

CITATION: *Hayden Robert Bruce Summers v The Trustee for Performance Services Trust* [2021] NTLC025

PARTIES: HAYDEN ROBERT BRUCE SUMMERS  
V  
THE TRUSTEE FOR PERFORMANCE SERVICES TRUST  
V  
NORTHERN TERRITORY OF AUSTRALIA –  
DEPARTMENT OF ATTORNEY GENERAL AND  
JUSTICE – CRIME VICTIMS SERVICES UNIT

TITLE OF COURT: WORK HEALTH COURT

JURISDICTION: WORK HEALTH

FILE NO(s): 2021-00798-LC

DELIVERED ON: 9 July 2021

DELIVERED AT: DARWIN

HEARING DATE(s): 16 June 2021

DECISION OF: Gordon JR

**CATCHWORDS:**

*Application to join Crime Victim Services Unit to Work Health Court Proceedings; Jurisdictional limits of Work Health Court and NTCAT; Legislative basis for joinder; commonality of issues in multiple jurisdictions.*

*Return to Work Act 1986*

*Work Health Administration Act 2011*

*Victims of Crime Assistance Act 2006*

*Northern Territory Civil and Administrative Tribunal Act 2014*

*Work Health Court Rules 1999*

*Johannsen v Buslink Vivo Pty Ltd [2018] NTMC 23*

*Official Trustee in Bankruptcy v Waa [2016] NTSC 69*

*Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd [2013] FCA 279*

*Knight v Beyond Properties Pty Ltd (No. 2) (2006) FCA 192*

**REPRESENTATION:**

*Counsel:*

Worker: Mr Downs

Employer: Mr Dancis

Proposed Respondent: Ms Tejaya

*Solicitors:*

Worker: NT Law

Employer: HWL Ebsworth

Proposed Respondent: Solicitor for the  
Northern Territory

Judgment category classification: B

Judgment ID number: 025

Number of paragraphs: 59

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

No. 2021-00798-LC

BETWEEN:

**HAYDEN ROBERT BRUCE SUMMERS**

Worker

AND:

**THE TRUSTEE FOR PERFORMANCE SERVICES  
TRUST**

Employer

AND:

**NORTHERN TERRITORY OF AUSTRALIA –  
DEPARTMENT OF ATTORNEY GENERAL AND  
JUSTICE – CRIME VICTIMS SERVICES UNIT**

Proposed Respondent

## **REASONS FOR DECISION**

(Delivered 9 July 2021)

### **GORDON JR**

1. This is an Interlocutory Application under Part 11 of the *Work Health Court Rules 1999*, filed by the Worker on 31 May 2021 seeking to join the Northern Territory of Australia<sup>1</sup> as a Respondent to the proceedings currently before the Work Health Court.
2. The substantive proceedings are in their infancy and save for this application, have yet to come before the Court.
3. The Worker allegedly suffered financial loss and injuries as a result of an assault committed on 21 November 2015 while performing duties as a crowd control officer at Opium Nightclub, Darwin City<sup>2</sup>. I note that the nature of the injuries and any loss suffered is not directly relevant to the joinder application and I do not intend to detail same here.

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<sup>1</sup> The Application for Joinder filed 31 May 2021 originally named “The Northern Territory Government – Department of Attorney General and Justice – Crime Victims Services Unit” as the second Respondent, However Mr Downs for the Worker made an oral application during the Hearing for the proposed Second Respondent to be “Northern Territory of Australia – Department of Attorney General and Justice – Crime Victims Services Unit” and leave was granted for same.

<sup>2</sup> Affidavit of Antony Howard Downs filed 31 May 2021 at para 2

4. Following the incident on 21 November 2015 the Worker initially contacted the Crimes Victims Services Unit (CVSU) to enquire about his eligibility for compensation. When advised that, as the incident occurred during the course of employment, he may be eligible for a claim under the *Return the Work Act 1986*, the Worker made a claim for compensation through the Employer's insurer, QBE.<sup>3</sup>
5. The Affidavit of Mr Downs sets out the procedural history between the Worker, CVSU and QBE as he attempted to navigate toward an award of compensation. Errors and delays occurred throughout the years leading us to the current situation.
6. The current situation is thus; the Worker has an application before the Worker Health Court arising out of the Notice of Decision issued by the Employer under section 85 of the *Return to Work Act* disputing liability.<sup>4</sup> Further, the Worker has made an application in the Northern Territory Civil and Administrative Tribunal (NTCAT) for a review of the CVSU's Assessors decision not to award compensation under the *Victims of Crime Assistance Act 2006*.<sup>5</sup>
7. The current Interlocutory application states<sup>6</sup> "*The Applicant [Worker] believes that by joining Second Respondent to these proceedings it will facilitate resolution of all matters without the need for protracted proceeding and thereby limiting the costs incurred by all parties.*"
8. In submissions for the Worker Mr Downs noted "*There's a commonality of the issues. What is a practical and efficient use of the Court's time and resources and to minimise the costs and any delay in litigation*".<sup>7</sup>
9. In response to the application for joinder, the Employer made no submissions in support nor in opposition to the Orders sought.
10. The proposed Second Respondent, opposed the Application on two grounds. The first being that the Work Health Court has no power to join CVSU, via the Northern Territory of Australia and secondly that the Work Health Court has no jurisdiction to determine the matters currently before NTCAT for determination.
11. The Worker, in arguing that the issue of determining compensation payable to the Worker arising out of the incident on 21 November 2015 should be heard in one forum, notes that NTCAT has no power to determine the issues current before the Work Health Court.
12. I accept this. The *Return to Work Act* confers no powers on NTCAT. It is not an option for the Worker to nominate NTCAT to determine the "commonality of issues".
13. The question then is does this Court have the power to join The Northern Territory of Australia to the Work Heath Court proceedings or should the Workers disputed entitlements be maintained in the separate jurisdictional regimes created by the *Return to Work Act* and the *Victims of Crime Assistance Act*, as argued by the proposed Second Respondent?

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<sup>3</sup> Ibid at paras 3-4

<sup>4</sup> Ibid at Annexure "AHD-23"

<sup>5</sup> Ibid at Annexure "AHD-27"

<sup>6</sup> Filed 31 May 2021 at para 12

<sup>7</sup> Transcript of proceedings at p 7

14. The case of *Taal Johannsen v Buslink Vivo Pty Ltd*<sup>8</sup> (*Johannsen*) dealt with the proposed joinder of the Work Health Authority to proceedings before the Work Health Court. The proposed Second Respondent relied upon *Johannsen* in support of their contention that the Work Health Court has no jurisdiction to join CVSU to the current proceedings.
15. In *Johannsen*, Managing Work Health Court Judge, Judge Neill the identifies 3 clear avenues provided for in the *Return to Work Act* for the involvement of parties beyond the Employer and the Worker.<sup>9</sup>
16. Those being:
  - a. Subsection 55(3): allowing a current employer to apply to join a previous employer. If the injury is a disease and there is evidence the disease may have been contracted with the previous employer;
  - b. Subsection 126A(2)(b)(ii): allowing a current insurer to commence proceedings against a previous insurer of the same employer, or apply to join it in an existing proceeding. In the event the current insurer alleges the injury may have arisen during the course of employment when the previous insurer was on risk;
  - c. Section 167: allows a Worker to make a claim against the Nominal Insurer, in various circumstances, where certain preconditions are met.
17. Judge Neill goes on to say:

*“There are no other specific provisions in the Act or in the Work Health Administration Act for the addition or involvement of any other category of party in a proceeding.”*
18. His Honour notes that the Work Health Authority sought to be joined in *Johannsen* is established by the *Work Health Administration Act 2011* and its powers and functions are found in the *Return to Work Act*. He notes that there may be some argument for the Joinder of the Authority under the *Return to Work Act* in certain circumstances – not directly pertaining to the Application before him.
19. He finds unequivocally that the Authority cannot be joined in a proceedings under Part 5 of the Act.
20. Similarly, the current proceedings are likewise seeking an:

*“order in respect of claim for compensation under Part 5 of the Workers Rehabilitation and Compensation Act or determination of dispute between worker and employer following mediation under Part 6A...”*<sup>10</sup>

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<sup>8</sup> [2018] NTMC 23

<sup>9</sup> *Ibid* at paras 33 - 35

<sup>10</sup> Per Form 5A Application to the Work Health Court filed 31 May 2021 – noting the use of the incorrect Act, but the quoting the correct Parts under the *Return to Work Act 1986* as per the current Form 5A found in the *Work Health Court Rules 1999*– Schedule 1.

21. The *Work Health Administration Act 2011* provides that the jurisdiction of the Court is *inter alia*:

**14 Jurisdiction of the Court**

*The Court has the following jurisdiction:*

- a. *Under the Return to Work Act 1968, to hear and determine*
  - i. *Claims for compensation under Part 5 of that Act; and*
  - ii. *All other matters required or permitted by that Act to be referred to the Court for determination;*
- b. *Omitted*
- c. *To determine all matters and questions incidental to, or arising out of, matters before the Court;*
- d. *Any other jurisdiction conferred on it under any Act.”*

22. There is no submission that the *Victims of Crime Assistance Act* nor the *Northern Territory Civil and Administrative Tribunal Act 2014* confers any powers for the Work Health Court which would enliven s 14(d) above.

23. Rather the Worker argues that the lack of conferral to enable the ability of all issues to be jointly heard and determined creates a situation where s 15(1) of the *Work Health Administration Act 2011* is enlivened.

24. In the Workers submission, where the preference to deal with both the Work Health Court dispute and the CVSU dispute jointly, for expedition and costs savings, is not specifically provided for by any Act, the jurisdiction, and powers, of the Work Health Court are extended to by virtue of s15(2) of the *Work Health Administration Act 2011* to encompass the general powers of the Local Court.

25. The Worker argues that the generality of the *Work Health Court Rules 1999* ('the Rules') contemplate the situation currently before the Court. Part 11 of the Rules provides for the process of joining a party to a proceeding. It specifically describes the two scenarios under the Act, summarised at 16.a and 16.b above and provides further a general non descriptive category of:

*“(c) a party proposing to join another party as a party.*

26. With respect, I cannot accept this argument when it was specifically rejected by Judge Neill, in *Johannsen*:

*“40. The Rules otherwise go on in Rule 11 to provide for the joinder of a party. The Rules specifically identify joinders of a prior employer, and of a previous insurer, and then go on in subrule 11.01(1)(c) to provide for a third category, namely “a party proposing to join another person as a party”. Counsel for the Worker submitted that this subrule provides sufficient general jurisdiction for the joinder of the Work Health Authority as a party. I do not accept this submission in respect of Part 5 of the Act...*

41. *Rules of Court cannot and do not create powers and jurisdiction beyond that established by the Act or Acts under which the Rules are made. If there is no jurisdiction in the Act or in the Work Health Administration Act sufficient to permit joining the Work Health Authority as a party in respect of Part 5 of the Act, then such jurisdiction cannot be created by the Rules – “the stream cannot rise higher than the source whence it flows” – Mays v Rose et al. Superior Court of Chancery (1844) 703 at 716.6.”*

27. While that decision pertained to the Work Health Authority, I find it even more pertinent when considering an external agency such as CVSU, which is a completely separate entity not directly engaged with any aspects of the *Return to Work Act*, the *Work Health Administration Act* or Work Health Court processes or procedures.
28. Having found that the Work Health Court lacks the inherent jurisdiction to order the joinder of CVSU to the proceedings, it is not necessary for me to rule on the balance of submissions of the parties made by the parties at the interlocutory hearing. However, I will turn briefly to same, as it is the case, that if am wrong on my finding regarding jurisdiction, I would have declined the application in any event.
29. The Worker relied upon the case of *Official Trustee in Bankruptcy v Waa* [2016] NTSC 69, which provides a useful summary of the considerations for joinder, in support of their application.
30. Master Luppino (as he then was) notes that the Courts authority to join a party is discretionary and largely unconstrained<sup>11</sup>. He discusses a number of authorities which have developed similar guiding principles for an application for joinder:
  - a. A course conducive to a just resolution with the desirability of limiting costs and delays of litigation;<sup>12</sup>
  - b. Avoiding unfairness to any party – balancing the prejudice of joining a party who may not be heard on some issues against the inconvenience of one party having to litigate in duplicitous proceedings;<sup>13</sup>
  - c. Efficiency of the use of Court resources.<sup>14</sup>
31. Once the statutory authority to permit joinder of a party to a proceeding is established, in my view, these principles are likewise applicable to the question of joinder in the Work Health Court.
32. Part 11 of the *Work Health Court Rules 1999* might be considered unhelpful, given it potentially creates the impression that the stream rises higher than its source and due to the lack of guidance on the considerations to be given to joinder applications, focussing rather on the procedure for same.

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<sup>11</sup> *Official Trustee in Bankruptcy v Waa* [2016] NTSC 69 at 29

<sup>12</sup> *Bishop v Bridgelands Securities Ltd* (1990) 25 FCR 311;

<sup>13</sup> *Ibid* and *Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd* [2013] FCA 279 citing *Knight v Beyond Properties Pty Ltd* (No. 2) (2006) FCA 192

<sup>14</sup> *CBI Contractors Pty Ltd v Abbott* (No. 2) [2009] FCA 1129

33. Conversely, the *Supreme Court Rules 1987 Order 9 'Joinder of claim and parties'* provides for the permissive joinder of parties with leave of the Court and sets out the tests to be met when considering granting leave:

***"9.02 Permissive joinder of parties***

- (1) *Two or more persons may be joined as plaintiffs or defendants in a proceeding:*
  - (a) *where:*
    - (i) *if separate proceedings were brought by or against each of them, a common question of law or fact would arise in all the proceedings; and*
    - (ii) *all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or*
  - (b) *subject to subrule (2), where the Court, before or after the joinder, gives leave to do so.*
- (2) *The Court shall not give leave under subrule (1)(b) unless it is satisfied that the joinder:*
  - (a) *will not embarrass or delay the trial of the proceeding;*
  - (b) *will not prejudice a party; or*
  - (c) *is not otherwise inconvenient.*

34. With respect to the Worker's current Interlocutory Application, I accept that the tests of Rule 9.02(1) of the *Supreme Court Rules* could be shown, on balance, to be met.

35. I further accept the Workers submission that the determination as to whether the Worker is a Worker under the Act and therefore potentially entitled to compensation under the *Return to Work Act*, is a question of law &/or fact which arises in both the dispute between the Worker and the Employer in the Work Health Court and with CVSU.

36. Likewise, I accept that the events and factual nexus which gives rise to any entitlement to compensation are largely common in both the dispute between the Worker and the Employer and with CVSU.

37. However, if I was considering the joinder application in light of the authorities set out above and the *Supreme Court Rules Order 9*, in my view, the application would still fail due to the prejudice to the proposed Second Respondent, thus offending Rule 9.02(2) and preventing the giving of leave.

38. The Worker submits that there are no disadvantages to joining CVSU to the proceedings. I respectfully disagree. Becoming a party to a proceeding is an absolute and prevailing Order. It is not the case that a party can self-nominate their level of engagement with the proceedings. Even if they are joined due to a limited number of common of issues with the other parties, a party to a proceeding would be expected, unless leave is given, to attend each Court event, to engage in all case management procedures, including filing pleadings and attending to discovery and would be at risk of an adverse costs Order for all or part of the proceedings.



39. In this regard I see CVSU as being quite disadvantaged were they to be joined. Although Mr Downs for the Worker focussed on their engagement with settlement negotiations, and I will speak to this below, merely compelling a party to the negotiating table is not the sole legal consequence of joining them as a party, nor can this element of involvement be neatly severed.

40. I accept the submissions of the proposed Second Respondent:

*"... CVSU is interested in one of the outcomes that may flow from this Work Health Court matter. But it is not interested and it has no stake or utility in assisting the Work Health Court in coming to that outcome which is whether Mr Summers is a worker. We have nothing further to add. It concerns matters that are beyond the assistance that SVCU (sic) may provide."*<sup>15</sup> and;

*This proceeding under s 104 of the Return to Work Act is a proceeding between a claimant and an employer on whether Mr Summers is a worker. Any factual dispute regarding this issue is a matter entirely between the worker and the employer. There is no utility in joining CVSU because we have nothing to add."*<sup>16</sup>

41. In addition to the prejudice and not insignificant, inconveniences arising to the proposed Second Respondent, they also argue that there are additional matters to be determined by NTCAT, over which the Work Health Court has no jurisdictional powers to make findings or Orders.

42. While I have accepted above that there are some commonalities in the factual nexus and avenues of interrogation, which the Worker is faced with reconciling in multiple jurisdictions, I agree that it is the case, that neither NTCAT, nor the Work Health Court has the full authority to hear and determine all issues in dispute across the two forums.

43. The Work Health Court will be called upon to determine whether the Worker is a Worker, as defined by s 3 of the *Return to Work Act*. In addition the Court will (presumably, based on the Notice of Decision disputing liability dated 23 October 2020<sup>17</sup>) hear argument in relation to a time limitation bar.

44. NTCAT has been asked to hear a "*Review of Decision by Crime Victims Services Unit dated 21/10/20 and Assessor's Notice to Director, dated 16 October 2020*"<sup>18</sup>.

45. In their Response<sup>19</sup> the Director of CVSU submits that the Worker's review of his entitlement to compensation under the *Victims of Crime Assistance Act* should be refused on the following grounds (in brief):

- a. The incident giving rise to the Worker's claim did not meet the requirements of s5(1)(b) (violent act) or s 10(4)(b) (compensable injury); and
- b. The Worker was not eligible as a primary victim (s 9) to make a claim for compensation (ss 10(4)(b) and 37); or
- c. The Worker has not established the violent act directly caused his injury (s 10(4)(b)); and

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<sup>15</sup> Transcript of proceedings at p 11

<sup>16</sup> Ibid at p 12

<sup>17</sup> Affidavit of Antony Howard Downs filed 31 May 2021 at Annexure "AHD- 23"

<sup>18</sup> NTCAT Initiating Application signed 8 March 2021 at Annexure "AHD- 27" of the Affidavit of Antony Howard Downs filed 31 May 2021

<sup>19</sup> NTCAT Response to Initiating Application signed 29 April 2021 tendered and marked "Exhibit A"

- d. The Worker's eligibility for compensation under the *Return to Work Act* renders him ineligible for a claim under the *Victims of Crime Assistance Act*; and further
  - e. Any award of compensation would be reduced (potentially by 100%) as a result of risk taking behaviours (s41(1)(a)) and a pre-existing condition (reg 9).
46. Clearly, save for the issue of any eligibility under the *Return to Work Act*, these determinations are to be made under the *Victims of Crime Assistance Act* and are outside the purview of the Work Health Court. I therefore accept the submission that a joinder of CVSU to the Work Health Court proceedings does not as a matter of course dispose of the determinations to be made by NTCAT, irrespective of the Workers indication that those proceedings would be withdrawn in the event this joinder application were successful.
47. Ultimately, I have found that there is no jurisdiction for CVSU to be joined as a party to the Work Health Court proceedings. Further, even if there were, in my view the guidance provided by the authorities and the Supreme Court Rules, leads me to form a view that such a joinder would not be appropriate in all of the circumstances.
48. I find that it is necessary, despite the potential for duplicity and increased costs, for the separate regimes to make their independent findings in relation to the Workers two separate applications.
49. Accordingly, the Interlocutory Application will be dismissed.
50. Despite my findings, just as I expressed at the Hearing of the application, I am concerned that the Worker is being asked to run the gauntlet in two separate jurisdictions, particularly so in the Work Health Court jurisdiction, which is a costs jurisdiction where the Worker may not get a final judicial determination for potentially 1 to 2 years.
51. I further expressed concerns regarding the duality of both jurisdictions potentially drawing final conclusions on eligibility under the *Return to Work Act* and the legal and financial consequences of those findings mirroring or potentially conflicting with each other.
52. I will note that my concerns with respect to potential 'double dipping' raised at the hearing have been assuaged by a consideration of s 42 of the *Victims of Crime Assistance Act* and s 54 of the *Return to Work Act* and accordingly those concerns have had no bearing on my final decision.
53. I voiced my opinion with regard to the pragmatic approach being pursued by the Worker in attempting to get the two possible sources of compensation<sup>20</sup> to a round table to see if a commercial outcome could be agreed upon by all three parties which would draw to a close the merry-go-round of litigation.
54. However, this approach was not seen as acceptable to the proposed second respondent:
- "I've been instructed that that (sic) [a round table discussion] would be the improper forum to consider the issues at hand between the CVSU and the applicant. The correct forum would be a review under the NTCAT but not informal mediation or a meeting between the applicant and the CVSU and the employer...."*

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<sup>20</sup> Being CVSU and QBE

*the assessor or the Director of the CVSU cannot negotiate an award. It has to be made per the regulations and the Victims of Crimes Assistance Act. There is no scope for the CVSU whatsoever to engage in negotiations.”<sup>21</sup>*

55. Obviously, just as I have been bound by the legislative schemes and jurisdictional limitations in considering this application, I appreciate that the Director of CVSU has similar restrictions and must provide natural and procedural justice to all claimants under the *Victims of Crime Assistance Act* and that this may render any attempts to move outside the box untenable.
56. Nonetheless, I reiterate my comments at the Hearing that in the event a representative of CVSU wished to attend the upcoming Directions Conference for the purposes of negotiations, then subject to the views of the parties (who were not necessarily fully instructed on this direct point at the Hearing but didn't raise any immediate objection) in my view R 3.04(q) of the Work Health Rules 1999 permits me to grant leave for the participation of a non-party to Court facilitated negotiations.
57. I have determined the current application. Parties have liberty to apply in relation to costs. The proceedings proper will continue with the Directions Conference listed for 15 July 2021.

## **ORDERS**

58. The Worker's Application filed 31 May 2021 is dismissed.
59. Parties to the Application are at liberty to apply in relation to costs.

Dated this 9<sup>th</sup> day of July 2021

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LEANNE GORDON  
JUDICIAL REGISTRAR

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<sup>21</sup> Transcript of proceedings at pp 15 - 16