
> It would seem to me to be contrary to the aim of the Act as a whole that a worker could be frustrated and prevented from coming to the court if in fact he was being delayed by people and persons beyond his power or control.[8]

39. I agree with Mr Trigg that if the mediator is unable to complete the mediation process within the 21 day period, a claimant would be entitled to commence proceedings as soon as the 21 day period expires. In those circumstances s 103J(1) of the Act would not operate as a bar to the commencement of proceedings.

- **The nature and scope of the dispute referred to mediation**

40. What was the nature and ambit of the dispute referred to mediation on 18 June 2010?

41. The certificate of mediation dated 29 October 2010, which is admissible under s 103K(2) of the *Workers Rehabilitation and Compensation Act*, is

[7] [2000] NTMC 25 p 6.
[8] [2000] NTMC 25, pp 6-7.

singularly unhelpful in illuminating the nature of the dispute that was referred to mediation.

42. In the certificate the nature of the dispute is described as “Other”. What does that description connote? Has it been borrowed from the Form 5A Application to the Work Health Court? That form requires a worker to tick one of eight different boxes, seven of which describe a specific application or claim. The eighth box is titled “Other (give brief description and specify section of the Act)”. The purpose of Form 5A is to require a worker to indicate the nature of the relief being sought.

43. If the use of the word “Other” in the certificate was intended to be a reference to the “Other” box in Form 5A, then it is of no assistance at all in indicating the nature of the dispute referred to mediation.

44. But if the description were intended to be something else, then it is still devoid of meaning.

45. Dealing further with the certificate, it is apparent from that document that no mediation conference was ever conducted and therefore neither party attended such a conference. I consider that those circumstances throw no light on the nature of the dispute.

46. However, the certificate does provide information as to the documentation provided by the worker and the employer/insurer to the Authority as part of the mediation process: see s 103D(2A) and (2B). That documentation is set out in the Schedule attached to the certificate of mediation. It is noted that all of those documents bear a date between 3 June and 7 October 2010. Mr Cole attached special significance to the schedule of documents, pointing out that the s 69 Notice issued in 2002 was not included in the schedule. He relied upon the absence of that document as an indication that the decision to cancel the worker’s benefits back in 2002 was not part of the dispute that was referred to mediation in June 2010. Conversely, he relied upon the

schedule of documents as an indication that the mediation was referable to a dispute about the failure of the employer to reinstate the worker's benefits in accordance with the letter from the workers solicitors, Halfpenny's, to the insurer dated 10 March 2010.

47. Furthermore, there is no evidence of the worker having completed the Notice of Decision and Rights of Appeal request for mediation that would have been provided to the worker at the time of cancellation of her benefits in 2002; nor is there any evidence of the worker having sent that request to the Authority.[9] Had there been such evidence that would have thrown considerable light on the nature of the dispute being referred to mediation.

48. That leads to a consideration of the affidavit of Catherine Louise Spurr sworn 8 December 2010 and the annexures thereto. That affidavit was tendered primarily to demonstrate the attempts made to resolve the dispute - whatever that might have been - at mediation. However, the contents of that affidavit throw some light on the nature of the dispute that was referred to mediation. In fact, it is the best evidence as to the nature of the dispute.

49. Ms Spurr deposes in her affidavit that she wrote to the insurer on 10 March 2010 seeking that the worker's benefits be reinstated. The salient parts of that correspondence are set out below:

> We advise that we are instructed to act on behalf of Margaret Johnston in relation to her entitlements under the Northern Territory Work Health Act.
>
> We are instructed that Mrs Johnston was injured in a car accident in 1999. Her employer at that time was Artback NT. She has now become again incapacitated for work as a result of her injuries. Those injuries include brain damage, injury to her neck and psychological injuries.
>
> She has been terminated from Centrelink on the basis that she is unable to do her job because of the brain damage.
>
> In the circumstances, we ask whether TIO is prepared to reinstate Mrs Johnston's benefits.

[9] That is not surprising given the effluxion of time.

50. It is important to put the request to reinstate the worker's benefits in its proper context. Although it is common to seek of a reinstatement of a worker's benefits where there is a dispute in relation to an employer's decision to cancel payments of worker's compensation, the letter to the insurer in the present case does not refer to the cancellation of benefits in 2002 or in any way seek to challenge the validity of the s 69 notice. The basis for the request to reinstate benefits is: "She has *now become again incapacitated for work as a result of her injuries"* (emphasis added). That gives the clear impression that no issue is being taken with the earlier cancellation of benefits nor the validity of the s 69 notice. In other words, the worker does not appear to have been aggrieved by the decision of the employer to cancel compensation back in 2002, and accordingly there is no dispute as to the cancellation of benefits. Indeed, the letter tacitly accepts a previous capacity for work consistent with the cancellation of payments some six years earlier. The clear impression is that the worker is relying upon a change of circumstances with respect to her capacity for work, following the cancellation of benefits.

51. The next salient correspondence is the letter dated 18 June 2008 from the worker's solicitors to NT Worksafe. That letter, inter alia, stated:

> We advise that we act on behalf of Margaret Johnston in relation to her entitlements under the Northern Territory Health Act.
>
> Ms Johnston's benefits were ceased some years ago.
>
> The injuries that she received in the work accident were significant including brain injuries and injuries to the neck.
>
> We have requested that TIO reinstate Ms Johnston's benefits and also that they provide us with medical records. They have not done so.

52. Although this correspondence makes a reference to the cessation of benefits some years ago, there is no mention of the worker having been aggrieved by the decision to cancel benefits. There is no suggestion that the decision to cancel benefits is being challenged and thereby gives rise to a dispute

between the parties. The letter does not link the request made to the insurer to reinstate benefits with the cancellation of benefits. It simply records the fact that the insurer has been requested to reinstate benefits. The best evidence of the basis for that request is contained in the earlier letter to the insurer. That letter speaks for itself.

53. In my opinion the letter to NT WorkSafe merely records the cessation of benefits as an historical fact. But, in my opinion, that is as far as the correspondence goes. It is "drawing a long bow" to infer from the correspondence that the cancellation of benefits in 2002 was in dispute and a live issue at mediation, particularly when there is evidence of direct correspondence with the insurer, defining the parameters of the dispute.

54. The email sent on 19 June 2010 by Nicole Adami, senior claims officer, to the worker's solicitors, throws further light on the parameters of the dispute referred to mediation.

55. The thrust of that email is that the insurer intended to pursue further investigations to determine *any ongoing liability* (emphasis added). This gives the impression that the dispute that was being referred to mediation had nothing to do with the cancellation of benefits, but was related to a change of circumstances in the worker's capacity for work.

56. The letter from NT WorkSafe to the worker dated 22 July 2010 does nothing to illuminate the nature of the dispute referred to mediation. It simply refers to the worker's compensation claim.

57. In the fax from the insurer to NT WorkSafe sent on 7 October 2010 the insurer stated "TIO are unable to determine *ongoing liability*" (emphasis added) in light of the conflicting medical evidence. Again, this creates the impression that the dispute related to a change of circumstances resulting in an incapacity for work.

58. Having regard to all of the available evidence I cannot be satisfied, on the balance of probabilities, that the dispute that was referred to mediation related to the employer's decision to cancel payments of compensation in 2002. Quite to the contrary, all of the evidence points to the mediation being directed at an attempt to resolve a dispute over the reinstatement of benefits, based on a change of the circumstances in the worker's capacity for work.

- **Are the present proceedings maintainable?**

59. It is clear from the Statement of Claim that the worker is seeking a declaration that the cancellation of payments of compensation in 2002 was invalid, and a reinstatement of benefits since the date of termination.

60. In my opinion the provisions of s 103J(1) bar the worker from pursuing that remedy because, for the reasons given above, there has not been an attempt to resolve a dispute concerning the cancellation of payments by mediation under Part 6A of the Act. The only dispute attempted to be resolved at mediation related to a reinstatement of benefits, apparently based on a change of circumstances.

61. In light of that ruling there is no need to consider the application for extension of time pursuant to s 103D(4) of the Act.

62. That would be the end of the matter if it were not for the fact that the Statement of Claim appears to seek an alternative remedy. As was the case in *Ju Ju Nominees Pty Ltd v Carmichael* [1999] 9 NTLR 1, the worker seems, in the alternative, to be seeking a determination of a claim for compensation based on a change of circumstances. That is supported by the following:

- The worker seeks, in the alternative, payment of weekly benefits as for total and/or partial incapacity from 10 March 2008 to the current date and continuing;

- The date 10 March 2008 appears to have been selected because that is the date the worker's solicitors wrote to the employer's insurer seeking a reinstatement of benefits, apparently on the basis that the worker had once again become incapacitated for work;

- The worker recited in the Statement of Claim the fact that her solicitors had requested a reinstatement of benefits by way of their letter of 10 March 2008 to the insurer, and the insurer failed to reinstate her benefits;

- By way of a plea of continuing incapacity, the worker asserted that she remained totally incapacitated for work.

63. Putting to one side the fact that the alternative remedy sought by the worker has been inadequately pleaded, an issue arises as to whether the dispute that was referred to mediation was in fact a "dispute" within the meaning of Part 6A of the *Workers Rehabilitation and Compensation Act* that was susceptible to the dispute resolution process established under that Part.

64. In my opinion, the dispute (as referred to in the letter from the worker's solicitors to the employer's insurer dated 10 March 2008) was not ripe for mediation.

65. In order for there to be a dispute capable of being referred to mediation the worker should have made another claim for compensation based on the change of circumstances referred to in the letter dated 10 March 2002. Having made that claim, the employer could have either accepted the claim or rejected it. In the event of the claim being rejected, and the worker being aggrieved by that decision to dispute liability for the compensation claimed, a dispute within the meaning of s 103B(a) would have arisen. The worker would then have been entitled to apply to have the dispute referred to mediation within 90 days of receiving the s 85(8) statement.

66. The situation in the present case is not unlike the situation considered by Mr Trigg SM in *Evans and Northern Territory of Australia* (No 9405778 – 31 January 1996, p12):

> … if a worker breaks his leg and (whilst still receiving compensation payments for that injury) develops an infection as a consequence of the break the worker cannot turn around and say that they only admitted liability for the original break as there was no mention of any infection in the claim form and therefore the worker has the onus of proving the employer's liability for the infection afresh. Such a result would, in my view, defeat the clear aims of the Act. It is different in the case where the worker has (for example) returned to full work (as opposed to a return on restricted duties) and subsequently becomes incapacitated for work (due to a sequelae to the original injury) as, in my view, in that case the worker should put in another claim (as every aggravation etc is itself an injury) leaving it to the employer to exercise its various options under section 85 of the Act.

67. Like the hypothetical worker discussed by Mr Trigg, the worker in the present case should have put in another claim for compensation in order to activate the dispute resolution process. The worker or her solicitors could not merely write a letter to the employer's insurer requesting reinstatement of payments of compensation and, if the employer denied liability or refused to accept liability, then go straight to mediation: see *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 83.

68. One final aspect that needs to be considered is the employer's argument that as there was no actual mediation in the present case, there was no attempt to resolve the dispute by mediation, and therefore the present proceedings are premature: see s 103J(1).

69. The worker applied to have the dispute referred to mediation on 18 June 2008. A Certificate of Mediation did not issue until 29 October 2008, more than four months after the application for mediation.

70. For the reasons given by Mr Trigg in *Murwangi Community Aboriginal Corporation and Carroll* (supra) the employer's argument cannot be sustained. In the present case the mediator did not complete the mediation process within the statutory 21 day period, and the worker was entitled to commence proceedings as soon as the 21 day period expired. The fact that no actual mediation took place does not bar the commencement of these proceedings. However, the proceedings are barred for the other reasons discussed above.

THE DEFECTIVE STATEMENT OF CLAIM

71. Although it is clear that the worker is seeking, in her Statement of Claim, an alternative remedy (based on the contents of the letter sent to the insurer on 10 March 2008), that remedy has not been adequately pleaded. The worker appears to be seeking, in the alternative, a determination of a claim for compensation based on a change of circumstances. However, the pleadings in that regard are very much underdeveloped. This is problematic, bearing in mind the need for the pleadings to clearly define the issues to be adjudicated upon.

72. As stated above, the worker should have made another claim for compensation in order to enliven the dispute resolution process under Part 6A of the Act in relation to the reinstatement of benefits. But the absence of a claim raises another fundamental issue; and that is whether the proceedings are a nullity due to the failure of the worker to make a claim pursuant to s 82 of the Act.

73. In *Prime v Colliers International (NT) Pty Ltd* (supra) Mildren J expressed the view that a failure to make a claim pursuant to s 82 of the Act may not render subsequent proceedings null and void ab initio. His Honour remarked that rather than being compelled to recommence proceedings because the proceedings were a nullity a worker could seek relief under s 182(3).

74. If the present proceedings (insofar they relate to the alternative claim) were not considered to be a nullity, they could only be maintainable if the worker's failure to make a claim pursuant to s 82 was excused under s 182(3). The Statement of Claim seeks no such relief.

CONCLUSION

75. The present proceedings were commenced prematurely and are barred by the provisions of s 103J(1) of the Act.

76. I will hear the parties as to any consequential and ancillary orders.

Dated this 23rd day of December 2010.

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Dr John A Lowndes
STIPENDIARY MAGISTRATE