

CITATION: Green v NT of Australia [2022] NTLC 022

PARTIES: Leslie John Green

v

Northern Territory of Australia

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO(s): 21940174

DELIVERED ON: 7 November 2022

DELIVERED AT: DARWIN

HEARING DATE(s): 4 June 2021

JUDGMENT OF: Judge Austin

CATCHWORDS:

Practice and Procedure – Amendment Pleadings – Defence - Statute of limitations - Contract – terms and conditions of employment – inclusion enterprise bargaining agreements – contractual obligation – aspirational statement – implied condition to provide safe working environment.

Limitation Act 1981

Local Court (Civil Jurisdiction) Rules 1998 5.09, 5.13, 7.02 (e) (iv) 28.02

Wickham Point Development Pty Ltd v Commonwealth of Australia [2019] NTSC 7

Commonwealth of Australia v Mewett (1995) 59 FCR 391 at 421

Helen Secretary & Ors v Northern Territory of Australia [2019] NTSC 73 at [8]

Burnham v City of Mordialloc [1956] VLR 239

Harvey v John Fairfax Publications Pty Ltd [2005] NSWCA 255

Ketteman v Hansel Properties Ltd [1987] 1 AC 189 at 220

Queensland v J L Holdings Pty Ltd [1997] CLR 146; [1997] HCA 1

Aon Risk Services Australia v Australian National University [2009] 258 ALR 14; [2009] 83 ALJR 951; [2009] HCA 27

Sheldon v McBeath (1993)

Coburn v Colledge [1897] 1 QB 702

Argyropoulos v Layton & Anor [2002] NSWCA 183

Larking v Great Western (Nepean) Gravel Ltd [1940] 64 CLR 221

Clutha v Millar (No.3) [2002] NSWSC 642

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (1979) Ch 384; [1978] 3 All ER 571

Argyropoulos v Layton & Anor [2002] NSWCA 183

REPRESENTATION:

Counsel:

Plaintiff: Mr Piper

Defendant: Mr Grove

Solicitors:

Plaintiff: Piper Ellis and Associates

Defendant: Ward Keller

Judgment category classification: C

Judgment ID number: [2022] NTLC 022

Number of paragraphs: 81

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. [2022] NTLC 022

BETWEEN

Leslie John Green

Plaintiff

AND

Northern Territory of Australia

Defendant

REASONS FOR JUDGMENT

7 November 2022

JUDGE AUSTIN

Interlocutory Application:

1. The Plaintiff has sued the Defendant for pecuniary damages arising out of alleged breach of employment contract at the workplace. There is no claim for personal injury and the claim is based in contract.
2. The matter was listed for a hearing on 21 June 2021.
3. The Initiating Statement of Claim was filed by the Plaintiff on 28 October 2019. An amended Statement of Claim was filed on 8 October 2020.
4. A Defence was filed by the Defendant on 28 April 2020. An Amended Defence was filed on 26 October 2020.
5. On 23 April 2021 the Defendant filed a FORM 25A interlocutory application. However the application was not served on the Plaintiff until 11 May 2021. The Defendant is seeking the court's leave for the following order:

An order that the defendant has leave to amend the defence to add the following paragraph:

The Plaintiff is statue barred from pursuing the action for breach of contract by operation of section 12(a) of the Limitation Act.1981 (NT)

6. The application was initially listed for a hearing by the court on 17 May 2022, however the application was adjourned to allow service of the Plaintiff and then listed to accommodate counsel for the applicant's availability, to Friday 4 June 2021 - three weeks prior to the hearing date.

Issues:

7. The Plaintiff opposes the application to amend the defence, firstly on the basis of the futility of allowing the amendment.
8. Secondly, the Plaintiff submits the proceedings are at a point where the case management requirements and the public interest in finalising litigation are such that any amendment to allow a statute of limitation defence at such a late stage so close to the hearing would result in incurable prejudice to the defendant, and a costs order will not address or remedy that prejudice.
9. The Employer submits that an order for costs will adequately address any prejudice and the amendment is not futile.
10. The Issue for the court is whether the defendant should be granted leave to amend the pleadings so close to the hearing date and if the amendment is granted whether an order for costs will adequately address any prejudice to the Plaintiff.

Decision:

11. On 17 June, 2 weeks prior to the hearing and after consideration of the defendant's application, the court made orders refusing the s25A application to amend the defence and dismissing the application. I advised the parties that I would hand down written reasons for decision at a future date.
12. Costs were reserved.

Application to Amend Pleadings to Include the Limitation Defence:

13. The Employer seeks leave to file amended pleadings relying upon the decision in *Wickham Point Development Pty Ltd V Commonwealth of Australia*¹ in support of their application.
14. The amendment sought as attached to the Employers application, are to include a limitation defence.
15. A defence that the proceedings are statute barred must be specifically pleaded. This is so notwithstanding that the statute extinguishes the cause of action: *Limitation Act (1981) NT* (the Act).

Limitation Defence:

16. The **period of limitation** for instituting an action founded on contract is three years from the date on which **the cause of action first accrues**. S12 of the Act provides:

12 Actions in contract, tort etc.

- (1) *Subject to subsection (2), the following actions are not maintainable after the expiration of a limitation period of 3 years from the date on which the cause of action first accrues to the Plaintiff or to a person through whom he claims:*

¹ [2019] NTSC 7

- (a) *an action founded on contract (including quasi-contract) not being a cause of action which is evidenced by a deed;*
 - (b) *an action founded on tort including a cause of action founded on a breach of statutory duty;*
 - (c) *an action to enforce a recognisance; and*
 - (d) *an action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.*
17. Time, for the purpose of calculating a limitation period, starts running from when the cause of action accrues. When the cause of action arises will differ depending on the type of action a Plaintiff is looking to maintain. In short, a cause of action will accrue when all elements required to establish the particular claim come into existence. That may occur at once or progressively over a period of time.
18. For example a cause of action based on a breach of contract occurs when the breach itself occurs. An example may be the giving of negligent advice by a lawyer. The cause of action arises in contract when the negligent advice is given.
19. Section 63 of the Act provides that, on the expiration of the limitation period fixed by the Act, the cause of action is extinguished. However, the effect of s68A is that the benefit of the extinction of the cause of action is waived by the defendant if the bar is not pleaded: *Commonwealth of Australia v Mewett*² per Lindgren J:
20. If a limitation defence is raised or anticipated, there is usually no doubt that the limitation period has run out and the only question, in personal injury cases, is whether the Plaintiff should be granted an extension of the limitation period (s44(1) *Limitation Act 1981* (NT)).
21. However, the defendant argues in this case that there are real issues for determination under the limitation defence, which is when the Plaintiff's cause of action first arose, and that this issue can be dealt with at the hearing of the cause.
22. The employer contends that its application meets the criteria espoused by Associate Judge Luppino at para 3 in *Wickham Point* (*supra* – references omitted):
- “... subject to case management requirements and the public interest in finalising litigation promptly utilising the Courts resources, in general Courts liberally allow amendments to pleadings provided that the application is made in good faith, any prejudice to the other party can be adequately addressed with an Order for costs and the amendment is not futile, namely that the amended pleading would not be liable to be struck out.*
23. In the more recent decision of *Helen Secretary & Ors v Northern Territory of Australia*³ His Honour Associate Justice Luppino again set out the applicable principles relevant to amending pleadings. They are (references omitted) :-
- a) applications for leave to amend should be made in good faith;
 - b) an amendment must not result in prejudice or injustice to other parties which cannot be remedied by an order for costs;

² *Commonwealth of Australia v Mewett* (1995) 59 FCR 391 at 421

³ *Helen Secretary & Ors v Northern Territory of Australia* [2019] NTSC 73 at [8]

- c) the amendment must disclose an arguable case;
 - d) as the Court is not concerned with the merits, a pleaded case will be allowed even if it has low prospects of success;
 - e) however, an amendment that is bad in law will not be allowed as it would be futile to allow an amendment that is liable to struck out;
 - f) an amendment cannot be embarrassing or prejudicial to a fair trial;
 - g) a pleading must set out the case to be met with clarity so that the Defendant can properly plead to it;
 - h) the requirements of proper pleading, both at common law and pursuant to Rule 13 of the Supreme Court Rules (“SCR”), must also be complied with.
24. Subject to the foregoing considerations, to case management requirements, to the public interest in finalising litigation promptly and properly utilising the Court’s resources, Courts liberally allow amendments to pleadings.
25. An amendment to a pleading may also be refused if a party has deliberately framed his case a particular way and the opponent may have conducted his case differently had the new issues been previously raised: *Burnham v City of Mordialloc*; *Harvey v John Fairfax Publications Pty Ltd*⁴.
26. In particular, a late application to add a limitation defence may be refused if the parties have, until that stage, fought the case on other grounds: *Ketteman v Hansel Properties Ltd*⁵, cited by the High Court in *State of Queensland v J L Holdings Pty Ltd*⁶.
27. Particularly pertinent is the High Court’s decision in *Aon Risk Services Australia v Australian National University*⁷. The High Court allowed the appeal and expressly overruled its previous judgment of *Queensland v JL Holdings*⁸ that case management concerns are only relevant in exceptional circumstances. Instead, courts must always consider the public interest in the efficient use of court resources when determining whether to grant indulgences such as amendment of pleadings and adjournments.
28. His Honour Chief Justice French at paragraph [4-6] held:
- 4. *Save for the dissenting judgment of Lander J in the Court of Appeal, the history of these proceedings reveals an unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation or adjournment of the dates set down for trial, and raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable Rules of Court, leave should be granted.*
 - 5. *In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a*

⁴ *Burnham v City of Mordialloc* [1956] VLR 239; *Harvey v John Fairfax Publications Pty Ltd* [2005] NSWCA 255

⁵ [1987] 1 AC 189 at 220

⁶ *Queensland v J L Holdings Pty Ltd* (1997) CLR 146 ; [1997] HCA 1

⁷ *Aon Risk Services Australia v Australian National University* [2009] 258 ALR 14; [2009] 83 ALJR 951; [2009] HCA 27

⁸ *Queensland v JL Holdings* (1997) CLR 146; [1997] HCA 1

satisfactory explanation for seeking it, the amendment to ANU's statement of claim should not have been allowed. The discretion of the primary judge miscarried.

6. *It appears that a factor in the decision of the primary judge and of the Court of Appeal was the decision of this Court in **JL Holdings**. That case arose out of an entirely different factual setting. However, to the extent that statements about the exercise of the discretion to amend pleadings in that case suggest that case management considerations and questions of proper use of court resources are to be discounted or given little weight, it should not be regarded as authoritative. For the reasons set out more fully below, I would allow the appeal. I agree with the orders proposed in the joint judgment ^[16].*

29. In summary the Court held:

- a) *Judicial Officers must now consider the wider public interest in the efficient use of limited court resources when deciding whether to grant applications to amend pleadings;*
- b) *Parties are not entitled to raise any arguable case at any stage of proceedings, subject only to payment of costs;*
- c) *Amendments that produce delay impact on the entire court system and affect parties who wish to use the court system.*

30. It is necessary for the court to consider the following matters:

- a) the nature and extent of the amendment proposed;
- b) the question of lapse of time and delay;
- c) any explanation offered for the delay in raising the subject matter of the proposed amendments;
- d) any unfairness or prejudice occasioned to the Plaintiff in the event of any amendment being granted;
- e) that the amendment is so fruitless that it would be struck out if it appeared in an original pleading;
- f) that it will require a further hearing after judgment has been reserved;
- g) that the application is made mala fides;
- h) that an order for costs is not sufficient to cure any prejudice to another party to the proceedings: *Heath v Goodwin* (1986) 8 NSWLR 478, or
- i) that the application of case management principles so requires.

The Merits of the Application:

The Plaintiff's Case

31. At paragraph 5 and paragraph 7 of the Plaintiff's amended Statement of Claim (SOC), the Plaintiff's case is pleaded that the defendant breached an express and an implied term of the employment contract between the defendant and the Plaintiff where the defendant failed to:
 - a) take all reasonably practical steps to prevent harassment and bullying in the work place (the Enterprise Agreements paragraph 59: express term); and/or
 - b) provide a safe and healthy system of work (implied term).
32. The Plaintiff's case is that the breaches of the express and the implied terms of the contract are the 20 pleaded allegations, set out in paragraph 5a) – 5t) (express term) and paragraph 7 (implied term – relying on the same breach allegations in paragraph 5a) – 5t).

33. The Plaintiff argues that upon its proper construction the case pleaded is a continuing breach of both the implied and/or express terms of the contract.
34. The Plaintiff argues his cause of action in contract commenced in late 2015 or early 2016 when he was transferred to Tennant Creek to commence his position as 2nd Fire Officer and there followed a continuous and cumulative series of relevant events which constitute the breach of the terms of his employment contract and culminated in his appeal to the *Public Sector Appeals Board* (the **Board**) and the decision of the Board on 14 March 2019 (the **Decision**), or his forced uplift from Tennant Creek by his employer (which occurred earlier in time).
35. The Plaintiff submits that since the evidence shows a continuing omission to take steps which would have prevented a) or provided b) (the contract terms above in paragraph 31) there is difficulty in postulating a succession of breaches. The Plaintiff's case is that most, if not all, of the relevant events occurred on or after 28 October 2016 and as such the Plaintiff's cause of action based in contract is not statute barred.
36. The Plaintiff asserts the employer's conduct, the disciplinary proceedings, subsequent to the supervisor Ferguson's conduct, forms part of the alleged continuing breach and, significantly, that the cause of action accrued either when the Plaintiff was uplifted from Tennant Creek by the defendant on or about 12 April 2017, or in the alternative upon 3rd party intervention (the **Board's Decision** on 14 April 2018). The Plaintiff asserts that both of these occurred within the limitation period.
37. The Plaintiff claims that upon its proper construction:
 - a) the *Statement Of Claim* (SOC) does not plead separate causes of action for every event or action alleged during the time period particularised in paragraph 5;
 - b) it is not open to the Plaintiff to plead a separate cause of action for the events and actions alleged given the nature of the case in contract.
38. The time of occurrence of the breach will turn on the construction of the particular contract, see *Sheldon v McBeath*⁹. In that case, an architect breached the contract in the design of the footings. The Court held that, in performing the contract, there was always the possibility (even if it were impractical) for the correction of the mistakes to take place and the architect had a continuing duty to do so. The Court held that, in that case, the breach occurred when the contract ended and the work handed over - as it was from that time that the architect ceased to have a role that would have allowed correction.
39. The Plaintiff claims the notion of a continuing duty, as postponing the accrual of a breach of contract in his case, due to nature of the continuing duty as opposed to the defendant's contention.

The Defendant's Case

40. The applicant defendant's contention is that there are arguably distinct causes of action pleaded in paragraph 5 of the SOC, accruing each time the defendant did something alleged in paragraph 5 as particularised.
41. The applicant alleges that the **last** breach occurs on 30 August 2016 and the alleged breaches are confined to the supervisor Ferguson's conduct asserted in paragraph 5 of the SOC

⁹ *Sheldon v McBeath* (1993) Aust Torts Rep 81-209

paragraph 5a) – g). As such the cause of action is statute barred by the Limitation Act as the SOC was filed on 28 October 2019.

42. The applicant asserts the conduct of the employer pleaded to in paragraphs 5h) - t) is not pleaded as part of the alleged breach of contract and cannot be relied on by the Plaintiff to ground his cause of action, even though it falls within the limitation period. The applicant asserts it is arguable that the pleadings disclose separate and distinct causes of action pleaded such that they are statute barred by the Limitation Act.

Discussion:

43. Regardless of the defendant's contention, the Plaintiff has nonetheless pleaded not only that the supervisor Ferguson's conduct is part of the alleged breach but that the defendant's conduct attributable to the employer on or after 28 October 2016 constituted part of the continuous breach of the defendant's contractual duties. The disciplinary action taken by the defendant against the Plaintiff is pleaded as commencing on or around 27 and 28 October 2016 and occurs within the limitation period.
44. I remain of the view that while it may be arguable generally that the Plaintiff's case could be pleaded as separate and distinct breaches or causes of actions, the nature of this particular case is that the Plaintiff alleges that the defendant breached their contractual obligations (see paragraph 28 above) due to multiple and cumulative acts/omissions attributable to the supervisor Ferguson **and** the employer as a continuous course of conduct. Isolated incidents are not alleged as breaches of the terms of the contract.
45. The definition at law of what is required to prove *bullying and/or harassment* in the work place of and by its very nature usually and by necessity may require more than just one isolated act and/or omission by the offending party. A workplace where an employee is subject to bullying and harassment may constitute an unsafe and unhealthy work environment.
46. The terms bullying and harassment are by their very definition both at common law and in statute variously defined, as requiring *the repetition of certain behaviours by a person or group of persons who act in an unreasonable way towards another targeted person AND their behaviour creates a risk to health and safety.*
47. An isolated incident of a certain behaviour may constitute offensive or unreasonable behaviour that is unacceptable in the workplace but without it being repeated it may not reach the threshold of bullying behaviour or harassment unless it is repeated.
48. The institution of disciplinary proceedings by the supervisor Ferguson and the action of the disciplinary proceedings by the defendant on and about 28 October 2016 onwards is relied on by the Plaintiff as the alleged breach of the terms of the contract of employment.

Accrual of a Cause of Action in Contract / Limitation Period:

49. The statutory period begins to run the moment that the cause of action accrues, that is usually, when the breach of the contract occurs. **Care must be taken to identify precisely the obligation in issue and the time at which it was breached.** Exactly when the breach occurred, and a cause of action therefore arose, depends on a construction of the contract.

50. In *Coburn v College*¹⁰, **A Cause of Action** was found to be:

...every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

51. The Court should consider the alleged breach relied upon by the Plaintiff to found his cause of action. Provided the alleged breach arose within the statute of limitation period, the Plaintiff's cause of action will be in time.

CONTINUING BREACH ARGUMENT (DAMAGES)

Continuing obligations and the accrual of the cause of action:

52. *Chitty on Contracts* states: *Chitty on Contracts*, Sweet & Maxwell, London, 1989, at 1,256:

If the breach consists in a failure to act, it may be held to continue die in diem until the obligation is performed or becomes impossible or performance or until the innocent part elects to treat the continued non-performance as a repudiation of the contract. Thus the failure of a solicitor to register an interest in land or diligently prosecute legal proceedings will ordinarily constitute a continuing breach of his retainer, and the client's cause of action will not become barred until six years after registration ceases to be possible or until the proceedings are struck out for want of prosecution. [at 1256 footnotes omitted].

53. In *Larking v Great Western (Nepean) Gravel Ltd*, Dixon J¹¹ discussed the concept of 'continuing breach' and the notion of a continuing obligation, stating:

*If a covenantor undertakes that he will do a definite act and omits to it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. **On the other hand, if his covenant is to maintain a state or condition of affairs**, as, for instance maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, **then a further breach arises in every successive moment of time during which the state or condition is not as promised**, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.*

54. The effect of a continuing obligation has also been expounded on as follows in the decision cited by the applicant in these proceedings, *Clutha v Millar (No.3)*¹² per Austin J at [20]:

Where the continuing duty is contractual, it may be plausible to say that the continuing failure to discharge it gives rise to a series of causes of action, while the failure continues. This is because contractual causes of action accrue upon breach, and it seems artificial and unacceptable to say, in the case of a continuing failure to discharge a continuing contractual duty that the only breach that has occurred is the failure to perform the duty when it first arose.

¹⁰ *Coburn v College* [1897] 1 QB 702, at 707 per Lord Esher; applied in *Argyropoulos v Layton & Anor* [2002] NSWCA 183, at [42] per Santow JA

¹¹ *Larking v Great Western (Nepean) Gravel Ltd* (1940) 64 CLR 221 Dixon J at 236

¹² *Clutha v Millar (No.3)* [2002] NSWSC 642, at [20]

55. I also note that the notion of a continuing obligation has been applied in cases involving limitation defences in both contractual¹³ and tortious¹⁴ contexts.
56. Whilst I am not required to decide the merits of any limitation defence, I am not persuaded by the defence submission. If that is what was the submission; that the notion of continuing breach is not available to the Plaintiff in the manner in which they have pleaded their case.
57. The case pleaded is that the defendant failed to fulfil their contractual obligations to ***maintain a state or condition of affairs*** in relation to both of the contractual terms alleged to have been breached by the applicant failing to:
- a) take all reasonably practical steps to prevent harassment and bullying in the work place (the Enterprise Agreements paragraph 59.(express term); and/or
 - b) provide a safe and healthy system of work (implied term).
58. The evidence relied on by the Plaintiff to prove his case is that the cause of action accrued when the defendant breached the duty by either involuntarily uplifting him from his position as lead firefighter at Tennant Creek as a result of the outcome of the disciplinary proceedings or due to the third party intervention of the **Board's decision**, such that the obligation became impossible to perform.

Defence Argument for Delay in relying on Limitation Defence:

59. The originating SOC was filed on 28 October 2019 and the Defence was filed on 28 April 2020. An amended SOC was filed on 8 October 2020. An amended defence was filed on 26 October 2020. Particulars were sought by defence of the allegations of the bullying conduct constituting the breach via email on 4 December 2020. The Plaintiff replied on 12 April 2021.
60. The applicant argued that it was not until the receipt of the answer sought to the particulars on 12 April 2021 that the applicant was able to properly identify the case against them and so they sought leave to file the amended defence to include the limitation period. The defendant asserts that before that time it was not apparent that the Plaintiff relied on both the supervisor Ferguson's conduct and the disciplinary proceedings to ground the bullying conduct.
61. The Plaintiff asserts his case is pleaded that the conduct of Ferguson is particularised as conduct that occurred prior to the disciplinary proceedings and that the defendant, through Mr Green's superiors, failed to act to prevent bullying and harassment in the workplace as they were obligated to do under the express and implied terms of his employment contract, and that instead they instigated disciplinary proceedings against him.
62. The Plaintiff counters that at all material times, including before the amended statement of claim was filed on **28 October 2019**, the particulars of the conduct alleged in both the originating SOC and the amended SOC and the timing thereof has not materially altered in any way. The Plaintiff submits that at all times the particulars of the conduct pleaded included both Ferguson conduct up to 30 August 2016, the failure of his superiors to take action **and** the disciplinary proceedings after that.
63. The Plaintiff asserts that in both the original and amended SOC's at paragraph 5) the Plaintiff specifically pleaded the timing of Ferguson's alleged bullying conduct without alteration:

¹³ Contractual (*Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384; [1978] 3 All ER 571; see also *Sheldon v McBeath* (1993) Aust Torts Reports 81-209)

¹⁴ Tortious (*Argyropoulos v Layton & Anor* [2002] NSWCA 183)

On dates between 1 January 2016 and 30 August 2016, the Plaintiff was bullied by Ferguson, who: (allegations listed)...

64. Significantly the Plaintiff submits that the effect of paragraph 4 and paragraph 5 of the originating SOC of 28 October 2019 and the amended SOC of 8 October 2020 is that the particulars regarding the disciplinary proceedings are repeated in almost identical terms:

Between late 2015 and 14 March 2018 the Defendant failed to prevent bullying and harassment in the workplace, or provide a safe and healthy work environment in breach of paragraph 59 of the Enterprise Agreement and/or the implied term.

65. The Plaintiff further submits that the particulars of the impugned conduct in paragraph 5) in both SOC's are also materially identical and were not materially altered in any way and included both allegations of bullying by Ferguson failure of his superiors to act **and** the disciplinary proceedings which commenced on or about 27 and 28 October as well to assert a continuous course of conduct by the defendant which constituted the breach of contract.
66. The Plaintiff submits that paragraphs 5e), f), g) of the SOC of 28 October 2019 were not materially altered in any way and became respectively paragraphs 5e), f), g) of the amended SOC of 8 October 2020. Those paragraphs articulate the time frame in which the Plaintiff alleges the superiors became aware of the bullying alleged by Ferguson and failed to act, after 30 August 2016.
67. The Plaintiff then submits that paragraphs 5h) – s) of the originating SOC of 28 October 2019 were not altered in any material particulars and became respectively paragraphs 5h) – s) of the amended SOC of 8 October 2020. Those paragraphs pleaded to the disciplinary proceedings instigated by Ferguson on or about 27 and 28 October 2019. An additional paragraph 5s) was inserted into the amended SOC documenting the **Boards** directions.
68. The Plaintiff alleges, contrary to the Defendant's submissions that the SOC of 28 October 2019 include the disciplinary proceedings as part of the failure to prevent the bullying conduct/failure to prove a safe and healthy work environment alleged and particularised.
69. The Plaintiff submits that this was clear on the face of the original SOC and then on the amended SOC of 8 October 2020, well before the email requesting particulars of the alleged breach in December. The response to the email of the defence on 12 April 2021 simply confirmed what was in the pleadings and was of no surprise to the defence. It did not disclose any new dates or particulars. In any event Ferguson's conduct was always asserted as bullying conduct up to 30 August 2016 and particularised as such in the original SOC.

Conclusion:

70. I have carefully examined the SOC's and the Defences. I have considered the request for particulars of 4 December 2020 and the Plaintiff's reply of 12 April 2021. I agree with the Plaintiff's submission generally that the request for particulars of the pleadings resulted in the Plaintiff restating what was already pleaded in both SOC's, that is, the Plaintiff relied on all the allegations pleaded in paragraph 5 including from paragraph h) onwards, to ground the alleged breaches of both the express and implied terms of the contract of employment.
71. I do not find that the pleadings were equivocal to the extent that the defendant was only able to clarify as of 12 April 2021 that the Plaintiff was relying on the disciplinary proceedings as part of their claim for breach.

72. Most importantly, I find that at all material times leading up to the request for particulars, the applicant was on notice that the Plaintiff had pleaded the conduct of Ferguson and his superiors prior to 28 October 2016 as bullying and harassment; and a failure to act to prevent bullying and harassment; and a failure to provide a safe and healthy work environment. Yet, despite this the defendant had not included the limitation defence in the original Defence or the Amended Defence.
73. I find that no reasonable explanation was offered by the applicant for why the amendment was sought so late and so close to the hearing.
74. The explanation focused on the seeking and furnishing of particulars of the amended SOC. As discussed above, I find the defendant has been aware of the Plaintiff's claim for continuing breach since the originating SOC filed on 28 October 2019, and thereafter when the amended SOC was filed on 8 October 2021. The defendant has also been aware of the range of dates of alleged bullying by Ferguson and alleged failure of Mr Green's superiors to prevent such conduct, and the range of dates of the alleged continuing breach which included both Ferguson's conduct and the disciplinary proceedings up to the request for particulars. The particulars simply restated what was in both SOCs.
75. I also don't agree with the applicant's submission that allowing the amendment would not result in the hearing being in jeopardy and that any issues the Plaintiff would seek to rely on as a result of amendment could necessarily be dealt with at the hearing. I am told otherwise by the Plaintiff and I accept those submissions from Counsel. Amendment would very likely have resulted in an adjournment. This was a case where the Plaintiff had run his case on a particular basis and he would have been required to go back to determine why the SOC had not been filed at an earlier time to seek an extension of time under the Act. It would necessarily have required further discovery and submissions and proper enquires to be made.
76. Further I accept that an order for costs would not have remedied those prejudices faced by the Plaintiff in delaying the hearing in order to meet the necessity to seek an extension of time to deal with what is essentially a new defence raised very close to the hearing date. The hearing date is only 3 weeks out. Further this is not the only prejudice that may have been caused to the Plaintiff.
77. It is well known that litigation can and does have emotional effects on parties and those emotional effects, and the possible exacerbation of those effects by any delay in the progress of the action, are relevant considerations to be taken into account on an application of this kind. As Lord Griffiths said in *Kettman v Hansel Kettman v Hansel Properties Ltd*¹⁵:
- Justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes...*
78. Ultimately I do not think it would be reasonable to allow the defendant an opportunity to amend the defence to plead the limitation defence given the lack of a reasonable or satisfactory explanation for the delay in the defendant seeking to apply to amend at this late stage in the proceedings. I have also made the decision based on how the Plaintiff has run his

¹⁵ *Supra* - [1987] AC 189, 220; This passage was cited with approval in *Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146, 155 per Dawson, Gaudron and McHugh JJ and affirmed by the Majority Gummow, Hayne, Crennan, Kiefel ad Bell JJ in *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at paragraph [101]

case to date and the fact the hearing dates would be in real jeopardy in order to allow the Plaintiff time to meet any new defence if leave to amend is granted.

79. The Plaintiff is a personal litigant and the defendant is the Northern Territory of Australia. I do find that the prejudice that would be suffered by the Plaintiff cannot be fairly cured by an order for costs in his favour at this stage in the proceedings. Were this matter to be adjourned, there would, in my view, be force in the Plaintiff's submissions based on delay and the principles in the High Court Case of *Aon Risk Services Australia Limited v Australian National University*¹⁶.
80. The defendant's application for leave to amend the defence to lead s12 (a) of the *Limitation Act 1981 (NT)* is refused.
81. I will hear the parties as to costs of the interlocutory Application filed 23 April 2021.

¹⁶ *Aon Risk Services case - Supra*