CITATION:	*Maria Rust v Northern Territory of Australia* [2024] NTWHC 5
PARTIES:	MARIA RUST v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO:	2022 – 00447 – LC
DELIVERED ON:	31 July 2024
DELIVERED AT:	DARWIN
HEARING DATES:	Parties' written submissions considered in Chambers 30 and 31 July 2024
DECISION OF:	ACTING JUDGE NEILL

CATCHWORDS:

WORK HEALTH – Costs – Party/Party – General rule that costs follow the event – Application of the rule and discretion – section 110 Return to Work Act – *section 109* Return to Work Act

Consideration of Part 6A Division 1 Mediation of the Return to Work Act - *Extent and application of section 103K(1) –statutory interpretation - inconsistency with section 110*

Consideration of Rule 7 of the Work Health Court Rules *and confidentiality of Work Health Case Management Conferences*

Return to Work Act 1986 sections 103A to 103K, 109 and 110

Work Health Court Rules Part 7 rule 7

Interpretation Act section 62A

Goodwin v Phillips (1908) 7 CLR 1
Stevens v Serco Australia Pty Ltd (2015) NTMC 027
Value Inn Pty Ltd v Proprietors of Unit Plan 2004/048 & Anor [2020] NTCA 8

REPRESENTATION:

Counsel:

Worker:	Ms J Clark
Employer:	Mr A Lindsay SC

Solicitors:

Worker:	Caroline Scicluna
Employer:	Hunt & Hunt Lawyers

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

No. 2022-00447-LC

BETWEEN

MARIA RUST
Worker

AND

NORTHERN TERRITORY OF
AUSTRALIA
Employer

REASONS FOR DECISION
(Delivered: 31 July 2024)

ACTING JUDGE JOHN NEILL

BACKGROUND

1. On 8 July 2024 I delivered my Decision in this matter. At paragraph 396 of that Decision I gave the parties the opportunity to provide written submissions on the question of costs and also to file any affidavit evidence relevant to section 110 of the *Return to Work Act*.

2. I have received the following documents from the parties relevant to the question of costs:

    i) 15 July 2024 – Worker's Submissions in Respect of Costs;

    ii) 15 July 2024 – affidavit of Carolyn Scicluna, solicitor for the Worker;

    iii) 18 July 2024 – affidavit of Chris Osborne, solicitor for the Employer;

    iv) 19 July 2024 - Employer's Submissions in Respect of Costs;

v) 25 July 2024 – Worker's Amended Reply to the Employer's Submissions in Respect of Costs.

PRELIMINARY ISSUES

3. The Employer in its submissions has objected to paragraphs 3 and 4 of the affidavit of Carolyn Scicluna on two separate grounds. On the basis of those objections, the Employer has also objected to paragraphs 28, 30(a) and 30(b) of the Worker's submissions.

First Objection - Section 103K(1)

4. In paragraph 3 of her affidavit Ms Scicluna has identified the individuals who attended on behalf of the parties at the NT WorkSafe mediation conference held on 14 February 2022. She has identified some of the disputed issues discussed between those parties at that mediation conference. She has commented on the attitude of the Employer's representative to some of the disputed issues. Mr Alan Lindsay SC for the Employer in his submissions has objected to the admissibility of this material on the ground that such material is expressly excluded by virtue of subsection 103K(1) of the *Return to Work Act*.

5. Section 103K provides as follows:

> "**103K Mediation proceedings privileged**
>
> *(1) Except as expressly provided by or under this Act, anything said, written or done in the course of mediation under this Division is not admissible in any other proceedings under this Act.*
>
> *(2) A certificate issued under section 103J(2) is admissible in proceedings under this Act".*

6. Part 6A Division 1 of the Act is headed "*Mediation*". It contains sections 103A to 103K inclusive. There is no definition of "*mediation*" in the general definition section of the Act, namely section 3. There is no definition of "*mediation*" in section 103A of the Act which is entitled "*Definitions*".

7. To determine what is included within the phrase "*anything said, written or done in the course of mediation"* in subsection 103K(1) above, and therefore not admissible, I adopt the purposive approach to statutory interpretation mandated by section 62A of the NT *Interpretation Act*.

8. I am satisfied that the purpose of the exclusion created by subsection 103K(1) of the Act is to permit parties at a mediation under Part 6A Division 1 of the Act to

speak frankly and to present their positions fully and freely without having to be concerned that anything they say might be used in evidence against them at some future time in the course of proceedings before the Work Health Court.

9. Section 103B provides as follows:

> *"**103B 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".*

10. Section 103D(1) of the Act provides that "*A claimant may apply to the Authority to have the dispute referred to mediation"*. The "Authority" referred to is NT WorkSafe. The section then goes on to provide for the appointment of a mediator, the requirement that the mediator must seek relevant documents from the parties, the requirement that the mediator must attempt to resolve the dispute, and it provides a timetable for these steps.

11. This might suggest that once a claimant has applied to have a dispute referred to mediation then all subsequent dealings between the mediator and the parties up until the issuing of the Mediation Certificate are included "*in the course of mediation*". However, such a broad approach to the concept of "*in the course of mediation*" brings with it a particular difficulty.

12. Section 103 J provides as follows:

> "***103J Pre-condition to court proceedings***
>
> *(1) Subject to subsection (3), a claimant is not entitled to commence proceedings under Division 2 in respect of a dispute unless there has been an attempt to resolve the dispute by mediation under this Division and that attempt has been unsuccessful.*
>
> *(2) At the conclusion of the mediation, the mediator must issue to each of the parties a certificate in the approved form:*
>
> *(a) stating that mediation has taken place;*

(b) listing the written information provided to the mediator by the parties during the mediation;

(c) setting out the recommendations (if any) of the mediator; and

(d) stating what the outcome of the mediation was.

(3) – not relevant.

13. The difficulty is that section 103J requires the mediation of a dispute as a precondition to the commencement of court proceedings. In the event of any argument about whether a dispute has in fact been mediated, it will be necessary to identify that dispute and how it might have been raised for the purpose of the mediation. It is not uncommon for a party or parties to narrow or enlarge or generally refine the range of the matters in dispute after a mediator has been appointed. If we take the broad approach to the concept of "*in the course of mediation*" then the identification of the matters in dispute at mediation would be prevented by the operation of section 103K(1) which makes inadmissible anything "*said, written or done in the course of mediation under this Division"*.

14. Additionally, as a matter of logic you cannot mediate a dispute until you have first identified that dispute.

15. I am satisfied and I rule that the concept of "*in the course of mediation*" as used in subsection 103K(1) of the Act does not include the application by a claimant to the Authority (that is, to NT WorkSafe) pursuant to section 103D(1) to have a dispute referred to mediation and in which the dispute or disputes are identified. Further, it does not include any subsequent communications which might narrow, enlarge or generally refine the matters in dispute to be mediated, even if those communications are with the mediator or the other party rather than with NT WorkSafe.

16. Section 103A defines a "*conference*" to mean "*a conference convened by a mediator under section 103C(3)(b)"*. This conference is the last step in the mediation process created under Part 6A Division 1 of the Act. It is clear that matters arising at the final, conference stage of a mediation do indeed occur "*in the course of mediation*" and therefore would appear not to be admissible "*in any other proceedings under the Act*".

17. However Ms Clark of counsel for the Worker has submitted in her submissions in reply that section 110 of the Act overrides the exclusion created by section 103K(1) of the Act when considering the question of costs in a proceeding before the Court.

18. Section 110 of the Act provides as follows:

> "**110 Costs**
>
> *In awarding costs in a proceeding before the Court, the Court shall take into account the efforts of the parties made before or after the making of an application under section 104 in attempting to come to an agreement about the matter in dispute and it may, as it thinks fit, include as costs in the action such reasonable costs of a party incurred in or in relation to those efforts, including in particular the efforts made at the directions hearing and any conciliation conference".*

19. Clearly, there is a tension between the operations of section 110 and section 103K(1) of the Act.

20. Section 110 was included in the original *Work Health Act*, one of the previous titles of the *Return to Work Act*, when it came into force on 1 January 1987. Sections 103A to 103K were added to the legislation at a later time.

21. There is a presumption of statutory interpretation that where a more general provision of an Act conflicts with a specific provision then the specific provision will prevail – *generalia specialibus non derogant*. This approach was stated by O'Connor J in *Goodwin v Phillips* (1908) 7 CLR 1 at 14 as follows:

> "*Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply".*

22. I am satisfied that section 110 of the Act is a special provision relevant to the question of costs, particularly at the end of proceedings. I am satisfied that section 103K(1) of the Act is a more general provision in relation to its effect on any question of costs. I am satisfied and I rule that section 103K(1) of the Act does not prevent anything said, done or written in the course of mediation from being admissible in a proceeding under the Act for the purposes of section 110 of the Act.

23. I overrule the Employer's objection to the admissibility of paragraph 3 of the affidavit of Carolyn Scicluna promised 15 July 2024.

Second Objection - Case Management Conferences

24. In paragraph 4 of her affidavit promised 15 July 2024 Ms Scicluna has deposed to matters discussed and the position taken by the Employer at a Work Health Court

Directions Conference held on 21 April 2022. The Employer in paragraph 2 of its submissions in respect of costs has objected to the contents of paragraph 4 "*for the reasons described in the affidavit of Chris Osborne*".

25. Chris Osborne is the legal representative of the Employer. Ms Osborne promised her affidavit on 18 July 2024. In paragraph 2 of her affidavit Ms Osborne states as follows:

> "*This Directions Conference was conducted by the Judicial Registrar and was on a without prejudice basis and in confidence. This Directions Conference and the like in the Work Health Court are conducted on this basis in order for the parties to have frank discussions that are not able to be used in the proceedings or at any time".*

26. Ms Osborne's stated position is a bare assertion. She does not refer to any section of any Act or any rule of any Rules or any authority in support of this proposition. Mr Lindsay SC of counsel has adopted this proposition in his submissions similarly as a bare assertion. A consideration of Part 7 of the *Work Health Court Rules* does not support this proposition.

27. The *Work Health Court Rules* provide for three different case management conferences. These are all set out in Part 7 comprising rules 7.01 to 7.13.

28. Rules 7.01 to 7.04 deal with a Directions Conference. There is nothing in these rules which creates any privilege or confidentiality in anything said or done at a Work Health Court Directions Conference.

29. Rules 7.05 to 7.08 deal with a Conciliation Conference. Rule 7.08 specifically provides that what takes place at a Conciliation Conference is to be confidential. However, the objection to paragraph 4 of Ms Scicluna's affidavit does not involve a Conciliation Conference.

30. Rules 7.09 to 7.11 deal with a Prehearing Conference. There is nothing in these rules which creates any privilege or confidentiality in anything said or done at a Work Health Court Prehearing Conference.

31. Rules 7.12 and 7.13 deal with miscellaneous issues at these Conferences. They do not create any privilege or confidentiality in any of the conferences.

32. Additionally, section 110 of the Act specifically contemplates and includes "… *the efforts made at the directions hearing and any conciliation conference"*. A specific provision in an Act overrules any contrary provision in rules made under that Act.

33. I overrule the Employer's objection to the admissibility of paragraph 4 of the affidavit of Carolyn Scicluna promised 15 July 2024.

Conclusion on Objections

34. For the foregoing reasons I receive into evidence the whole of the affidavit of Carolyn Scicluna promised 15 July 2024 including paragraphs 3 and 4. For the same reasons I receive and consider paragraphs 28 and 30 (a) and (b) of the Worker's Submissions in Respect of Costs.

COSTS

35. It is a well-established rule of law that costs are in the absolute discretion of the Court hearing the suit, however that discretion must be exercised judicially - see for example *Value Inn Pty Ltd v Proprietors of Unit Plan 2004/048 & Anor ("Value Inn")* [2020] NTCA 8 at paragraph [30]. Rule 23.03(1) of the *Work Health Court Rules* effectively reproduces this rule.

36. It is a further well-established rule of law that a successful party should ordinarily be awarded its costs. That rule may be departed from in circumstances where a differential costs order is appropriate - *Value Inn* at paragraph [31]. There Grant CJ and Mildren A J in their joint judgement identified some of the circumstances where such a differential costs order might be appropriate, as follows:

> *"(a) where, in respect of one or more issues, the successful party has "unfairly, improperly or unnecessarily increased the costs", including unreasonably pursuing or persisting with points which have no merit; (b) where the bulk of the time has been taken on an issue on which the unsuccessful party has succeeded, even if the successful party has not acted unreasonably in raising those issues; and/or (c) where a particular issue or group of issues is clearly dominant or separable, and the application of the general rule may involve hardship on a losing party which has nevertheless succeeded on that issue or group of issues".*

37. In paragraph 21 of my Decision delivered 8 July 2024 in this matter I identified the issues in this case in the form of six questions, set out as follows:

> *A. What happened at the meeting on 30 July 2021?*
>
> *B. Did the Worker suffer any and if so what injury?*
>
> *C. Was the injury caused by the meeting on 30 July 2021?*
>
> *D. Was the injury of mental injury caused wholly or primarily by reasonable management action?*
>
> *E. Has the Worker been incapacitated at all for work as a consequence of the injury?*

F. *Has the Worker have been totally incapacitated for work as a consequence of the injury?*

38. In paragraph 393 of my Decision delivered 8 July 2024 I found as follows:

> *393. The Worker has essentially been successful on every issue raised on the pleadings and before me at the hearing, with one significant exception. That exception is her total incapacity for work at any time after 30 July 2021. The Worker pleaded and she ran her case solely on the basis of total incapacity after 21 December 2021. I have not been satisfied on the balance of probabilities that the Worker was totally incapacitated for any periods after that date".*

39. In other words, the Worker was successful in five out of the six issues raised for consideration at the hearing. Her lack of success in the sixth issue was significant. It had the effect that the Worker failed to establish any entitlement to be paid weekly benefits under the Act after the initial 26 week period from when she was first certified as having some incapacity as a consequence of her work injury.

40. The Worker's success in five out of the six issues was not however a merely Pyrrhic victory. She established against the Employer's strong opposition that she had suffered a compensable mental injury arising out of the employment. She established an entitlement to recover past medical and like expenses which I found in the sum of $15,154.60. She established an entitlement to future medical and like expenses which might be incurred in respect of her mental injury, in accordance with the Act. She established an entitlement in accordance with the Act to be paid a tax-free lump sum for any percentage permanent impairment of the whole person arising out of the mental injury.

41. It is not easy to separate the time taken at hearing on the six questions I identified as the issues in the case. In particular, the evidence to establish what happened at the meeting on 30 July 2021, the evidence as to whether the Worker had suffered the work injury claimed and in the manner claimed, and the evidence as to her credibility on the issue of her incapacity, was to a large extent intermingled. I upheld the Worker's credibility on some issues, and I found that the Worker was not credible on some other issues.

42. I am satisfied and I find that the time taken at the hearing solely on the issue of the Worker's credibility and where I found that she was not credible, was very much less than the time taken on all the other issues.

Section 110 of the Act

43. Rule 23.03(3) of the *Work Health Court Rules* provides that in exercising its discretion in relation to costs the Work Health Court must have regard to the matters referred to in section 110 of the Act. I now have evidence before me of

some such matters in the affidavit of Carolyn Scicluna promised 15 July 2024, and in the affidavit of Chris Osborne promised 18 July 2024.

44. This evidence falls into two categories. The first category is evidence of the Employer's firm resistance to the Worker's claim. Here I consider that the Northern Territory of Australia as the Employer had an obligation to be a model litigant and therefore should properly have weighed all the evidence before it at different stages of the proceedings and it should have been prepared to review its position based on the changing state of the evidence.

45. All the medical evidence at the hearing before me supported the Worker's claim that she had suffered a mental injury as a consequence of the meeting on 30 July 2021 and that she had some incapacity for work at some times arising from that injury. The Employer had no medical evidence contrary to this. The Employer had the Worker assessed by medico-legal psychiatrist Dr Antonella Ventura on 3 August 2022. Dr Ventura provided a report to the Employer dated 12 August 2022. I do not know the date when that report came into the Employer's hands but it is safe to assume that it would have done so within 14 days, say by 26 August 2022. That report firmly supported that the Worker was suffering a formally diagnosed psychiatric condition. That report firmly supported that this condition had been caused by the meeting on 30 July 2021.

46. Notwithstanding the unequivocal nature of all of the medical evidence available to the parties and most particularly the expert opinion of the Employer's own medico-legal psychiatrist, the Employer nine months after it had received the report of Dr Ventura persisted in pleading in its Third Amended Notice of Defence dated 30 May 2023 its denial that the Worker had suffered any injury at all. The Employer ran its case on this basis. This took up a great deal of time at the hearing.

47. In paragraphs 316 and 317 of my Decision delivered on 8 July 2024 I expressed my view that the Employer's submissions to the effect that the Worker had knowingly adopted a plan of action to pretend to be psychologically injured and she had then persisted with that plan, and that Mr Grumelart and the Worker's husband Mr Ellsley were either dupes of the Worker or alternatively had knowingly conspired with her in that plan, went too far and was inconsistent with the weight of the evidence.

48. The second category of the evidence before me for the purposes of section 110 of the Act involves correspondence between the legal representatives of the parties making various settlement offers. None of these offers amounted to a *Calderbank* letter and indeed neither party in submissions has submitted otherwise. I simply note that the Worker made a settlement offer or offers limited to these proceedings before the Work Health Court, whereas the Employer persisted in making offers that could only be accepted on the basis of settlement of these proceedings and also settlement of related proceedings on foot in another

jurisdiction.

49. I conclude in relation to section 110 of the Act that the Employer in its approach to its defence of this claim has demonstrated a lack of flexibility. This is significant in the Work Health jurisdiction. This jurisdiction includes not only section 110 but also the provisions of section 109 of the Act. Subsection 109(1) creates a statutory expectation that an employer will not cause an unreasonable delay in accepting a worker's claim. Subsection 109(1)(a) provides that where an employer has caused such an unreasonable delay in accepting a claim then the Court must order the employer to pay interest on any amount of compensation which it awards. Additionally, and significantly on the present question of costs, subsection 109(1)(b) provides that where the Court is satisfied the employer has caused unreasonable delay in accepting a claim for compensation and where in its opinion the employer would otherwise be entitled to have costs awarded to him or her, then the Court must order that costs be not awarded to him or her.

50. The question whether the Employer in these proceedings had caused unreasonable delay in accepting the Worker's claim was not argued before me and I make no finding on that question in these Reasons. However, I do take the Employer's lack of flexibility into account in the exercise of my discretion as to costs.

51. In *Stevens v Serco Australia Pty Ltd* (2015) NTMC 027 I considered the operation of section 109(1) of the Act and I made the following observation in paragraph 17 of that Decision:

> "*By disputing the 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 a claim must continue to be reasonable at all times thereafter*** (emphasis added)***".***

52. In these proceedings on the question of costs I am of the view that the Employer was on notice by the end of March 2023 that it should review its decision not to accept the Worker's claim. This is because by this time the Employer had in its possession the Worker's pre-injury medical records plus three significant documents. The first was the recording of the meeting between the Worker and the CEO of DIPL Mr Andrew Kirkman on 30 July 2021 which the Employer had been aware of since around 21 April 2022, the date of the first Directions Conference in the proceedings – see paragraph 4 of the affidavit of Carolyn Scicluna promised 15 April 2024. The second was the report of psychiatrist Dr

Antonella Ventura which I have found would have been in the possession of the Employer by about 26 August 2022. The third was the report dated 17 March 2023 addressed to Ms Carolyn Scicluna of the Worker's treating psychiatrist Dr Dinesh Arya. Again, I make the assumption that this report would have been provided to the Employer within about 14 days – that is, by about the end of March 2023.

CONCLUSION AS TO COSTS

53. On the basis that the Worker was mainly successful in the proceedings, on the basis that the Worker's lack of success on the issue of total incapacity is offset by her overwhelming success in establishing both the existence and the circumstances of her mental injury arising out of the employment, and on the basis of my view that the Employer displayed a lack of flexibility in continuing to maintain its opposition to all aspects of the Worker's claim in the light of the state of the evidence known to it by about the end of March 2023, I conclude that the ordinary rule should prevail, namely that the Worker as the successful party should be awarded her costs.

54. I order that the Employer pay the Worker's costs of and incidental to these proceedings from and including the initial mediation process, to be taxed in default of agreement at 100% of the Supreme Court scale certified fit for counsel at all Directions Hearings and at all interlocutory applications after the matter was first allocated any hearing dates, and at all hearing dates.
