CITATION: *Ruthven v Woolworths* [2011] NTMC 014

PARTIES:	LISA ANNE RUTHVEN
	V
	WOOLWORTHS LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	20929785
DELIVERED ON:	9 May 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	14 March 2011
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

WORK HEALTH -- VALIDITY OF CLAIM -- SCOPE OF MEDIATION

Workers Rehabilitation and Compensation Act, ss 82, 103J

Prime v Colliers International (NT) Pty Ltd [2006] NTSC

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355

Johnston v ArtBack NT [2010] NTMC 071

REPRESENTATION:

Counsel:

Worker:	Mr Johnson
Employer:	Mr Roper

Solicitors:

Worker:	Withnalls Lawyers
Employer:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	[2011] NTMC 014
Number of paragraphs:	32

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

No. 20929785

BETWEEN:

LISA ANNE RUTHVEN
Worker

AND:

WOOLWORTHS LTD
Employer

REASONS FOR JUDGMENT

(Delivered 9th May 2011)

Ms Sue Oliver SM:

1. The Employer has made an interlocutory application for an order that the Worker's proceedings filed 3 September 2009 be struck out in whole or in part or that they be struck out in so far that the proceedings extend beyond a claim pursuant to Section 73 of the *Workers Rehabilitation and Compensation Act* (the Act).

The Proceedings

2. On 2 September 2009 the Worker made application to the Work Health Court for compensation. By her statement of claim she seeks benefits pursuant to Section 65 of the Act from January 2009 to date and continuing, reimbursement of Section 73 and Section 78 expenses arising from surgery undertaken on 10 June 2009 and ongoing entitlements pursuant to the Act.

3. In its interlocutory application the Employer says that there is no proper application before the court because the Worker failed to provide a claim form for the compensation which is sought to the Employer in the manner prescribed by Section 82 of the Act. Alternatively, the Employer say that in so far as there was a valid claim and a dispute that went to mediation that

dispute was only with respect to a claim under Section 73 of the Act and not with respect to the other claims and on that basis the Court lacks the jurisdiction to deal with a claim other than that under Section 73.

4. The parties agree that on or about 8 November 2007 the Worker made a claim (#159672) pursuant to Section 80 of the Act. The Employer accepted liability for the injury as disclosed in that claim. According to the Worker's application to the Work Health Court, she resumed employment but in January 2009 resigned in anticipation of her ongoing injury resolving by rest.

5. On or about 30 April 2009 the Worker provided a medical certificate dated 29 April 2009 to the Employer. Counsel for the Worker said that it was not clear whether at the same time she provided an undated letter to the Employer in which she set out the circumstances of her original injury and what she said was her current medical condition. However, in its amended defence, the Employer states that an undated letter **was** provided to the Employer together with the medical certificate. It is not clear whether the Employer received both the medical certificate dated 29 April 2009 ("the 28 Day certificate") together with an undated medical certificate from the same doctor which states that the worker had seen a specialist who advised surgery ("the surgery advice certificate"). Each of these documents did form part of the schedule of documents for the purpose of the mediation.

Did the failure by the Worker to provide the Employer with a fresh claim form result in an invalid claim?

6. Section 82 of the Act requires that a claim for compensation shall be in the approved form, accompanied by a certificate in a form approved by the Work Health Authority from a medical practitioner or other prescribed person and, subject to section 84(3), be given to or served on the Employer.

7. In *Prime v Colliers International (NT) Pty Ltd* (2006) 204 FLR 220 Mildren J held that as the lodging of a claim form was the triggering mechanism which brought to life the chain of events that would result in a claim being either accepted or rejected and if rejected mediated and if mediation was unsuccessful, litigated, strict compliance with section 82 was required. In *Prime* the Worker had lodged the claim form with the Employer but not the medical certificate that is required by section 82. His Honour allowed the appeal finding that the court should not have dismissed the claim altogether based solely on the failure to give a medical certificate and remitted the matter to the Work Health Court for reconsideration both of the exercise of the discretion in respect of the claim for weekly compensation and as to whether reasonable cause under section 182 existed. His Honour observed at page 227 that the outcome of an application to strike at the initiating process or to move for summary dismissal may depend on whether the employer has waived non-compliance or is otherwise estopped by its conduct.

8. In *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 the High Court considered the question of whether an act done in breach of a statutory provision was invalid. Although the act in question was a breach of a condition regulating the exercise of a statutory power, the majority appear to have considered the question of breaches of statutory conditions or requirements in general terms. The majority said

> "In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They

> are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute". (at [93])

9. A copy of an authorised claim form was tendered. The content of the form is relatively simple. It provides only for the most basic detail of the compensation claim to be given. The Worker is required to complete short sections that identify them (“About you”), their occupation (“About your job”), where the injury is said to have occurred (“About your claim”) details of what caused the injury (“About the incident”) a very brief description of the injury or disease (“About your injury/disease”), whether the injury or disease might have arisen in prior employment (“Previous Employers”), persons who were present at the time of injury (“Witnesses”). Finally, a section provides for “Other information” that requires answers to questions about whether the Worker reported the injury, stopped work, started back at work and whether the Worker had medical treatment or was admitted to hospital. The nature of the claim is also dealt with briefly in this section of the form with description of the nature of the claim being limited to ticking two boxes “Time off work” and/or “Medical expenses, surgical, rehabilitation, hospital expenses”.

10. The remainder of the form provides for the Employers report on the incident and is focused on questions relating to insurance, the Worker's remuneration and whether the incident was a reportable accident to NT WorkSafe.

11. As Mildren J noted in *Prime,* the requirements of section 82 establish the starting point for a chain of events for compensation that might ultimately, though not necessarily, require determination by the Work Health Court. A claim might be resolved along that way, by acceptance of liability and payment of benefits or following initial denial of liability, resolution at mediation. Clearly there has to be some triggering mechanism for the parties to establish the respective claim and response. Section 82 provides the format or mechanism for a claim to be commenced.

12. In my view, the contents of the authorised form make it clear that what is required for a valid claim is for the Employer to be provided with basic information about the Worker, the incident which has lead to the injury and whether the nature of the claim is for time off work and/or associated medical treatment. The purpose for requiring the claim to be in a particular format is to ensure that the Employer is provided with sufficient, *albeit* basic, information in order to confirm the occurrence of an incident that may give rise to liability and consider whether liability for the alleged incident will be admitted, refused or deferred for consideration. The medical certificate is required to provide independent evidence of the inability to work if that is part of the claim.

13. What is submitted by the Employer is that the Worker should have completed a fresh claim form when she raised the question of her impending surgery and that as she had failed to do so her application should be struck out. The original claim form (#159672) was one of the scheduled documents to the mediation. It is slightly different from the current authorised form. The current form provides for some additional information (which is not relevant to this application) but relevantly the previous form did not include the question "What are you claiming for?" with the 2 available selections for answer "Time off work (other than the day of injury)" and "Medical expenses, surgical, rehabilitation, hospital expenses"

that are now provided. The other addition to this section has been to alert the Worker to the requirement of s82 that a medical certificate is required if the claim is for time off work.

14. It is necessary to consider the purpose for the requirement in section 82 for a claim to be made on an approved form rather than by some other means. The content of the form is such that it provides the basic information that an Employer requires in order to consider the question of liability. That in my view is why section 82(3) provides that "a defect, omission or irregularity in a claim or certificate shall not affect the validity of the claim unless the defect, omission or irregularity **relates to information which is not within the knowledge of or otherwise ascertainable** by, the employer or his or her insurer." The aim is to provide employers with standard, though brief information from which an employer may accept liability or be in a position to investigate the claim prior to accepting or denying liability.

15. In this matter, the Worker has omitted to provide a fresh "approved form" by which her claim was sought to be made.

16. The Worker's Statement of Claim alleges that her present medical condition is attributable to the original incident. No intervening incident or accident is said to have occurred that has caused an aggravation to the injury that she suffered at that time and for which liability was accepted by the Employer. Consequently, if she had obtained and completed a fresh claim form it is readily apparent that very little of the information originally provided would alter. She may have altered her description of the type of injury from "mussel spazim" (sic) and "Lt sided muscular LB spasm" as it appears in the original claim form to a description in keeping with the contents of the medical certificate/s provided to the Employer and she may have ticked the boxes that are now provided that would describe the nature of the claim.

17. In other words, completion of a fresh claim form would not have provided to the Employer any further information than the Employer already possessed when she contacted the Employer advising of her forthcoming surgery. She provided a medical certificate or medical certificates to the Employer on or

about 30 April 2009 and the undated letter. The Employer responded to the receipt of these documents by a letter dated 12 May 2009 in these terms

> "I refer to your previous Work Health Claim number 159672 relating to low back strain sustained on 22 October 2007."

The letter then goes on to state that there was acceptance of liability for that claim and that the Worker returned to work and then resigned in September 2008. Receipt of the medical certificate of Dr Khan is acknowledged and the writer says "I assume you allege that the current certificate somehow relates to the injury of October 2007." She then goes on to state that

> "That claim was resolved 14 months ago. In the circumstances **I advise that Woolworths does not consider it has any liability to you in relation to the payment of benefits or medical expenses.** Accordingly I advise that Woolworths will not be making any such payments to you." (emphasis added)

18. Although in *Prime* Mildren J spoke of the need for "strict compliance" with section 82 in my view His Honour had in mind the need to strictly comply in terms of the purpose of the provision. A claim cannot, as His Honour observed, be commenced by simply writing a letter to the Employer. The purpose of the claim form is to provide the foundational information for a claim. There is good reason for a requirement for provision of a standardised set of information that can be provided by the use of an authorised form.

19. This however, is not a case in which the information provided to the employer seeks to initiate a claim for compensation. The purpose of section 82 has in my view been achieved by the Worker providing information in the form of the medical certificate/s and letter to the Employer. It is clear from the correspondence referred to above that the Employer knew both what incident the claim related to and the nature of the claim. Consequently, the Employer would not have been placed in any better position in considering its further liability by the mere act of the Worker completing a fresh form. It had the relevant details of the incident together with the fresh

medical advice. In my view compliance with section 82 has been achieved and a proper and valid claim in terms of that section has been made.

20. In the event that I am wrong in that determination, I note that in *Prime,* His Honour found that even if a claim for compensation was invalidly made, it did not carry with it a finding that subsequent proceedings in the Work Health Court were a nullity. His Honour's view was that the provisions of s82(2) of the Act were merely procedural bars to a claim for compensation which bar the remedy but not the claim itself. As noted earlier, it's the question of estoppel by conduct may arise with respect to applications to strike out proceedings. In this matter the worker made her application to the Work Health Court on 3 September 2009. The application to strike out was not made until 3 March 2011, which is shortly before the matter was listed for a 5 day hearing commencing 21 March 2011. From my view, if my conclusion as to validity of the claim is incorrect, the employer should be estopped from denying its validity. The Employer participated in mediation and raised no objection to the proceedings for some 18 months. No demonstrable prejudice to the Employer can be seen in allowing the matter to proceed absent the strict compliance with section 82 in this case.

What was the ambit and scope of the mediated dispute?

21. The further argument is that the Court lacks jurisdiction to hear the application for compensation because there has been a failure to mediate all of the matters that form part of the Worker's application to the Court.

22. Section 103J provides that a claimant is not entitled to commence proceedings in the Work Health Court in respect of a dispute unless there has been an attempt to resolve the dispute by mediation and that attempt has been unsuccessful. A dispute is defined in section 103B as arising 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.

At the conclusion of a mediation, the mediator must issue to each of the parties a certificate in the approved form. The Certificate is required to state that the mediation has taken place, list the written information provided to the mediator by the parties during the mediation, set out the recommendations (if any) of the mediator and state the outcome of the mediation.

23. In *Johnston v ArtBack NT* [2010] the Work Health Court held that the remedy sought by the Worker was barred because there had been a failure to attempt to resolve the dispute the subject of the application to the Court. His Honour, Dr Lowndes, found that a dispute within the meaning of section 103J could only arise if a claim was made pursuant to section 82 of the Act and pursuant to section 85 the employer notifies the claimant that it is disputing liability for the compensation claimed. In that matter His Honour found that there had not been an attempt to resolve a dispute concerning the cancellation of payments by a mediation under Part 6A of the Act because the only dispute attempted to be resolved at mediation related to reinstatement of benefits and therefore the worker was barred from pursuing a remedy for cancellation of benefits as there was a failure to comply with s103J(1).

24. The Employer says that in this matter the Worker is barred from bringing her application to the Work Health Court because the only matter mediated was a section 73 dispute whereas the application to the Work Health Court is for benefits pursuant to section 65, reimbursement of both section 73 and section 78 expenses and for ongoing entitlements under the Act.

25. Although mediation proceedings are themselves privileged, the Certificate of Mediation is admissible. The Certificate of Mediation includes scheduled documents. The Certificate of Mediation and the scheduled documents i.e. the written information provided to the mediator were tendered in these proceedings. The Certificate on its face describes the nature of the dispute as being “Section 73 – Medical, surgical, rehabilitation”. In my view the entry included on the Certificate by the mediator is some evidence of the

nature of the dispute but is not conclusive. There is nothing in the Act that provides that the description of the dispute on the face of the certificate is to be taken as conclusive of the nature of the mediated dispute or even as *prima facie* evidence of the nature of the dispute. In this case, neither party attended the mediation, and although it is difficult to see how a matter might be considered to have been mediated (within the ordinary meaning of that expression) in the absence of either party, clearly there is nothing in the Act that requires attendance of the parties. It appears sufficient for the mediation, as a pre-condition to an application to the Court, for a mediation to be held on the documentary material supplied by the parties or indeed one of them.

26. According to the Certificate, the Employer provided to the mediator the Claim Form #159672, the medical certificates from November and December 2007 and February 2008, a Vocational Rehabilitation Plan and a Work Visit Outcome Record also related to the injury in 2007. The Worker provided an undated letter from herself to Woolworths ("the 1st letter"), the reply from Cathie White of Woolworths that I have referred to in paragraph 17 of these reasons, the 1st Medical Certificate of Dr Salahuddin Khan dated 29/4/09, a further undated letter from the Worker ("the hand written letter") and the undated Medical Certificate from Dr Khan.

27. The first undated letter to Woolworths is the letter which the Employer in its Defence stated was received by the Employer together with a medical certificate. In the final paragraph the Worker says

> "My back problems began when I was working for Woolworths, and I feel they should contribute to my Medical expenses, and for the pain and suffering I have had to endure over the past 18 months. I only hope that this operation is a success and I can return to work."

It seems clear to me that this passage states three things. First, that she has an injury arising out of her employment with Woolworths, secondly, that she has not been able to continue to work because of that injury and finally, that she seeks a "contribution" to her medical expenses in relation to the pending surgery that she has referred to earlier in the letter.

28. The reply from "C White, Claims Administrator" (the letter referred to in the schedule as "Reply from Cathie White, Woolworths") shows that it was understood it in those terms. Ms White said "In the circumstances I advise that Woolworths does not consider that it has any liability to you in relation to **the payment of benefits or medical expenses.**" (emphasis added). Her letter as a whole is clear that the Employer totally denies liability for any form of compensation under the Act.

29. In her handwritten letter to the mediator, the Worker says "I am not happy with the desision Wollworths (sic) has made and I would like mediation." The decision made by Woolworths on the claim as expressed to her was that it refused liability for "benefits or medical expenses".

30. In my view these documents make clear that the nature of the dispute was wider than a refusal to pay costs under section 73. It extended to a refusal to accept liability for any benefits payable under the Act. Both parties understood that to be the case.

31. Consequently, in my view the matters the subject of the application to the Court have been mediated in accordance with section 103J and were not resolved.

32. I find that the proceedings are not barred and will hear the parties as to costs.

Dated this day of 2011

_____

STIPENDIARY MAGISTRATE