CITATION:	*Jean-Remi Campion v Northern Territory of Australia* [2021] *NTLC 011*
PARTIES:	Jean-Remi CAMPION
	V
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
CLAIM NO:	2020-01818-LC
DELIVERED ON:	20 December 2021
DELIVERED AT:	Darwin
HEARING DATE(S):	30 March & 9 November 2021
JUDGMENT OF:	

CATCHWORDS:

Pleadings - Statement of Claim – Amendments – Interlocutory Applications - Discovery - Summary Judgment – Strike Out or Dismissal.

REPRESENTATION:

Counsel:

Worker:	self-represented
Employer:	Mr M Roso then Mr Roper

Solicitors:

Worker:	self-represented
Employer:	Minter Ellison

Decision category classification:	B
Decision ID number:	011
Number of paragraphs:	26

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

No. 2020-01818-LC

BETWEEN

Jean-Remi Campion

Worker

AND

Northern Territory of Australia

Employer

REASONS FOR DECISION

(Delivered 20 December 2021)

JUDGE MACDONALD

Background

1. Mr Jean-Remi Campion (the Worker) had been a Firefighter with the Northern Territory Fire and Rescue Service for many years, so an employee of the Northern Territory of Australia (the Employer).

2. On 30 January 2020 the Worker made a claim under the *Return to Work Act 1986* (RTW Act), which was rejected by the Employer on 19 March 2020 and was then subject to unsuccessful mediation, resulting in a Certificate of Mediation issuing on 10 April 2020.[1] The dispute was then subject to an Application filed on 22 April 2020 by Hall Payne on behalf of the Worker in the Work Health Court (court) under s104 of the RTW Act, with the Statement of Claim (Claim) being filed 30 June 2020.

3. The Employer appeared through Minter Ellison, with a Notice of Defence (Defence) then being filed on 21 July 2020. The Defence included an allegation that the Worker

[1] The claim was for mental injury arising 3 January 2020, against a background of alleged bullying by colleagues over a period of years.

had been receiving weekly entitlements under the RTW Act from 3 January 2020 through an unrelated claim, and also raised an allegation that any mental injury "*was caused wholly or primarily as a result of management action taken on reasonable grounds and in a reasonable manner*"[2].

4. On 1 September 2020 Hall Payne filed a Notice of Ceasing to Act, such that the Worker became self-represented. That change in circumstance had the usual detrimental consequence for conduct of the proceeding.

5. Various correspondence, directions and movement then occurred in the proceeding resulting in an interlocutory application being filed by the Worker on 20 November 2020 to amend his Claim. That application was ultimately supported by an Affidavit filed 1 December 2020. On 14 December 2020 Judicial Registrar Gordon granted leave to the Worker to file and serve the proposed amended Claim, which occurred on 4 January 2021. The amended Claim actually filed and served was in a different form to that for which leave was granted, but continued to suffer from various of the shortcomings and flaws identified by the Judicial Registrar in her decision of 14 December 2020.[3]

6. To be clear, if the Worker in fact wishes to allege any contravention of Part 6 of the *Work Health and Safety (National Uniform Legislation) Act 2011*, separate and different proceedings would be required.

7. The Employer then filed an amended Defence on 21 January 2021 in response to the amended Claim, which did not reiterate that the Worker had received weekly entitlements from 3 January 2020, but did maintain the defence of 'reasonable management action'.

The Interlocutory Applications

8. On 24 February 2021 the Worker made further interlocutory application (first Application) for five orders, three of which might be described as substantive. Firstly, that the court "*strike out the employer's notice of defence that the injury was caused*

[2] Paragraphs 9 and 11 of the Defence respectively.
[3] Subject to very limited qualification, s 52 of the RTW Act abolishes common-law actions, such that concepts such as negligence, breach of duty of care and reasonably foreseeable risk are generally irrelevant under that Act. See also *Sommer v Coates Hire Operations Pty Ltd* [2015] NTMC 028 at [32] and [33]. Likewise, other than under Division 3 of Part 6 of the *Work Health and Safety (National Uniform Legislation) Act 2011*, proceedings, penalty and relief under that scheme are not amenable to individual and private law proceedings.

wholly or primarily as a result of management action"[4], and/or "*strike out wholly the employers reply to the amended defence as filed by the employer*" or thirdly and apparently in the alternative, "*strike out the defence of the employer*". Other orders sought were as to costs, listing of the application, and the court's discretion.

9. The first Application was supported by Affidavit sworn 24 February 2021, annexing a letter from the Worker dated 12 February 2021 requesting particulars of the 'management action' alleged by paragraph 11 of the amended Defence. That Application was listed for hearing at 10am on 30 March 2021.

10. On 26 March the Employer filed and served an Affidavit of Mr Roso of Minter Ellison annexing various correspondence commencing 23 March 2021, and providing a draft further amended Defence, effectively removing the defence of 'reasonable management action'. The thrust of that request was to seek the Worker's consent to the filing of the further amended Defence, and withdrawal of the Application.[5]

11. For reasons apparent from the various correspondence referred to, the Application proceeded to hearing on 30 March 2021. At that time Mr Roso advised the court that he held unequivocal instructions from the Employer to withdraw the 'management action' defence. The court also observed that aspects of the relief sought by the Worker were in the nature of summary judgment and that such an order (or striking out the Defence) would not be made in the proceeding. That included in the circumstances of the Employer's concession that the defence of 'reasonable management action' would be withdrawn.[6] The court's written reasons were to be provided.

12. Further interlocutory applications were subsequently filed by the Employer on 30 August 2021 (second Application) and the Worker on 14 September 2021 (third Application), which are dealt with below. The Employer's further amended Defence was ultimately filed on 13 October 2021 following an express order granting leave to that course. With hindsight, the court should have required that course by order on 30 March, and perhaps referred the dispute to a conciliation conference.

13. It is necessary to provide the court's reasons for ruling in relation to the Applications. The terminology relied on by the first Application, being to "*strike out*" the Defence,

[4] Being paragraph 11 of the amended Defence filed 21 January 2021, and sought due to the Employer having failed to supply particulars of that Defence, which were requested by the Worker by letter dated 12 February 2021.
[5] The various correspondence passing between the Worker and the Employer from 12 February through to 25 March 2021 inclusive are annexed to the Affidavits referred to, held on the court file.
[6] Noting that amendment of pleadings by withdrawal of an asserted defence is unlikely to attract any need for leave under either of Rules 2.03(4) or 8.08(2), due to the narrowing effect of that course.

does not appear in the RTW Act and is used sparingly in the *Work Health Court Rules 1999* (Rules).[7] In context, that step is expressly reserved for failures to attend court, cooperate in the proceeding, or to comply with an order of the court.[8] In the result, at the hearing of 30 March the Employer conceded the Worker's primary relief in respect of the 'reasonable management action', consistent with its invitation to withdraw that aspect of the amended Defence a few days earlier, so any 'strike out' for failure to cooperate in the proceeding was not sustainable.

14. In relation to the proposition that 'summary judgment' was effectively sought by the first Application, I note Rules 21.01 to 21.06 provide for summary judgment, with rule 21.02(1)(a) enabling valid application by a worker where the employer "*has no real defence to the claim made*" in the proceeding. In my view that criterion is little different to the test prescribed by Order 22.01 of the Supreme Court Rules, being where there is "*no reasonable prospect of successfully defending the proceeding*". A large number of Supreme Court authorities on O22 and Superior Court decisions on analogous provisions exist[9], however it is sufficient to note that summary judgment should not be entered unless it is clear that "*there is no real question to be tried*".[10]

15. The accepted approach does not require that any defendant have a good or strong case, but simply that one or more issues warrant more than a summary 'hearing' of the matter, noting that the evidence in such applications is ordinarily by affidavit.

16. The first Application is in the context of a proceeding which seeks relief for a psychological injury in a no-fault statutory scheme providing for compensation to be paid to workers injured out of or in the course of their employment, where the injury produces incapacity.[11] The Worker is *dux litis* and bears the onus of proof in the proceeding, and in interlocutory applications made by him. Having regard to the extant pleadings, issues concerning liability, including diagnosis and aetiology or causation or the mental injury alleged will need to be addressed and proven by the Worker. Similarly, if liability were assumed, issues concerning the extent of any incapacity and quantum of compensation would remain.[12]

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[7] See Rules 5.04, 7.13, 12.09, 13.07 and 20.03.
[8] And noting that exercise of any implied jurisdiction is limited; *Consolidated Press Holdings Ltd v Wheeler* [1992] NTSC 102.
[9] See paragraphs [5.22.3] to [5.22.503] of *Grant*; *Civil Procedure Vol 1*, *Presidian Legal Publications*.
[10] *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5, and the numerous decisions following, including *Agar v Hyde* (2000) 201 CLR 552 at [57] – see para [5.22.106] of *Grant* supra.
[11] Definitions of crucial concepts including "*compensation*", "*incapacity*", "*injury*" and "*out of or in the course of employment*" provided by ss 3, 3A and 4, and the "*economic loss*" provided by s 64, of the RTW Act.
[12] Compensation includes the costs of medical services and treatment. Paragraph 10(iii) of the Amended Claim of 4 January 2021 pleads a mixture of total and partial incapacity.

17. The focus of the Worker's Affidavit in support of the first Application was the Employer's 'reasonable management action' defence pled by paragraph 11 of the Defences filed to that point.[13] That Affidavit provided no evidence concerning any actual or apparent issue in dispute which would be necessary for proper determination, other than in relation to the 'reasonable management action' defence.

18. To the extent that the first Application was based on a failure by the Employer to comply with a valid procedural request, seeking to strike out that part of the pleading was appropriate. However, none of the evidence provided by the Worker extended to support the breadth of the second and third orders referred to in paragraph [8] above. In the event the Employer withdrew the objectionable paragraph of its Defence by filing the Further Amended Defence of 13 October 2021.

19. The second Application, filed by the Employer on 30 August 2021, sought specific orders for discovery by the Worker of any evidence of post-injury employment in Queensland. That was following written requests from the Employer's solicitors on 15 July and 5 August 2021 which did not produce any positive response. On 12 October 2021 the Parties were ordered to file and serve amended Lists of Documents. Then on 9 November 2021, due to the Worker not having included any employment records in an amended List of Documents filed by him on 1 November 2021, the court ordered that the "*Worker is to discover by filing and service of an updated List of Documents, all documentation relating to post-injury employment, including any wage or salary records, within 21 days*".

20. It is apparent from both the Worker's correspondence to the Employer's lawyers and submissions made to the court that at least until 9 November 2021 the Worker did not appreciate or accept any relevance of documentation in his possession concerning employment post 3 January 2020. On 9 November the court's perspective, some of which aligned with the matters referred to in paragraph [16] above, was advised to the Worker.

21. The specific order made 9 November was in the context of Rule 12.01 obliging a party to discover by List of Documents all documents which "*relate to a matter in question between the parties*". That Rule is practically of the same effect as Order 29 of the Supreme Court Rules. The Worker cited various authorities in support of his position that any records of post injury employment were not discoverable, starting with *Compagnie Financiere du Pacifique v Peruvian Guano Co*, which simply supports the Employers position. The ratio of that decision is that a document is discoverable

[13] Noting that the Employer filed its further Amended Defence on 13 October 2021.

if it "*may fairly lead ... to a train of inquiry*" which might either advance the case of the party seeking discovery or damage the case of the party resisting it.[14] The procedure has altered to some extent since 1882, however an important Territory authority on the ambit and extent of the obligation to discover, including particularisation by List of Documents, is *Matzat v Gove Flying Club Inc* [1996] NTSC 9.[15] The obligation is ongoing, for the life of any proceeding.

22. The third Application, filed by the Worker on 14 September 2021, sought summary judgment or, alternatively that the amended Defence be 'struck out' together with or, alternatively, that the Employer provide discovery in relation to the 'reasonable management action' defence which subsisted at that time. That defence was effectively withdrawn on 13 October 2021, leaving the third Application to be considered in that context.

23. The law concerning summary judgment is discussed at [14] above. In the context of the third Application, the Affidavit in support again failed to provide any evidence concerning the true issues to be proven. Pleadings and other procedural documentation filed with the court are not evidence. Neither for that matter is the NT Workers' Compensation Claim Form, although the "*attachment*" referred to in that document but which was not included as part of the Affidavit may be, if deposed to. Various potentially relevant documents referred to in Lists of Documents filed by the Parties are not in the possession of the court, and did not comprise any of the evidence provided by Affidavit.

24. The manner in which the Employer has pleaded its case is of some relevance, in that the Further Amended Defence is comprised entirely of admissions and, in response to some allegations crucial to the Worker's Claim, a pleading of "*does not admit*".[16] Contrary to the Worker's assertion at paragraph 3 of his Affidavit sworn 13 September 2021, the Employer does not deny any of the Worker's allegations. The effect of Rule 8.07 in the circumstances is that the Employer would appear to not be seeking to prove anything.[17] Given the state of the pleadings, the Employer is prevented from doing so.

25. Although it cannot be said that the Employer appears to have any strong case, due to the state of the evidence before the court, the Employer is entitled to take the

[14] (1882) 11 QBD 55 at 63 as approved in *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67 at [71].
[15] See also *Minkie Pty Ltd v Wise Channel Marketing Pty Ltd* [2011] NTSC 53 at [27] and *Murray Pest Management Pty Ltd v A & J Bilske Pty Ltd* [2009] NTSC 68 at [7]
[16] Particularly paragraphs 4, 5 and 9 of the Amended Claim.
[17] But noting Rule 8.03 and *Millar v ABC Marketing & Sales Pty Ltd* [2012] NTSC 21 at [50], which was undisturbed by the Court of Appeal in *ABC Marketing & Sales v Millar* [2012] NTCA 6.

position that the Worker should prove his case. Whether that could possibly be done at a 'summary judgment' stage is doubtful given the issues involved. Regardless, it is clear that summary judgment could not be entered in respect of the third Application.

Orders

26. In addition to the orders previously made in respect of the interlocutory Applications, the court orders:-

(i) the proceeding is referred to the Judicial Registrar for listing as a conciliation conference as soon as possible;

(ii) the Worker has leave to appear at the conciliation conference by AVL, via any platform which the Judicial Registrar deems suitable for the purpose;

(iii) an order of "costs in the proceeding" is made in respect of the first, second and third Applications.

Dated this 20th day of December 2021

Greg Macdonald
WORK HEALTH COURT JUDGE