CITATION:	*Timothy McClintock v Julalikari Council Aboriginal Corporation* [2022] NTWHC006
PARTIES:	TIMOTHY MCCLINTOCK
	v
	JULALIKARI COUNCIL ABORIGINAL CORPORATION
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO:	21910574
DELIVERED ON:	21 April & 3 May 2022
DELIVERED AT:	DARWIN
HEARING DATES:	4 SEPTEMBER 2020
DECISION OF:	JUDGE MACDONALD

CATCHWORDS:

Return to Work Act - Compensation - Medical and rehabilitation entitlements - liability - s 73 - Mediation - s103B – Applications – s 104 - Justiciability - Costs - Work Health Court Rules 1999 - R. 3.08 and 23.02 – Supreme Court Rules - Order 63 – Rule 63.11 - Partial success of each party – Non-justiciable Dispute

REPRESENTATION:

Counsel:

Worker:	Mr B O'Loughlin
Employer:	Mr T Anderson

Solicitors:

Worker:	Halfpennys
Employer:	Roussos Legal Advisory

Judgement category classification:	B
Judgement ID Number:	[2022] NTWHC006
Number of paragraphs:	32

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

Claim No. 21910574

BETWEEN

TIMOTHY MCCLINTOCK

Worker

AND

JULALIKARI COUNCIL ABORIGINAL CORPORATION

Employer

REASONS FOR DECISION

(Delivered 3 May 2022)

JUDGE GREG MACDONALD

BACKGROUND

1. Mr Timothy McClintock (Worker) commenced employment with the Julalikari Council Aboriginal Corporation on 14 May 2015 and sustained a shoulder injury on 25 June 2015 in the course of that employment. On 19 August 2015 the Worker made a claim for compensation under the now *Return to Work Act 1986* (RTW Act), which the employer's insurer (Employer) ultimately accepted liability for on 31 December 2015.[1] As a result, the Employer paid weekly benefits over the period 7 November 2016 to 17 December 2018, and also met the cost of surgery to the injured shoulder (arthroscopy, acromioplasty, rotator cuff repair and humeral ostectomy). The costs of subsequent rehabilitative physiotherapy throughout 2017 were then also met by the Employer. All of that conduct was consistent with its acceptance of liability for the injury in December 2015.

2. Other aspects relevant to management of both the claim and the ensuing proceedings were that; the Worker resigned his employment on 23 August 2015, 5 days following making the claim; recommenced work in September 2015 as the

[1] The Employer's work health insurer was Allianz Insurance Ltd trading as TIO Workers Compensation and all conduct, management and defence of the claim was carried out by that corporation in the Employer's name. References to the Employer should be read in that light.

owner/operator of a restaurant in Tennant Creek; and from December 2017 was the owner/operator of a funeral service in Katherine.[2] In July then August 2018 the Employer received expert opinions to the effect that the Worker had ceased to suffer any loss of earning capacity through incapacity resulting from the injury.[3]

3. On 23 November 2018 the Employer gave Notice of Decision to the Worker under s 69 of the RTW Act of cancellation of weekly benefits, due to his deemed earning capacity through application of s 65(2)(b)(ii). That was followed by prerequisite mediation which was unsuccessful in resolving differences between the parties and, on 11 March 2019, the Worker made Application 21910574 to the Work Health Court (Court), asserting an ongoing entitlement to weekly benefits due to total and/or partial incapacity.

4. On 15 March 2019, 4 days following commencement of proceeding 21910574, the Employer advised the Worker by letter that date it "*no longer accepts liability for any ongoing medical entitlements with regards to your injury of 25th June 2015*" and "*we confirm that no further treatment will be covered i.e. any ongoing medical treatment, including consultations with your general practitioner in relation to your workplace injury*".[4] The letter did not refer to s 73 of the RTW Act, but annexed documentation providing information to the Worker concerning Allianz's internal dispute resolution process, and an NT WorkSafe Bulletin on the availability of mediation of disputes through that Authority. The Worker promptly applied for mediation, which took place on 11 April 2019, with the parties having the benefit of legal advice and attendance at that time. The dispute concerning whether ongoing medical entitlements should be paid by the Employer was not resolved at the mediation.

5. On 15 April 2019 the Worker filed a further Application with the Court, commencing proceeding 21915080 disputing the Employer's advice of 15 March 2019. That proceeding was then consolidated into proceeding 21910574 on 30 April 2019, such that all disputes were raised in that proceeding.

6. On 18 March 2020 the Worker advised the Employer he would shortly amend the proceeding to abandon any claim for weekly benefits. On 3 April 2020 the Worker filed an Amended Consolidated Statement of Claim (Statement of Claim) which effectively withdrew or discontinued the claim for weekly benefits. On 24 April 2020 the Employer filed a Defence and Counterclaim to Amended Consolidated Statement of Claim (Defence). The extant pleadings shortly prior to hearing became, relevantly, paragraphs 12, 13 and 14 of the Statement of Claim and paragraphs 6 to 9 inclusive (including sub paragraphs) of the Defence. The focus

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[2] The Worker holds a Bachelor of Business Management and a Certificate IV in Training and Evaluation – Page 21 of the Book of Documents filed 15.6.2020.

[3] Pages 13 to 33 of the Book of Documents.

[4] Although no legislated provision was referred to by the letter, on any plain and fair reading it refers to an Employer's obligation arising under s 73 of the RTW Act. The letter annexed advice concerning mediation procedure.

of those pleadings was whether any real and justiciable dispute arose from the letter of 15 March 2019, such that the precondition to proceedings of mediation was truly available.

7. The April 2020 amendments to the pleadings were in the context of the proceeding having been fixed for hearing, ultimately, for 3 days from 1 June 2020. On 27 May 2020 the Worker made oral application that the hearing be vacated, which application was either by consent or not opposed by the Employer, albeit the Employer advised it was ready to proceed to hearing. The Employer also sought an order that the Worker file and serve a Notice of Discontinuance, however no such order was made at that time. In all, the Court considered the situation to be "*one where neither side wishes to proceed to have the merits determined for their own sake*".[5] Vacation of the hearing was followed by filing of various agreed documentation by the parties, and written submissions and replies, with an opportunity to speak to the issues on 4 September 2020.[6]

8. The Employer's position in written submissions included that the Worker had discontinued the proceeding. Although that step had not been formally taken at the time of decision, these reasons proceed on the basis that discontinuance has occurred.[7]

Issues

9. Until 3 April 2020 the essential issues in the proceeding were, firstly, in relation to any entitlement in the Worker to weekly benefits and, second, any liability in the Employer concerning reimbursement of future medical costs incurred.[8] The issue as to weekly benefits resolved on 3 April 2020 by the Worker withdrawing that claim, and on 27 May 2020 the hearing was vacated in the context referred to above.

10. The issues became whether the advice provided by the Employer's letter of 15 March 2019 created any true dispute, including by reference to s73 of the RTW Act, which was legally capable of proceeding to mediation, so ultimately the Work Health Court. The Worker contended a true dispute under s 73 followed by

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[5] *Parap Hotel Pty Ltd v NT Planning Authority* (1993) 112 FLR 336 at 341, referring to *JT Stratford & Son Ltd v Lindley (No 2)* [1969] 1 WLR 1547. In this case I consider the Worker should be treated as having discontinued, despite that no Notice had been filed at the time of decision (no doubt due to lack of agreement on costs).

[6] Following vacation of the hearing on 27 May 2020 the parties filed various documentation, namely Agreed Facts, an agreed Book of Documents comprising 122 folios, followed by comprehensive written submissions and replies, lastly on 19.6.2020. The Employer's submissions included a Chronology of signal events in the course of the proceedings.

[7] An alternative would have been to order the proceedings be dismissed in the circumstances. The Worker's written submissions did not cavil with the Employer's submissions that the costs issue be determined having regard to the process of discontinuance. Had the s 73 and costs issues been agreed, there is no doubt the proceeding would have been formally discontinued.

[8] Noting that the Employer's position was that there was no true issue in this regard, and that as formulated, no justiciable issue existed.

adequate compliance with the mediation precondition provided by the RTW Act. The Employer contended an absence of any real dispute, and that the advice of 15 March 2019 did not engage s 73, it being an indemnity provision, so there was no justiciable issue before the Court. An inevitable issue of legal costs was partially consequent on the outcome of the s 73 issue.

Discussion and findings

11. It is convenient to first deal with the issue concerning the Employer's advice of 15 March 2019 and s 73 of the RTW Act (the s 73 issue). Section 73 of the RTW Act is clearly an indemnity provision.[9] The compensation or benefit provided by s 73 cannot be accessed or received unless and until a worker has actually incurred expenditure on any medical, surgical or rehabilitative treatment. Operation of s 73 relies on reimbursement once an insurer is satisfied that the cost was both "*as a result of* [the] *injury*" and "*reasonably incurred*". Despite that the operation of s 73 is conditioned on particular factors, it nonetheless legislates a liability (so obligation) in an employer in circumstances where that employer has accepted or been found liable under the RTW Act for an "*injury*".

12. Section 103B of the RTW Act, contained in Division 1 of Part 6A and headed "Mediation", provides;

> ***Disputes***
>
> *For the purposes of this Division, a dispute arises where a claimant is aggrieved by the decision of an employer:*
>
> *(a) to dispute liability for compensation claimed by the claimant;*
>
> *(b) to cancel or reduce compensation being paid to the claimant; or*
>
> *(c)* ***relating to a matter or question incidental to or arising out of the claimant's claim for compensation****.* (**emphasis** added)

13. The objects of the RTW Act include to provide for the rehabilitation of workers, with the concept of "*rehabilitation*" including to "*maximise the worker's ability to live independently*".[10] In addition, s 3 of the RTW Act defines "*compensation*" to mean "*a benefit, or an amount paid or payable under this Act as the result of an injury to a worker* …" with "*benefit*" being defined to include "*an advantage of any kind*". The concept of "*compensation*" includes the weekly benefits which were at issue on the commencement of proceeding 21910547, and also encompasses any 'advantage' available to an injured worker through provisions of the RTW Act, including the medical and rehabilitation costs contemplated by s 73.

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[9] *BAE Systems Australia Ltd v Rothwell* [2013] NTCA 3 at [12].

[10] Sections 2 and 3 of the RTW Act.

14. The Worker's position on the letter of 15 March 2019 was pled by paragraphs 12, 13 and 14 of the Statement of Claim. The Employer's position, including articulated through paragraphs 6.1, 6.3, 7.1(a) and (b) of the Defence, was that the letter did not affect the Worker's rights under s 73 of the RTW Act. I consider the Employer's Defence sought to rely on a sophisticated and nuanced position and construction which was unavailable. A plain and simple reading of the letter is open and required. I do not understand any of the propositions laid down by *BAE Systems Australia Ltd v Rothwell* [2013] NTCA 3 to support the Employer's crucial contentions.[11]

15. A substantive and significant difference exists between denying liability for the payment of an incurred medical cost on one or both of the bases prescribed by s 73 and, alternatively, denying any liability in legal principle.[12] The central proposition of the letter of 15 March 2019 denying liability was not qualified or conditioned on any 'medical entitlement' being either unrelated to the injury for which liability had been accepted in December 2015, or unreasonable. The letter was not directed to any particular claim for reimbursement made by the Worker, however it did engage directly with the Employer's fundamental obligation to receive and consider any 'medical costs' incurred by the Worker and decide whether those costs fell within or without the entitlement legislated by s 73.

16. In my view the letter of 15 March 2019 meant what it said. That is, the insurer made clear it *"…no longer accepts liability for any ongoing medical entitlements*…" The letter advised the Worker of a comprehensive and exhaustive decision which did not admit any possibility of consideration of reimbursement of future medical costs under s 73.

17. Up until that point the Employer had "*paid*" medical and rehabilitative costs incurred in relation to the injury. Given the nature of the injury, and remedial surgery undertaken, and diagnostic and prognostic statements made by medical providers and assessors prior to and following the s 69 notice of 23 November 2018, it was not hypothetical that the Worker could incur 'medical costs' at some time in the future.[13]

18. The letter of 15 March 2019 advised the Worker of a decision. In the circumstances, it may be open to conclude that either of ss 103B(a) or (b) had been activated by the letter. Regardless, s 103B(c) enables and empowers mediation in relation to any "*matter or question* ***incidental to or arising out of*** [a] *claim for compensation*" (**emphasis** added). That criterion is in also expanded by

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[11] In addition to the pleadings referred to, paragraphs [46] to [48] and [12] to [22] of the Employer's written submissions dated 12 June 2020 and 19 June 2020 respectively.

[12] At the time of the letter of 15 March 2019 the Employer did not have the advantage of any actual medical cost incurred before it, for decision on relevance to the injury or reasonableness. Nonetheless, the clear advice of the Employer was that it had decided to now deny liability for "***any*** *ongoing medical entitlements*" and "***no*** *further treatment will be covered*".

[13] Pages 6, 14, 18, 24, 55, 59, 60, 70 and 75 of agreed Book of Documents.

the preceding words "*relating to*", which is of similar legal effect to the phrase 'in relation to'. Paragraph (c) gives rise to a particularly broad field within which disputes may legitimately and lawfully be the subject of mediation under the RTW Act.

19. It is possible that the Worker's re-engagement in physiotherapy over March through to May 2020 was motivated in part by artifice, towards bolstering his legal position.[14] However, on the basis of the analysis at [14] to [16] above, I find that the mediation sought and conducted in March and April 2019 respectively was valid and satisfied the s 103J precondition to the issue being incorporated into the proceeding. It is therefore unnecessary to consider whether any of the other requests or attempts in relation to mediation were of legal effect. Similarly, I also consider that the past medical costs through Medicare do not require consideration in the context of the true issues in dispute.[15]

20. Associated with the question of the validity of the mediation is whether the Court then had jurisdiction to hear and determine the 'section 73' issue. The Employer maintained that, as s 73 is an indemnity provision, the issue was not justiciable and the Court had no jurisdiction. A simple answer to that position is that once it is concluded that any decision is properly amendable to mediation under s 103B and that process has been complied with, the issue arising must be properly within the jurisdiction of the Court.

21. Assuming that analysis to be simplistic, so potentially incorrect, the starting point for the Court's jurisdiction is s 14 of the *Work Health Administration Act 2011*. Section 14(a) empowers the Court to hear and determine "*claims for compensation*" under Part 5 of the RTW Act, and "*all other matters required or permitted by* [The RTW Act] *to be referred to the Court for determination*".[16] Section 14(c) then broadens the jurisdiction empowering the Court "*to determine all matters and questions incidental to, or arising out of, matters before the Court*". Other than to note it is implicit that "*matters*" second occurring must be solely confined to any matter *properly* before the Court, paragraph (c) clearly expands the Court's jurisdiction. Section 15 of the *Work Health Administration Act 2011* then provides the Court with all of the powers of the Local Court exercising civil jurisdiction.[17]

22. Section 104 of the RTW Act, which is conditioned on "*subject to this Act*" enables any worker to commence proceedings "*for the **recovery** of compensation under Part 5 **or for an order or ruling in respect of a matter or question incidental***

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[14] This possibility exists, regardless of the irrefutable conclusion that the Worker continued to suffer some ongoing symptomology of the injury, such as above.

[15] Employer's submissions at paragraphs [59] to [67] and paragraph [36] of the Worker's submissions.

[16] Part 5 includes s73.

[17] It is also be noted that, where enabled by express provisions, the Work Health Court may also exercise implied jurisdiction; *Grassby v The Queen* (1989) 168 CLR 1 at 16, applied in *Consolidated Press Holdings Limited v Wheeler* (1992) 109 FLR 241 at 247.

to or arising out of a claim for compensation under that Part" (**emphasis** added). Due to the ordinary meaning of "*recovery*", the Employer's position in relation to the s 73 issue is likely well-founded on the first limb of s 104. However, in the circumstances I consider the Court clearly had jurisdiction to hear and determine the question of whether the Employer could properly or lawfully deny any ongoing liability under s 73 from 15 March 2019 onwards.

23. I find that commencement of proceeding 21915080 in relation to the s 73 issue on 15 April 2019, with consolidation of that issue into proceeding 21910574 on 30 April 2019, placed a justiciable issue before the Court.

24. The last issue for determination is in relation to legal costs. The parties were in agreement that quantification of any costs order should begin at 100% of the Supreme Court scale. Working from that point, the Worker contended that, having regard to all issues and their manner of resolution, an order in his favour of "*80% of his costs of the totality of the proceedings*" was appropriate. Due to its success on the 'weekly benefits' issue and its position in relation to the 's 73 issue', the Employer sought that the Worker be ordered to pay its costs in the proceeding and proceeding 21915080 at 100% of the scale.

25. The parties applications for cost orders are under r23.03 of the *Work Health Court Rules 1999* (WHC Rules), with r23.02 making clear that Order 63 of the *Supreme Court Rules 1987* generally applies.[18] Considering the costs issue on the basis that the Worker discontinued the proceeding, it is WHC Rule 3.08 which may first apply.[19] Rule 3.08 is simpler in construction than r 63.11(6) of Order 63, however the net effect is largely the same, being that a party who discontinues or withdraws a proceeding is liable to pay the other parties costs.[20] However, the simple application of both r 3.08 and r 63.11 are subject to "*unless the Court otherwise orders*" and "*such other order as the Court makes*", respectively.

26. The discretion to make some 'other order' must not only be exercised judicially, but should at the least be based on "*some sound positive ground or good reason for departing from the ordinary course*".[21] The Employer's written submissions relied upon various superior court decisions on provisions analogous to r 63.11, particularly from the New South Wales Court of Appeal, starting with *Fordyce v Fordham* [2006] NSWCA 274. The authorities make clear that the party seeking an "*other order*" bears an onus to satisfy the court such an order is necessary and appropriate. In some cases that may be an order that each party bear their own

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[18] Application of r23.03 is firstly expressly subject to the RTW Act, WHC Rules and any other law in force. That includes having any appropriate regard to the operation and intent of s 110 of the RTW Act.

[19] WHC Rule r3.08 provides; "*A party who discontinues or withdraws must pay the costs of the other party incurred before service of the notice of discontinuance or withdrawal unless the Court orders otherwise*."

[20] Nuances arise where part of a proceeding has been withdrawn, but noting that in the area of costs it is generally "the event" which is a starting point. In this case it could be said that each party was partially successful or unsuccessful.

[21] The test which the Employer urged following *Australiawide Airlines Limited v Aspirion Pty Ltd* [2006] NSWCA 365 at [54], at least in relation to the 'weekly benefits' issue.

costs. Even less often, a discontinuing party might demonstrate an entitlement to a positive costs order in a proceeding.

27. The authorities relied on by the Employer posit a number of possible tests amounting to more than a "*sound positive ground*" or "*good reason*", noting that either of those tests would add little to the requirement to act judicially in determining any costs issue. A higher 'test' applied by the New South Wales authorities to satisfy the onus is that a discontinuing plaintiff should establish unreasonable conduct on the part of a defendant.[22] The notion of 'unreasonableness' on the part of a party seeking to resist an application for an "*other order*" is certainly a frequent feature of the NSWCA authorities.

28. Although given in consideration of quite different circumstances, I consider the decision of his Honour Justice Mildren in *Parap Hotel Pty Ltd & Ors v NT Planning Authority & Ors* is instructive.[23] Some "*other order*" was required in that matter, with Mildren J concluding that "…*the general rule should be that each party should bear their own costs, but that in an exceptional case the court might depart from the general rule if one party could show that it was plain beyond doubt that, without having to decide any facts in contention, it must inevitably have succeeded*". Further, "… *one such exception would arise in a case such as this … if one party or the other could show they would have been entitled to summary judgment on the undisputed facts known to the court at the time the court was asked to exercise its discretion*". The exceptions suggested by Associate Justice Luppino in *Greg Meyer Paving Pty Ltd v Can-Recycling (SA) Pty Ltd* [2020] NTSC 16 at [6] are all also apposite in the context of this proceeding.

29. On the basis of the analysis at [14] to [16] above, in my view the Worker would have been entitled to summary judgment on the 's 73 issue'.[24] In addition, regardless of whether a test of 'unreasonableness' on the part of the party seeking to resist an "*other order*" or, alternatively, 'exceptional circumstances' is applied, I consider the Worker is entitled to a cost order from the date on which he formally withdrew the 'weekly benefits' claim. The 'section 73' issue had existed since 15 March 2019, and continued to subsist through until at least 20 May 2020 when the Employer advised; "*Our client recognises and accepts its obligation to reimburse Mr McClintock for medical 'costs reasonably incurred' that relate to the relevant injury, pursuant to section 73*…".[25] That was 7 days prior to vacation of the hearing, and in the context of the Employer having precipitated the 's 73 issue', and not acting reasonably in defence of that issue, and ultimately conceding its ongoing obligation under s 73. I am quite satisfied that the Worker is entitled to an "*other order*" on that issue.

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[22] *Ralph Lauren 57 Pty Limited v Byron Shire Council* [2014] NSWCA 107 at [22] to [27]

[23] (1993) 112 FLR 336 at pp 340 to 341, where the subject matter of the litigation had ceased to exist through the actions of a third party.

[24] As to that proposition, see the cited authorities and discussion in *Campion v NTA* [2021] NTLC 011.

[25] Page 99 of the agreed Book of Documents.

30. For the period 15 March 2019 through to 30 April 2020 the two primary issues of liability were 'weekly benefits' and the 's 73 issue'. On one view, due to the manner in which the issues resolved it was open to order that each party bear their own costs for that period. However, I accept that the predominant issue was as to weekly benefits. The Employer's position on denial of ongoing liability under s 73 for medical expenses was fundamentally flawed (which was the Worker's position), and the issue was generally one of law not fact. I consider the significant majority of professional skill and attention of the parties was directed to the issue of weekly benefits. The Employer should have its costs on that issue, but reduced from 100% of the Supreme Court scale in recognition of the existence of the collateral s 73 issue.

31. Once the 'weekly benefits' issue fell away, the parties' entire focus in negotiation and preparation became the 's 73 issue'. For the reasons set out, the Worker is entitled to a cost order in respect of that issue, at 100% of the scale.

32. On 21 April 2022 the Court gave brief oral reasons and made the following orders.

Orders

For the reasons set out above, the Court makes the following orders;

(i) The Worker is to pay the Employer's costs of and incidental to proceeding 21910574 for the period 11 March 2019 to 3 April 2020, to be agreed or taxed at 80% of the Supreme Court scale.

(ii) The Employer is to pay the Worker's costs of and incidental to proceeding 21910574 from 4 April 2020, to be agreed or taxed at 100% of the Supreme Court scale.

(iii) The Worker is directed to file and serve a Notice of Discontinuance within 7 days.

(iv) Orders 1. and 2. include 'certified fit for counsel'.

Dated this 3rd Day of March 2022

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Judge Greg Macdonald
Work Health Court