CITATION: *Cook v Suplejack* [2011] NTMC 002

PARTIES: ROBERT COOK

v

SUPLEJACK PASTORAL NT

TITLE OF COURT: Work Health

JURISDICTION: Work Health Court – Alice Springs

FILE NO(s): 21028171

DELIVERED ON: 27 January 2011

DELIVERED AT: Alice Springs

HEARING DATE(s): 16 November 2010

JUDGMENT OF: J M R Neill

CATCHWORDS:

Section 114A(1) appeal from Orders of Judicial Registrar allowing amendment of Statement of Claim to add further issues and to list for expedited early hearing – section 103J(1) dispute and mediation - whether new proceedings can be commenced by amendment to pleadings in existing proceedings.

Workers Rehabilitation and Compensation Act ss 103B, 103J(1), 104(1) and (2), 110A, 114A(1)
Work Health Court Rules 2.05(3), 3.02, 3.04(1), 3.04(2) (c), (h), (k), (m) and (q), 5.02(1), and 8.08(1) and (2).

Murwangi Community Aboriginal Corporation v Carroll [2000] NTMC 25 followed
Margaret Johnston v Artback NT: Arts Development Touring Inc applied

REPRESENTATION:

Counsel:
Worker: Mr Alan Lindsay
Employer: Mr George Roussos

Solicitors:
Worker: Povey Stirk
Employer: CridlandsMB

Judgment category classification:	B
Judgment ID number:	[2011] NTMC 002
Number of paragraphs:	38

IN THE WORK HEALTH COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21028171

BETWEEN:

ROBERT COOK
Worker

AND:

SUPLEJACK PASTORAL NT
Employer

REASONS FOR JUDGMENT

(Delivered 27 January 2011)

Mr JOHN NEILL SM:

1. This was an appeal pursuant to s.114A(1) of the *Workers Rehabilitation and Compensation Act* ("the Act") from the Orders of Judicial Registrar McNamara made 4 November 2010. The appeal was made by the Employer's interlocutory application filed 8 November 2010. Pursuant to s.114A(3) of the Act the appeal was by way of hearing *de novo*. This meant that the Worker was once again seeking the Orders made on 4 November 2010, or similar Orders, and the Worker bore the onus of satisfying the Court that such Orders should be made.

2. The Judicial Registrar had made Orders granting the Worker leave to amend his Statement of Claim in the form before her on 4 November 2010, and consequential Orders. The amendment she allowed introduced into the pleadings new issues which the Employer said involved disputes which arose and were mediated only after these proceedings were commenced. The Employer said that by virtue of s.103J(1) of the Act, the Worker was obliged to commence one or more new sets of proceedings in order to litigate the new issues. The Employer argued that this was a procedural necessity which could not be avoided simply by amending the pleadings in the current proceedings.

3. Judicial Registrar McNamara listed the new issues for expedited hearing on 27 and 28 January 2011, notwithstanding that the matter was before her for its very first Directions Conference and there were steps yet to be taken under the Work Health Court Rules before the matter would ordinarily have been seen as ready to be listed for hearing. The Employer said there was no power to do this, and in any event it objected to its being done because "…the employer has been denied procedural fairness and the opportunity to properly deal with the Nuffield dispute" (Employer's submissions 15 November 2010). That is, the Employer submitted it would be prejudiced by dispensing with the usual steps in proceeding to a hearing.

4. On 16 November 2010 I ruled that new proceedings can be commenced by amendment to pleadings in existing proceedings, and I ruled that the Court, whether a Judicial Registrar or a magistrate, can vary/abrogate time limits and/or dispense with requirements in the rules and list a matter for expedited hearing, in appropriate circumstances. I ordered that this matter proceed to expedited hearing as previously ordered by Judicial Registrar McNamara, on 27 and 28 January 2011, and I made orders to manage that process. I said I would provide my reasons in due course. I now provide my reasons.

Power to Dispense With Prescribed Steps

5. All the steps for making a matter ready for hearing and listing it for hearing are provided for in the Work Health Court Rules. Such rules are ordinarily subordinate to the Act.

6. Sub sections 110A(1) and (2) of the Act provide:

> "**110A Procedure**
>
> (1) The procedure of the Court under this Division is, subject to this Act, the Regulations and any rules or practice directions made or given specifically for the conduct of the business of the Court, within the discretion of the Court.

(2) The proceedings of the Court under this Division shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matter permits."

7. The very broad discretion provided by s.110A(1) is stated to be subject to "… any rules or practice directions made or given specifically for the conduct of the business of the Court …". I am satisfied that there are no practice directions relevant to these issues. I turn to consider the relevant rules.

8. Sub-rules 3.04(1) and (2) of the Work Health Court Rules relevantly provide:

"3.04 Orders for conduct of proceeding

(1) At any stage of a proceeding the Court may, of its own motion or on application, make orders relating to the conduct of the proceeding that the Court thinks are conducive to its fair, effective, complete, prompt and economical determination.

(2) Without limiting subrule (1), the Court may at any stage of a proceeding make orders relating to the following matters:

(c) filing and service of or dispensing with pleadings, including a statement of claim and notice of defence;

(e) time limits for pleadings;

(h) referring the parties to or dispensing with a directions conference or prehearing conference;

(k) settling issues for the hearing of the proceeding;

(m) listing the proceeding for hearing."

9. I am satisfied that the Court, whether the Judicial Registrar or a magistrate, may exercise its discretion pursuant to rule 3.04 of the Work Health Court Rules and pursuant to section110A of the Act, to dispense with some or even all of the steps

ordinarily required to be taken before a matter is listed for hearing, and to list a matter for expedited hearing, if that is appropriate.

Commencing Proceedings

10. Can proceedings be commenced simply by amending pleadings in existing proceedings to introduce new issues in dispute (assuming those new issues have been mediated as required by the Act), or must one or more new sets of proceedings be commenced? The answer to this question requires a consideration of the Act and the rules.

11. Section 103J of the Act provides:

> **"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."

12. Section 103J(1) is a bar to the commencement of proceedings unless there has been an attempt to resolve the dispute by mediation as provided. If there has been such an attempt, then s.103J(1) not longer presents any bar. It no longer has any role to play. It does not prescribe the manner of commencing proceedings under the Act other than by reference to Division 2 (in Part 6A) of the Act.

13. Sub section 104(2) is the relevant provision in Division 2 of part 6A of the Act. It provides:

14. **"104 Applications**

> (2) Proceedings under this Division may be commenced before the Court by application in the prescribed manner and form or, where there is no manner or form prescribed, in such manner or form as the Court approves."

15. It is important to note that this sub section is neither mandatory nor directory in its terms. The use of the word "may" indicates it is an enabling provision. Neither sub section 104(2) nor any other provision of the Act actually prescribes the manner or form of the commencement of proceedings. That is left to the rules, which are themselves subject to the discretion in rule 3.04, and thus to the discretion in section 110A of the Act.

16. The manner of commencing proceedings under the Act is prescribed only in the rules. Rule 3.02(a) provides:

> **"3.02 Commencement of proceeding**
>
> A proceeding is commenced:
>
> (a) by filing an application under Division 2 of Part 5."

17. Rule 5.02 (1) appears under Division 2 of Part 5 of the rules and provides that an Application commencing a proceeding is to be in accordance with Form 5A. It goes on to prescribe information to be set out in that form.

18. I have made earlier reference to rule 3.04 and in particular to *placita* (c), (e), (h), (k) and (m) of sub-rule (2). I note that there is a very broad discretion provided by sub-rule 3.04(1), and that *placitum* (q) in sub-rule 3.04(2) additionally empowers the Court at any stage of a proceeding to make orders relating to "(q) other matters of practice and procedure". The discretion allowed by these sub-rules can apply to the procedures prescribed by sub-rules 3.02 and 5.02(1). Therefore the discretion provided in section 110A can similarly apply.

19. I note the provisions of sub-rule 2.05(3).This states that use of a wrong form does not invalidate proceedings and the Court may make amendments to the form or "… make the orders that the Court considers appropriate". I am satisfied that this wording is broad enough to encompass the commencement of proceedings without using a form at all. I also note section 68 of the *Interpretation Act* which provides: "Strict compliance with the forms prescribed by or under an Act is not necessary and substantial compliance, or such compliance as the circumstances of a particular case allow, is sufficient".

20. In this matter the proceedings were commenced by Application filed on 23 August 2010, which was in Form 5A and contained all or at least a substantial part of the information prescribed in sub-rule 5.02(1). Is this information required to be reproduced slavishly in another Form 5A to commence proceedings involving a new dispute? In my view, this would serve no practical purpose.

21. I next consider rule 8.08 which provides:

> **"8.08 Amendments and orders as to form, filing and service**
>
> (1) Amendments are to be made to the pleadings that are necessary for determining the real questions at issue between the parties even though the effect of those amendments is to add or substitute a cause of action that arose after the commencement of the proceeding.
>
> (2) At any stage of a proceeding, the Court may:
>
> (a) allow a party to amend his or her pleadings in a manner and on terms the Court considers appropriate;
>
> (b) order that the pleadings be in a particular form; or
>
> (c) make orders in respect of the filing and service of pleadings."

22. One at least of the new issues to be added by the proposed amendment to the Statement of Claim arose only after these proceedings were first commenced. Because sub-rule 8.08(1) specifically authorises an amendment to pleadings which has the effect of adding a cause of action that arose after the commencement of the proceeding, that issue does not present a problem in this case. The fact that the rules specifically allow for the addition by amendment to pleadings of a cause of action which arose after the proceedings were commenced, necessarily contemplates a new dispute which will require mediation pursuant to Part 6A Division 1 of the Act.

23. I am satisfied that sub-rules 2.05(3), 3.04(1) and (2) and 8.08(1) and (2) of the rules and s.110A of the Act provide ample power for the Court within its discretion to deal with all procedural matters.

24. I am satisfied that the manner in which proceedings are commenced before this Court is a matter of procedure rather than substance. That this is so is underscored by the fact that that manner is prescribed solely by the rules rather than the Act.

25. Accordingly, I conclude for the foregoing reasons that the Work Health Court has the discretion to permit the commencement of proceedings before the Court other than by use of Form 5A or indeed of any form whether prescribed or otherwise. Specifically, I find that the Court can exercise its discretion to permit proceedings to be commenced by amendment to pleadings in existing proceedings so as to add a new or further cause of action, provided that there has first been compliance with the mediation requirements in Division 1 of Part 6A of the Act as to any such cause of action.

Has There Been Compliance With Division 1 of Part 6A of the Act?

26. The Worker was employed by the Employer as a station hand on Suplejack Station in Central Australia. He became quadriplegic as result of injuries sustained in a helicopter accident in the course of his employment on 13 September 2008 ("the injury"). The Worker made a claim pursuant to the Act on 3 October 2008 and this was accepted by the Employer's Work Health insurer QBE Insurance (Australia) Limited by letter dated 23 October 2008, for the specified condition of "quadriplegia".

27. By e-mail dated 15 June 2010 Povey Stirk on behalf of the Worker wrote to NT WorkSafe identifying a dispute about payment of the Worker's ongoing personal care costs necessitated by his condition of quadriplegia. It was alleged the Employer had advised it would meet such care costs only for a few more weeks ("the first mediation request"). By Certificate of Mediation dated 9 August 2010 it was stated that there was "no change" in respect of this dispute ("the first Certificate of Mediation").

28. By letter dated 10 August 2010, one day after the issuing of the first Certificate of Mediation, Povey Stirk wrote to NT WorkSafe identifying 11 separately enumerated and itemised issues said to be in dispute between the parties ("the second mediation request").

29. Issues 2, 4 and 6 related to the "Gooseneck trailer" and associated issues. Issue 5 was: "Carers (sic) additional travel expenses including caravan park site fees, travel allowance, flights for carer changeovers on extended trips. Also flights and accommodation when Mr Cook is travelling by air". This raises the question whether issue 5 was in terms broad enough to encompass the "Nuffield scholarship" issue. I am satisfied that it was not. The first evidence before the Court that the Worker was awarded the Nuffield scholarship appears in an e-mail letter dated 23 September 2010 from Povey Stirk for the Worker to CridlandsMB for the Employer, well after the second mediation request on 10 August 2010. I cannot be satisfied, on the balance of probabilities, that issue 5 in the second mediation request related to any dispute concerning the Nuffield scholarship issue then alive between the parties. Rather, I find that issue 5 involved an extension of the issue raised in the first mediation request. It is true that the Worker had been investigating the Nuffield scholarship possibility prior to 23 September 2010 and had raised that possibility with the Employer, but the Nuffield scholarship issue "… was not ripe for mediation" as at 10 August 2010 -- see Margaret Johnston v Artback NT: Arts Development & Touring Inc decided by Dr Lowndes on 23 December 2010, at paragraph 64.

30. NT WorkSafe did not respond to the second mediation request as provided for in Part 6A Division 1 of the Act. It did not within 7 days refer the dispute to a mediator. Consequently, no mediator within a further 21 days attempted to resolve the dispute as identified in the second mediation request nor advised the parties of the outcome of mediation nor advised the parties of further proceedings that may be commenced and the time within which to commence them. No Certificate of Mediation was issued in response to the second mediation request after 28 days, or ever. Instead, it appears that NT WorkSafe told Povey Stirk in a telephone conversation on an unspecified date between 10 August 2010 and 6 October 2010 that it did not consider it necessary to issue a Certificate of Mediation in response

to the second mediation request and that there would be no bar to the Worker's commencing proceedings before the Court. This conversation is summarised in an e-mail dated 6 October 2010 from Povey Stirk to NT WorkSafe.

31. That response from NT WorkSafe, if correctly reported, involved an erroneous assumption of authority. NT WorkSafe was not and is not able to authorise either a Worker or an Employer to act otherwise than in accordance with the Act. NT WorkSafe is itself bound by the Act.

32. By e-mail dated 6 October 2010 Povey Stirk wrote to NT WorkSafe specifically raising the Nuffield scholarship issue as a dispute for mediation ("the third mediation request"). That proceeded in accordance with the Act, and a Certificate of Mediation dated 19 October 2010 issued advising "no change" in this dispute ("the second Certificate of Mediation").

33. The Worker had commenced these proceedings on 23 August 2010 within 28 days of the first Certificate of Mediation, before 28 days from the date of the second mediation request had expired on 7 September 2010, and before the date of the third mediation request. The Worker filed his Statement of Claim in the proceedings thus commenced on 27 September 2010, after the expiry of that 28 day period. Those pleadings included the Gooseneck trailer issue, but they did not include the Nuffield scholarship issue. My view is that the Worker did not thereby commence proceedings in relation to the Gooseneck trailer issue because no leave to plead or amend pleadings that way was sought or obtained before 27 September 2010, but I do not need specifically to rule on that.

34. On 4 November 2010 the Worker applied to amend his Statement of Claim in a manner which then included the Nuffield scholarship issue and still included the Gooseneck trailer issue. Orders were made on that date permitting the filing of an amended Statement of Claim pleading both issues. This occurred within 28 days of the second Certificate of Mediation dated 19 October 2010, and thus satisfied the time limit in subsection 104(3) of the Act in respect of the Nuffield scholarship issue. No 28 day time limit pursuant to that subsection has ever commenced to run in respect of the Gooseneck trailer issue because no Certificate of Mediation ever issued in response to the second mediation request. Although

no mediation was ever actually held in relation to the second mediation request, I find that this was not necessary and that the Worker was entitled to commence proceedings in respect of that issue at any time later than 28 days after the date of the second mediation request – see *Murwangi Community Aboriginal Corporation v Denis Martin Carroll*, an interlocutory Decision of Magistrate Trigg delivered 17 July 2000, at page 7.4. See also the Decision of Dr Lowndes in *Margaret Johnston* (above) at paragraphs 39 and 70.

35. I find that there has been compliance with Division 1 of Part 6A the Act in respect of each of the Gooseneck trailer issue and the Nuffield scholarship issue.

36. I find that no time limit issue arose by virtue of subsection 104(3) of the Act in respect of the commencement of proceedings involving either issue on 4 November 2010.

The Expedited Hearing

37. I was satisfied on the material before Judicial Registrar McNamara on 4 November 2010 and before me on 16 November 2010 that a decision needed be made as soon as possible on any entitlement the Worker might have to payments pursuant to any one or more of sections 73 to 78 of the Act if he was to have any prospect of taking up the Nuffield scholarship and travelling overseas and thereby arguably enhancing his rehabilitation prospects. This prospect would disappear if the proceedings had to go through the usual processes before being listed for hearing because no such hearing was likely to be listed in the ordinary way before the second half of 2011. I was satisfied, as was Judicial Registrar McNamara before me, that the balance of convenience clearly favoured the Worker in the circumstances so that that issue should be listed for expedited hearing. I was not satisfied on the evidence before me that the Employer would suffer any prejudice that could not be cured by a strict timetable for the expedited hearing, which timetable I imposed.

38. There was no evidence before me of urgency in relation to the Gooseneck trailer issue other than the possibility of repayment of a significant sum of money to the Worker, if he were successful. That consideration alone did not justify an expedited hearing of that issue. However recovery of all or some significant part

of the money claimed for the Gooseneck trailer might be important or at least very useful if the Worker were successful in his claim in respect of the Nuffield scholarship. I was sufficiently satisfied on the balance of convenience given that the Nuffield scholarship issue required an expedited hearing, that the Gooseneck trailer issue should be included in that expedited hearing.

Dated this 27th day of January 2011.

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John Neill
STIPENDIARY MAGISTRATE