CITATION:	*Stevens v Serco Australia Pty Ltd NTMC 027*
PARTIES:	NOELENE STEVENS
	V
	SERCO AUSTRALIA PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	21451969
DELIVERED ON:	7 December 2015
DELIVERED AT:	Darwin
HEARING DATE(s):	27 August 2015
JUDGMENT OF:	JMR Neill

CATCHWORDS:

WORK HEALTH – ROLE AND APPLICATION OF SUBSECTION 109(1) INTEREST AND 109(3) INTEREST; COSTS ON THE INDEMNITY BASIS

Return to Work Act – subsections 85(1), (4) and (7); subsections 109(1) and (3); subsections 182(3) and (5)
Work Health Court Rules 23.01, 23.02, 23.03 and 23.04
Workers Rehabilitation and Compensation Regulations regulation 14
Supreme Court Rules 63.03(1), 63.25, 63.26, 63.27 and 63.28(1)

Wormald International v Aherne (1994) 26 NTLR 152
Passmore Roofing v Plewright 118 NTR 28
MIM Exploration v Henry Allan Robertson [1998] NTSC 57
Pengilly v NT of A (No3) [2004] NTSC 1
Wormald International v Aherne [1995] NTSC 69
Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd [1986] 81 ALR 397
Botany Municipal Council v Secretary Department of Arts, Sport, Environment, Tourism and Territories (1992) 34 FCR412
J-Corp Pty Ltd v Australian Builders Labourers' Federation Union of Workers (WA Branch) (No 2) (1993) 46 IR 301
Cath Yuk Chew Lin v Catamon Pty Ltd and Frank Hung Chi Lam [1995] NTSC 61

REPRESENTATION:

Counsel:

Plaintiff:	Mr Crawley
Defendant:	Mr Christrup

Solicitors:

Plaintiff:	Maurice Blackburn Lawyers
Defendant:	Hunt & Hunt

Judgment category classification:	A
Judgment ID number:	027
Number of paragraphs:	80

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

No. 21451969

BETWEEN:

NOELENE STEVENS
Plaintiff

AND:

SERCO AUSTRALIA PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 7 December 2015)

John Neill SM:

The Background

1. The Worker Noelene Stevens ("Ms Stevens") was born on 6 October 1954 and is currently 61 years of age.

2. At all relevant times Ms Stevens was employed by the Employer Serco as Senior Operations Manager Detention Services at the Airport Lodge Immigration Detention Centre in Darwin. She lived with her brother Donald Stevens on a rural property at Howard Springs on the outskirts of Darwin.

3. On 23 April 2012 Ms Stevens was the victim of a most harrowing ordeal ("the event"). She was ambushed and attacked in her own home after working hours by Matthew Vanko, a fellow Serco employee ("Vanko"). There had been a history of tension in the workplace between Ms Stevens and Vanko. On the day of the event Vanko had unlawfully entered Ms Stevens's home and lain in wait for her. When she came home he held her at

gunpoint. He then over a 5 hour period terrorised her by detaining her in her own home, handcuffing her, tying her to her bed and threatening to kill her. She eventually escaped to a neighbour's house and called the police. It was only after police arrived that Ms Stevens learned that when Vanko first came to her house that day he had murdered her brother Donald and slaughtered their dogs before she had arrived home.

4. Ms Stevens developed an incapacitating post-traumatic stress disorder as a consequence of the event. She did not return to work in the employment or at all and left the Northern Territory within weeks of the event to live permanently in North Queensland. The Employer nevertheless continued to pay her wages until 31 August 2013, some 16 months after the event. The eventual cessation of payment of wages led Ms Stevens to seek legal advice and in May 2014 she made a claim under the then *Workers Rehabilitation and Compensation Act* ("the Act"), 2 years after the event. The Act has subsequently been amended in part and renamed the *Return to Work Act*, but nothing turns on that in this matter.

5. The Employer by its Work Health insurer CGU Workers Compensation initially deferred its response to the claim and subsequently disputed the claim. Ms Stevens commenced proceedings against the Employer in the Work Health Court and these continued until the Employer by its lawyers Hunt & Hunt advised by email on 9 February 2015 that it now accepted her claim.

6. The parties agreed to resolve the proceedings by filing a Memorandum of Agreement pursuant to section 108 of the Act as it then stood ("the agreement"). The agreement was to pay Ms Stevens all her claimed entitlements under the Act from the date of the event up to date and continuing. It was agreed she would be paid the automatic section 89 interest on arrears of weekly benefits. It was agreed the Employer would pay her legal costs.

7. The parties filed their Memorandum of Agreement with the Court on 11 August 2015. The time provisions in section 108 of the Act as it then stood required that at least 35 days should elapse before the Court might consider a Memorandum of Agreement. In this case a document signed by both parties abridging time was subsequently filed on 2 September 2015 and I came to consider the Memorandum of Agreement on 3 September 2015.

8. On 4 September 2015 pursuant to subsection 108(3)(b) of the Act as it then stood I approved the agreement by directing the registrar of the Work Health Court to register the Memorandum of Agreement, but at the request of the parties I reserved two outstanding questions.

The Outstanding Questions

9. The outstanding questions were – 1) whether the Employer should pay section 109(1) and 109(3) interest on any amount of compensation for any period; and 2) whether the Employer should pay Ms Stevens's legal costs on the indemnity basis or the solicitor/client basis rather than on the standard basis. On 2 July 2015 Ms Stevens by her lawyers had filed an interlocutory application seeking section 109 interest and costs other than on the standard basis. I eventually heard argument on these issues for a full day on 27 August 2015. Ms Stevens's counsel did not on that day pursue costs on the solicitor/client basis but continued to pursue them on the indemnity basis. I reserved my Decision until after I had dealt with the then outstanding Memorandum of Agreement.

Section 109 of the Act

10. Section 109 of the Act provides as follows:

"(1) If, in a proceeding before it, the Court is satisfied that the employer has caused unreasonable delay in accepting a claim for or in paying compensation, it must:

(a) where it awards an amount of compensation against the employer – order that interest on that amount at a rate specified by it be paid by the employer to the person to whom compensation is awarded; and

(b) If, in its opinion, the employer would otherwise be entitled to have costs awarded to him or her – order that costs be not awarded to him or her.

(2) Where a weekly or other payment due under this Act to a person by an employer has not been made in a regular manner or in accordance with the normal manner of payment, the Court must, on an application in the prescribed form made to it by the person, order that interest at a rate specified by it be paid by the employer to the person in respect of the amount and period for which the weekly or other payment was or is delayed.

(3) Where the Court orders that interest be paid under subsection (1) or (2) , it may, in addition, order that punitive damages of an amount not exceeding 100% of such interest be paid by the employer to the person to whom compensation is awarded or to whom the weekly or other payment due under this Act is payable."

11. Subsection 109(1)(a) empowers the Court to order an employer to pay interest on compensation only where it awards an amount of compensation against the Employer. In this case the Court did not award an amount of compensation against the Employer until 4 September 2015 when I directed the registrar of the Court to record the Memorandum of Agreement, subject to the outstanding questions. That Memorandum of Agreement was formally recorded on 7 September 2015. Accordingly, since then I have been able to consider whether I am "satisfied the employer has caused unreasonable delay in accepting a claim for or paying compensation" in all the circumstances of this matter. If I am so satisfied then I "must" order that interest "on that amount" be paid by the Employer at a rate to be determined and specified by me.

12. The amount in question is "the amount of compensation against the employer" awarded by the Court. "Compensation" is defined in section 3 of the Act to mean "*a benefit, or an amount paid or payable, under this Act as a result of an injury to a worker…*". I am satisfied and I rule that the breadth of this definition necessarily includes the section 89 interest sum of $9,681.54 in numbered paragraph 3. of the Notice Of Direction To Record Agreement dated 7 September 2015 which notes my direction made on 4 September 2015. I rule that this sum plus the sum of $132,484.34 for past weekly compensation benefits in numbered paragraph 2. of that document together constitute the amount for the purpose of any award of section 109 interest in this matter. That is a total amount of $142,165.88.

13. In *Wormald International v Aherne* (1994) 26 NTLR 152 at the top of page163 Mildren J said: "*Clearly s109 is a coercive power which is part of the court's armoury to ensure compliance, and prompt compliance, with the Act and orders made by the court under the Act".* Subsection 109(1) by its reference to "unreasonable delay in accepting a claim" makes it plain that the requirement of prompt compliance with the Act can include a responsibility to accept a claim before any orders are made by the Court.

14. In this matter the Employer disputed Ms Stevens's claim under the Act after initially deferring its response to that claim. This initial deferral and subsequent dispute involved a procedure specifically provided for by subsections 85(1)(b) and 85(4)(a) of the Act. Payments of weekly benefits must be made by an Employer to a Worker during the deferral period and these are made on a without prejudice basis – subsection 85(7)(a) of the Act.

15. As a consequence of the Employer's subsequently not accepting her claim, Ms Stevens bore the legal and evidentiary onus of proving it. Where an Employer "*…disputes liability, it is a matter for the Work Health Court to determine whether he is liable for compensation and there can be no requirement for him to pay compensation before such determination.*" – per

Gallop ACJ, Mildren and Bailey JJ in *Passmore Roofing v Plewright* 118 NTR at page 21.5. This was said in the context of payment of interest pursuant to section 89 of the Act as it stood in 1997. At that time section 89 interest only applied where a person liable to make a weekly payment of compensation failed to make it on or before the due date. However, no section 89 interest could be payable before the person (the Employer) was **liable** to make such a weekly payment, and that liability did not arise in the case of a disputed claim until the Court ruled on it.

16. Subsection 109(1) of the Act does not involve a consideration of when an Employer's liability first arises to make payments under the Act. Rather, it recognises a responsibility for an Employer to respond to a claim under the Act reasonably and promptly, and this responsibility is ongoing. This subsection potentially exposes an Employer to mandatory interest to be imposed on all past compensation, not just past weekly benefits, where it chooses not to accept a Worker's claim when it is first made.

17. By disputing a claim an Employer is obliging a Worker to go through the complex, personally stressful, lengthy and expensive processes of mediation and litigation involved if the Worker intends to pursue any disputed entitlement under the Act. Whilst an Employer is undoubtedly entitled to put a claimant Worker to his or her proof, the effect of subsection 109(1) is that it should do so advisedly. If the Employer does not accept the Worker's claim at the outset subsection 109(1) puts it on notice that that decision must have been reasonable at the time it was made. The Employer is on notice that maintaining the decision not to accept the claim must continue to be reasonable at all times thereafter. What is considered reasonable will involve an objective assessment by the Court on the balance of probabilities. If the Court does determine that the Employer has caused unreasonable delay in accepting the claim, then the Employer must be required to pay interest on the unpaid compensation – subsection 109(1)(a) - and the Employer may be required to pay an additional penalty – subsection 109(3).

18. Subsection 109(3) requires a consideration of different issues. A finding that an Employer has acted unreasonably by a delay in accepting a claim or in paying compensation will not necessarily lead to a further order for payment of subsection 109(3) interest. Something more may be required.

19. Mildren J went on in *Aherne* (above) to consider subsection 109(3). He said: " *However, in my opinion s109(3), which confers upon the court a power to award punitive damages where it orders interest to be paid, contemplates, by the use of the expression "punitive damages" the exercise of that power as a punishment to the employer*".

20. An Employer might merit such punishment if it has acted contumeliously – for example, in a high-handed, arrogant and/or dismissive manner toward a Worker without proper regard for his/her entitlements and/or the Employer's obligations. It might merit such punishment if it has acted contumaciously – for example, by a wilful disregard of an order of the Court to pay compensation.

The Relevant Evidence

i) Before the Event on 23 April 2012

21. At the time of the event Ms Stevens was 58 years old and Vanko was 35 years old, 23 years younger. There was never any question of any connection or relationship between them other than their both being employed by the Employer. The Employer was aware of tension between Ms Stevens and Vanko arising out of work issues. Ms Stevens was in a position of authority over Vanko in the workplace. This tension initially arose out of Vanko's being promoted by Ms Stevens to act as an operations manager on a temporary basis. When he was required to return to his original position he questioned that return. He appeared to Ms Stevens to be angry generally and angry with her specifically, about this. Ms Stevens on one occasion said to Vanko "*If I knew you were going to act like this I wish I had never put you*

up in that role". She said she realised from Vanko's reaction that she shouldn't have said this. Vanko did not come to work the next day and remained away from work for "*the next couple of days*". Ms Stevens told her superior Maxine Haughian about Vanko's reaction. Ms Stevens believes she made a written report about this incident and that the report is still on the Employer's files. Ms Stevens did not herself have a copy of that report. It was not tendered before the Court but neither did the Employer challenge this evidence of such a report at the interlocutory hearing. All this foregoing history appears in paragraphs 19 to 23 of Ms Stevens's statutory declaration made to police on 26 April 2012, and in the remarks of Riley CJ when he sentenced Vanko for murder and other offences on 20 March 2014.

22. Thereafter there were six emails from Vanko to Ms Stevens between 18 and 27 August 2011, which led her in an email dated 31 August 2011 to complain to a work superior Lisa Oram in these terms: "*I am forwarding you this email trail because I wanted to flag with you that Matthew Vanko is making me feel very uncomfortable with these constantly harassing and demanding messages and the rather nasty way he has expressed them. It appears to me that he is trying to provoke a reaction from me, although I have no idea what his agenda is. I feel that he is focusing a lot of attention towards me in this way and to be honest it worries me because I don't really know how far he is prepared to take this and I feel slightly afraid as I believe each email appears to get angrier. Maxine is aware of all the emails and we have a meeting scheduled with him which I hope may resolve this, but I feel compelled to let you know that I may need to take this further in future".*

23. That foreshadowed meeting and one other subsequently took place between Vanko, Maxine Haughian and Ms Stevens. Ms Stevens in paragraph 27 of her statutory declaration made 26 April 2012 said that no concrete issues were raised by Vanko at these meetings, that "*it was all just nonsense*", and that Vanko made the meetings "*about me*" – that is, about Ms Stevens.

ii) Immediately Following the Event

24. Ms Stevens was taken by police to the Royal Darwin Hospital for medical treatment after the event. She has deposed in paragraph 10 of her affidavit sworn 25 June 2015 to having suffered her mental injury as a result of the event. She informed the Employer of the event the following day, 24 April 2012. She did this through the police who apparently spoke with her superior Ms Maxine Haughian the Centre Manager for Serco on that date – see the Work Health claim form 208411.

25. Ms Stevens has deposed in paragraph 11 of her affidavit of 25 June 2015 that: "*Initially my Employer treated me compassionately, stating they would look after me. I continued to receive my normal wages, even after exhausting my accrued leave entitlements. Accordingly, I did not make a formal claim for workers' compensation".* This history is set out in more detail on pages 3.9 to 4.3 of a letter dated 26 August 2014 from Ms Stevens's lawyers Priestleys to the Employer's lawyers Hunt & Hunt which is annexure CJE2 to the affidavit of Cassandra Jane Ellis made 29 July 2015 and which was before the Court without objection on 27 August 2015. There was no contrary evidence led before me.

26. In that letter we are told that Ms Stevens herself rang Maxine Haughian for the Employer on 25 April and again on 27 April 2012, personally notifying her of what had happened in the event and informing her that she, Ms Stevens, as a consequence was not able to resume her duties. Ms Stevens at that time felt emotionally incapable of returning to her home with the result that she did not have access to her bank cards, cash or clothing. Mr John Hayes a senior Serco manager lent her $1,000 to tide her over. Both Maxine Haughian and John Hayes as well as other Serco staff attended the funeral of Ms Stevens's brother Donald on 3 May 2012. The Employer recognised the significance of the event by providing bus transport for staff to the funeral and making shift changes to accommodate staff who wished to attend the

funeral. Ms Stevens met with Maxine Haughian shortly before the funeral at Northlakes Shopping Centre for coffee and to update her on her personal progress, as well as on the funeral arrangements.

27. Ms Stevens attended a meeting on 27 May 2012 with the Employer's representatives Maxine Haughian, John Hayes and possibly someone named Layne from the Employer's Human Resources Department. Ms Stevens was supported at that meeting by her son Joel Stevens. John Hayes told her that her job would be waiting for her no matter how long it took for her to recover, and that she would be on compassionate leave until then.

28. Ms Stevens left Darwin and relocated to Mackay in North Queensland the very next day, on 28 May 2012. It is probable that Ms Stevens's intended relocation from the Territory to Queensland was mentioned at the meeting the day before. She never returned to work with the Employer. She never returned to the Northern Territory and her evidence at the later criminal trial of Vanko was given by videolink. Additionally, Maxine Haughian was aware that Ms Stevens had left the Territory because of several text messages and phone calls between the two women after her departure.

iii) The Cessation of Paying Wages

29. The Employer stopped paying Ms Stevens wages or for compassionate leave as at 31 August 2013, 16 months and one week after the event. Ms Stevens received an email dated 15 October 2013 from Alana Fullarton who described herself as the Regional Human Resources Manager-North based in Darwin, for the Employer. Ms Fullarton started the email by stating: "***I am aware of the circumstance of your extended absence from Serco and trust that you are well and your recovery is progressing*** (emphasis added).

"Noelene, it has recently come to our attention that you have continued to be paid following the exhaustion of personal and annual leave entitlements on 31/8/12. Our records indicate that you have been overpaid

the gross amount of $98,799.96 for the period commencing 1/9/12 to 31/8/13. Our understanding was that you were to be on leave without pay after 31/8/12.

"I am conducting an internal investigation into how this error may have occurred and as part of this process I would like to invite you to clarify your understanding of your entitlement to receive a salary following the 31/8/12".

30. There was no evidence before me of any contact between the Employer and Ms Stevens after the meeting on 27 May 2012 and before Ms Fullarton's email of 15 October 2013, other than the text messages and phone calls between Ms Stevens and Maxine Haughian referred to above.

iv) The Claim and the Employer's Response

31. Ms Stevens made a claim under the Act which she signed on 28 April 2014 and which her lawyers served on the Employer on 13 May 2014. By email dated 13 May 2014 Ms Kye Brown of Serco wrote to Ms Stevens acknowledging that lawyer Mr Eric Hutton of Priestleys had personally served the claim that day. Ms Brown invited Ms Stevens to nominate whether she wished Serco's insurer CGU to deal directly with her or with her lawyer, notwithstanding the patent involvement of lawyers on Ms Stevens's behalf and notwithstanding her psychological vulnerability given the nature of the injury as set out in the claim and as known to the Employer from very shortly after the event.

32. The claim consisted of the claim form 208411 completed by Ms Stevens in which she claimed to have suffered an "emotional" injury, namely "post traumatic stress", caused by "*on arrival at home after work a co-worker M Vanko assaulted me with weapon deprived me of liberty and murdered my brother Donald Stevens and my two dogs*". The claim form continued that she had consequently stopped work on 24 April 2012 and that she had not as

at the date of the claim returned to work. It stated that notice of the injury had been given by police to Maxine Haughian for the Employer on 24 April 2012, the day after the injury. The claim form was accompanied by a medical certificate from a Dr David Smith of the Tully Medical Centre dated 1 May 2014 in which he diagnosed post traumatic stress disorder as a result of being "*assaulted and tormented by assailant a co-worker from sercox* (*sic*)", and in which he certified Ms Stevens totally incapacitated for any type of work from 23 April 2012 to 31 December 2014, a period of 20 months in all up to 8 months after the date of the certificate. The certificate stated that Ms Stevens had first been seen at this medical practice on 13 October 2013.

33. The Employer responded formally by letter dated 16 May 2014 from the Work Health insurer CGU Workers Compensation addressed to Ms Stevens at her Queensland address, not to her lawyers. It informed Ms Stevens that the Employer's response to her claim was being deferred pursuant to section 85(1)(b) of the Act, and that the Employer would make a further decision on her claim within 56 days. It explained that its reason for deferring the claim was to enable the Employer to "*…make further enquiries obtain additional information including a statement from yourself and an initial rehabilitation assessment".* It said that "*CGU will appoint a vocational rehabilitation provider to undertake an initial assessment. A representative will contact you in the very near future".*

34. There was no subsequent written communication from the Employer or CGU to Ms Stevens or to Priestleys over the next 45 days. Then by email dated 1 July 2014 Ms Peggy Cheong of Hunt & Hunt lawyers for the Employer wrote to Priestleys. Ms Cheong said that somebody from CGU had attempted to contact Ms Stevens to discuss her claim and seek further information. Ms Cheong said that the CGU representative had been advised to seek information through Ms Stevens's solicitor. We are not told how or when this contact was made. There was no suggestion that CGU had thereafter

attempted to make contact with Priestleys before Hunt & Hunt initiated their contact on 1 July 2014.

35. Ms Cheong said that she was now instructed to deal directly with Priestleys in respect of the claim. Ms Cheong raised the issue of Ms Stevens's delay in making her claim, she pointed out time limits under the Act, she sought information relevant to this delay and she sought a list of Ms Stevens's medical practitioners since April 2012. Ms Cheong's email relevantly said:

> *"In the circumstances, my client has authorised me to communicate with you in relation to the above matter. One of the reasons for which liability for the worker's claim has been deferred in in order for the Employer and Insurer to consider and assess the effect and potential prejudice to the their positions as a result of the delay in the worker's submission of her claim for an injury that occurred in April 2012. As you may be aware, there are time limits in the Workers Rehabilitation and Compensation Act (NT) which deals with the notice of injury as well as the making of a claim for any alleged work related injury.*
>
> *From the information and documents available thus far, there is no explanation for the lack of notice of a work related injury by the worker to the employer, nor is there an explanation for her delay in submitting her claim for compensation. Further, given the time that has passed since the alleged occurrence of the injury, my client will also need to consider and assess past medical evidence and history with respect to the worker's alleged injury.*
>
> *Therefore, I would be grateful if you could provide me with further information with respect to the worker's injury and claim as follows:*
>
> 1. *Please provide details of when the worker gave notice of her injury to the employer, to whom, when, where and the nature and detail of the notice and injury provided to the employer at that time?*
>
> 2. *Please provide details of why and circumstances that have given rise to the worker's delay in submitting her claim for compensation for an alleged injury that occurred in April 2012?*
>
> 3. *Please provide a list of all the doctors and/or medical practices/medical centres that the worker has attended for treatment and/or consultations since April 2012.*

I look forward to receiving the above further information and details so that I may advise my client further during the deferral period. If you have any queries or wish to discuss this matter further please feel free to contact me".

36. Notwithstanding Ms Cheong's initiating contact with Ms Stevens's lawyers on 1 July 2014, 8 days later CGU wrote directly to Ms Stevens by letter dated 9 July 2014. This relevantly stated: *"Unfortunately as we are not yet in receipt of all requested information and the maximum period for the deferral of a claim is about to expire we now dispute liability for your claim. However we undertake to reconsider our decision once the further information is received and to provide you with written advice stating whether the decision to dispute liability is maintained or that liability has been accepted".* The letter did not identify the information CGU said it had requested and not yet received.

37. This letter enclosed a Notice of Decision under the Act also dated 9 July 2014 which disputed Ms Stevens's claim. This Notice provided the following reasons for disputing the claim:

"1. *You did not suffer an injury arising out of or in the course of your employment with the employer.*

2. You did not submit your claim for compensation within 6 months of the occurrence of the said alleged injury, as required by the Act".

(v) From Dispute to Acceptance of Claim

38. Priestleys on behalf of Ms Stevens wrote to Hunt & Hunt by email dated 21 August 2014 attaching a copy of a report dated 4 July 2014 from psychologist Joanne Rick which diagnosed Ms Stevens as suffering post traumatic stress disorder, agoraphobia, persistent depressive disorder and persistent complex bereavement disorder, all of which she said were attributable to the event. The prognosis was poor in that not only had Ms

Stevens been totally unfit for work since the event, she was likely to continue unfit for at least a further 12 months.

39. On 29 August 2014 Priestleys wrote by email to Hunt & Hunt and provided the background to Ms Stevens's delay in making her claim. They provided the requested details of Ms Stevens's medical practitioners and health service providers. They attached copies of the following documents not already in the Employer's possession:

i) Ms Stevens's statutory declaration to police made 26 April 2012;

ii) Decision of Riley CJ in *R v Vanko* [2014] NTSC 3 delivered 15 January 2014;

iii) Ms Stevens's victim impact statement made 10 March 2014 and provided for sentencing in *Vanko;*

iv) Sentencing remarks of Riley CJ in *Vanko* delivered on 20 March 2014; and

v) Coroner's Decision delivered 10 June 2014.

40. Ms Stevens sought a formal mediation of the dispute of her claim on 15 September 2014. That mediation was held on 6 October 2014 when the Employer maintained its dispute of the claim. Ms Stevens commenced these proceedings, by Application filed on 10 November 2014. A Certificate of Mediation stating "No Change" eventually issued, dated 11 November 2014.

41. Ms Stevens was assessed on 19 September 2014 for rehabilitation purposes on behalf of the Employer by occupational therapist Sanja Zeman. Ms Zeman provided her report dated 2 October 2014 to Hunt & Hunt. That report concluded that Ms Stevens at that time 2.5 years after the event had "no work capacity on the open labour market" as a consequence of the event.

42. By email dated 3 October 2014 the Employer by Hunt & Hunt offered to resolve all Ms Stevens's claims under the Act, past and future, for the amount of $120,000 inclusive of costs and repayable statutory charges, to be evidenced by a *Hopkins* style Deed of Agreement. The offer was not accepted.

43. On 16 October 2014 the Employer made arrangements for Ms Stevens to be assessed by an independent psychiatrist. The assessment took place on 11 November 2014 and psychiatrist Dr Curtis Gray provided Hunt & Hunt with his report dated 27 November 2014. That report concluded that Ms Stevens suffered from post traumatic stress disorder and agoraphobia and she would probably never return to work. He identified the event as the cause of her condition.

44. By email dated 7 January 2015 the Employer by Hunt & Hunt increased its previous settlement offer from $120,000 to $200,000, otherwise on the same terms. The offer was not accepted.

45. By email dated 9 February 2015 Hunt & Hunt for the Employer wrote to Priestleys for Ms Stevens and advised the Employer now accepted her claim. On 2 March 2015 CGU wrote directly to Ms Stevens confirming that liability for her claim had now been accepted by the Employer and that weekly payments and medical expenses would now be met. A formal Memorandum of Agreement was entered into between the parties and filed on 11 August 2015, 6 months after the email of 9 February 2015. No explanation for the delay between 9 February 2015 and 11 August 2015 was provided to the Court as part of the materials and submissions for my consideration.

Analysis and Conclusions – Subsection 109(1)

46. On the basis of the foregoing evidence I am satisfied on the balance of probabilities and I find that the Employer by its servants and agents was

aware from at least Ms Stevens's email to Maxine Haughian on 31 August 2011 and continuing to the date of the event, of ongoing resentment and animosity on the part of Vanko towards Ms Stevens, of Ms Stephens's formally raised concerns arising from this, and that this situation was entirely work-related.

47. I find that the Employer by its servants and agents was given notice on 24 April 2012 of the event, and was further given notice by Ms Stevens over the next few days of the details of Vanko's actions constituting the event and of the impact on Ms Stevens of the event, namely an incapacitating psychological injury.

48. I am satisfied on the balance of probabilities and I find the Employer by its servants or agents was in possession of sufficient information on and shortly after 24 April 2012 such that it knew or ought to have known by the date of the meeting on 27 May 2012 that Ms Stevens had suffered an injury on 23 April 2012 arising out of or in the course of her employment with the Employer.

49. I am satisfied on the balance of probabilities and I find that the Employer by its servants or agents was in possession of sufficient information by the meeting on 27 May 2012 such that it knew or ought to have known that the injury was an incapacitating mental injury and that there were no exclusionary circumstances under the Act, in that the injury did not arise out of reasonable administrative or disciplinary action taken in respect of Ms Stevens or out of any failure by her to receive any promotion or benefit.

50. I am satisfied on the balance of probabilities and I find that Ms Stevens gave the Employer notice of the injury on 24 April 2012 which was as soon as practicable for the purpose of subsection 80(1) of the Act, and before she left the employment for the purpose of subsection 182(1) of the Act.

51. I find that the Employer by its servants or agents Maxine Haughian and John Hayes at the meeting on 27 May 2012 led Ms Stevens to believe that compensation in the form of paid compassionate leave would be paid to her "no matter how long it took for her to recover". I find it was in this context that the Employer made payments each week to Ms Stevens when she was not in fact carrying out any work for the Employer over the 16 months and one week from 24 April 2012 to 31 August 2013 and during much of which period she had ceased to be entitled to any form of accrued leave. I find that the Employer was aware that Ms Stevens left the Northern Territory on 28 May 2012 and thereafter was absent from the Territory. I find that these three circumstances jointly and severally constituted reasonable cause within the meanings of subsections 182(3) and/or (5) of the Act for Ms Stevens not to have made a claim under the Act within 6 months after the occurrence of the injury. I am satisfied on the balance of probabilities and I find that the Employer by its servants or agents was aware of these three circumstances from 27 May 2012.

52. I find in the circumstances that Ms Stevens did not become aware, and could not reasonably have become aware, at any time within 6 months after the occurrence of the injury of any need for her to make a claim under the Act in respect of the injury.

53. When the claim was eventually made on 12 May 2014 it included the factual claims and the medical information set out in paragraph 32 above. I find that this information was not significantly different from the information I have found was known to the Employer by its servants or agents by the date of the meeting two years earlier on 27 May 2012, other than the then actual and predicted duration of Ms Stevens's incapacity due to the injury as set out in the medical certificate provided as part of the claim.

54. In many cases when an Employer is served with a Work Health claim it will know little about the circumstances of the injury claimed or about the nature

of the injury itself. It may be entirely reasonable for such an Employer to make further enquiries and carry out investigations. That was not the position in this case.

55. The Employer by CGU deferred its response to the claim, citing two reasons for the deferral. These were to obtain additional but unspecified information including a statement from Ms Stevens, and to obtain "an initial rehabilitation assessment". CGU said that its representative would contact Ms Stevens "in the very near future". There is no evidence before me to suggest that the Employer made any efforts to organise a rehabilitation assessment at any time during the 56 day deferral period.

56. The email of 1 July 2014 from Ms Cheong of Hunt & Hunt for the Employer to Priestleys for Ms Stevens mentions contact with Ms Stevens by CGU at which time Ms Stevens referred all enquiries to Priestleys, but we don't know when this contact was made. Ms Cheong's email did not make any reference at all to any rehabilitation assessment. Rather, Ms Cheong sought three specific categories of information, and nothing else. Category 1. asked about the notice given by Ms Stevens of her work injury. Category 2. invited an explanation for her delay in making her Work Health claim. Category 3. sought details of all Ms Stevens's treating doctors and medical services since the injury in April 2012.

57. In considering the reasonableness of the Employer's initial delay in accepting the claim, namely a deferral to seek further information, I have taken into account both the CGU letter of 16 May 2014 and the email of 1 July 2014 from Ms Cheong as together identifying the further information sought.

58. There was no need for the Employer through CGU to defer its response to the claim pending a rehabilitation assessment. Rehabilitation information is certainly desirable in the management of an accepted claim however I see no

reason on the evidence and in the circumstances of this case why it was required as a condition precedent to accepting Ms Stevens's claim.

59. There was no need for the Employer at any time after the claim was served to defer its response to seek further information about categories 1. and 2. given the information and circumstances already known to the Employer which I have found in paragraphs 46 to 53 above.

60. As for category 3., further medical information might be sought by an Employer as a condition precedent to accepting a claim but this should be for some adequate reason. This may be where there is something known to or at least suspected by the Employer which raises some doubt about a claimed medical condition, such as its work-relatedness, other possible contributions to its cause, or even its very existence. On the evidence before me, there were no such circumstances in this case. The Employer was aware by 27 May 2012 at the latest of the incapacitating psychological nature of Ms Stevens's medical condition, of its work-relatedness, and that it was ongoing, and once the Work Health claim was served on it in May 2014 the Employer was aware of a consistent, formal diagnosis of that medical condition, and of a prognosis of total incapacity up to the end of 2014. There was no reason on the evidence for the Employer to require access to Ms Stevens's post-injury medical history as a condition precedent to accepting her claim.

61. On the evidence before me there was no "*bona fide issue as to the incapacity of the worker*" to justify disputing the claim as per Gray AJ in *MIM Exploration v Henry Allan Robertson* [1998] NTSC 57 delivered 30 July 1998. It was not the case that "*the liability or quantum of the payment was genuinely disputed* " as per Mildren J in *Pengilly v NT of A (No 3)* [2004] NTSC 1 at paragraph 10.

62. I am satisfied and I rule that the Employer has caused unreasonable delay in accepting Ms Stevens's claim served on 13 May 2014. I find that

unreasonable delay commenced on 16 May 2014 when CGU wrote to Ms Stevens deferring its response to her claim for the reasons I have identified. I am satisfied those reasons were clearly unsustainable in the circumstances of this case.

The Rate of Subsection 109(1) Interest

63. Section 109 interest is not imposed to compensate a worker for not having the use of compensation under the Act – that is the role of section 89 interest, at least in relation to weekly benefits. As Mildren J said in *Aherne* (above), the purpose of section 109 interest is coercive, to ensure prompt compliance with the Act. In a further *Aherne* Decision reported as *Wormald International (Aust) Pty Ltd v Aherne* [1995] NTSC 69 at paragraph 7, Mildren J applied an interest rate of 20% pursuant to subsection 109(2) of the Act. At that time, the section 89 interest rate was fixed by regulation 14 of the *Workers Rehabilitation and Compensation Regulations* at 20% and Mildren J adopted that rate as "appropriate". Although the section 89 interest rate is no longer fixed at 20% and is now in accordance with the lower rate determined under the *Supreme Court Act* and *Rules*, clearly the rate of 20% per annum can still be appropriate for subsection 109(1) interest given that the Court is empowered by subsection 109(1)(a) to specify the rate, without qualification. I am satisfied the rate of 20% is appropriate in the circumstances of this matter.

Analysis and Conclusions – Subsection 109(3)

64. I have found above that by the date of Ms Stevens's making her claim on 12 May 2014 the Employer already knew of the "reasonable cause" for her late claim including its own part in her delay in making that claim. I have found that by 27 May 2012, two years before she made her claim, the Employer already knew that Ms Stevens had suffered a mental injury arising out of or in the course of her employment with the Employer. Accordingly I am satisfied and I find that the two reasons identified by the Employer and set

out in the Notice of Dispute dated 9 July 2014 were not genuine reasons for disputing the claim.

65. However, even though the Employer had no reasonable basis for not accepting the claim as at 16 May 2014 or for disputing the claim on 9 July 2014 it nevertheless continued to have a legitimate interest in assessing its exposure under the claim and in managing the claim. It needed further information in order to do this.

66. Subsequently, on 21 August 2014 the Employer received the report dated 4 July 2014 of psychologist Joanne Rick followed on 29 August 2014 by the 5 documents listed in paragraph 39 above and then the report dated 2 October 2014 of occupational therapist Ms Sanja Zeman. I am satisfied and I find that by the time the Employer had additionally become aware of the opinions set out in the report dated 27 November 2014 of psychiatrist Dr Curtis Gray it was fully informed as to Ms Stevens's long term incapacity for any work arising out of her work injury. I find it then had no grounds whatsoever for holding any reservations concerning Ms Stevens's entitlement under the Act to be compensated for her work-related injury on 23 April 2012 on the basis of total incapacity for work from 24 April 2012 to November 2014 and continuing indefinitely.

67. In the course of submissions on 27 August 2015 I was informed that Hunt & Hunt received Dr Gray's report on 1 December 2014. I proceed on the basis that they could have advised the Employer and the Employer could have provided instructions within 7 days, no later than 8 December 2014. Yet notwithstanding the opinions set out in Dr Gray's report, and notwithstanding the Employer's state of knowledge as found by me above and as augmented by the contents of the materials and the other two experts' reports already received, the Employer did not formally accept Ms Stevens's claim until 9 February 2015, and settlement arrangements culminating in the

section 108 Memorandum of Agreement were not finalised until the agreement was filed on 11 August 2015.

68. In its letter dated 9 July 2014 disputing Ms Stevens's claim, CGU on behalf of the Employer had said "*…we undertake to reconsider our decision once the further information is received…".* There is no evidence before me to suggest that the Employer's decision to dispute the claim was reconsidered by 8 December 2014. The settlement offer made on 3 October 2014 was not an offer to accept the claim.

69. I am satisfied that the failure by the Employer after 8 December 2014 to accept Ms Stevens's claim and arrange payment of it as soon as practicable was both unjustified and unjustifiable within the scheme of the Act. I am satisfied that it evinced a dismissive attitude to Ms Stevens without proper regard for her entitlements or for the Employer's obligations under the Act. I am satisfied and I rule that this failure merits a punitive response. I am satisfied that response should involve a further imposition of interest also at the rate of 20% per annum.

Costs Otherwise Than on the Standard Basis

70. Rule 23.02 of the *Work Health Court Rules* imports Order 63 of the *Supreme Court Rules* into the *Work Health Court Rules*, subject to the Act, the Rules and any Practice Directions. Order 63 of the *Supreme Court Rules* deals with costs and rule 63.03(1) provides: *"Subject to these Rules and any other law in force in the Territory, the costs of a proceeding are in the discretion of the Court".* Rules 63.25, 63.26 and 63.27 identify the two bases for a taxation of costs, namely the standard basis or the indemnity basis, and rule 63.28(1) provides costs shall be taxed on the standard basis except as otherwise provided by the Rules or as otherwise ordered by the Court.

71. Rule 23.03 of the Work Health Court Rules provides as follows:

"(1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.

(2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.

(3) In exercising its discretion under this rule in relation to a proceeding commenced under section 104 of the Act, the Court must have regard to the matters referred to in section 110 of the Act."

72. I am satisfied and I find that by rule 23.03(1) the Work Health Court has the power conferred by its own Rules to determine the basis on which costs are to be paid. Additionally, it has that power conferred by Order 63 of the *Supreme Court Rules* as imported by rule 23.02 of the *Work Health Court Rules*.

73. Costs will normally be allowed only on the standard basis, unless there is something warranting a departure from this basis. Examples of this include "*a wilful disregard of the facts or clearly established law*" – see *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Ltd* [1986] 81 ALR 397 at 400-401. In *Botany Municipal Council v Secretary Department of Arts, Sport, Environment, Tourism and Territories* (1992) 34 FCR 412 at 415 Gummow J said that a costs order of this sort was not limited by the relevant Federal Court legislation to the case of "*an ethically or morally delinquent party*".

74. In *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No2)* (1993) 46 IR 301 at 303 French J (as he then was) said it was not necessary to find "*…a collateral purpose or some species of fraud be established. It is sufficient, in my opinion, to enliven the*

discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen as a hopeless case".

75. In the Northern Territory these cases and this issue were considered by the Supreme Court in *Cath Yuk Chu Lin v Katamon Pty Ltd and Frank Hung Chi Lam* Nos 29 and 30 of 1995 delivered 31 May 1995. Kearney J said at paragraph 9 that "*Subject to the express wording in r63.27 this latter basis* (the indemnity basis) *is akin to what was formerly called costs on a "solicitor and client" basis*". He went on to say in para 13: "*I consider, in general, that indemnity costs should be awarded in cases which are clearly exceptional in nature; for example where the conduct of the losing party has involved some unmeritorious deliberate or high-handed conduct, an element of deliberate wrongdoing, which warrants an award of costs over and above the normal standard basis, because it is unjust in the circumstances that the successful party should have to bear any part of the legal costs he has reasonably incurred".*

76. Notwithstanding my findings in paragraph 69 above, I do not conclude that the Employer's actions at any stage were those of "*an ethically or morally delinquent party*" as referred to by Gummow J in *Botany Municipal Council* above. Nor do I conclude that the Employer's behaviour evinced "*a collateral purpose or some species of fraud…*" as discussed by French J in *J-Corp Pty Ltd* above. However, I do not need to arrive at any such conclusion to order costs on the indemnity basis.

77. I am of the view on the basis of my foregoing findings that the Employer by continuing to dispute Ms Stevens's claim after 8 December 2014 engaged in "*a wilful disregard of the facts"* as referred to in *Fountain Selected Meats (Sales) Pty Ltd* above. I am of the view that after 8 December 2014 the Employer persisted in "*what should on proper consideration (have) been seen as a hopeless case"* as per *J-Corp Pty Ltd* above. I am satisfied and I rule that the Employer should pay Ms Stevens's costs on the indemnity basis

on and after 9 December 2014. I note that costs prior to 9 December 2014 remain covered by Order 4. in the Notice of Direction to Record Agreement dated 7 September 2015.

Orders

78. I order that the Employer pay subsection 109(1) interest calculated at 20% per annum to Ms Stevens on the amount of $142,165.88 from and including 16 May 2014 to the date that amount was paid to her or on her behalf.

79. I order that the Employer additionally pay section 109(3) punitive interest to Ms Stevens also calculated at the rate of 20% per annum on the amount of $142,165.88 from and including 9 December 2014 to the date that amount was paid to her or on her behalf.

80. I order the Employer pay Ms Stevens's costs of and incidental to the proceedings on and after 9 December 2014, including all directions hearings and all costs of the interlocutory application filed 2 July 2015 all certified fit for counsel, to be taxed in default of agreement on the indemnity basis at 100% of the Supreme Court scale.

Dated this 7th day of December 2015

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John Neill SM