CITATION:	*Lucas McAuley v NT Police Fire and Emergency Services [2017] NTLC 018*
PARTIES:	LUCAS McAULEY v NT POLICE FIRE AND EMERGENCY SERVICES
TITLE OF COURT:	Work Health
JURISDICTION:	Work Health
FILE NO:	21625860
DELIVERED ON:	27 July 2017
DELIVERED AT:	Darwin
HEARING DATE:	23 June 2017
JUDGMENT OF:	Judge Neill

CATCHWORDS: *Notice of a work injury "as soon as practicable" in compliance with sub section 80(1) of the Return to Work Act; obligation to raise compliance/noncompliance with sub section 80(1) and legal and evidential onus of proof.*

Return to Work Act sections 80, 81 and 182;
Allison v Newroyd Mill Ltd (1925) 134 LT 171
Currie v Dempsey (1967) 69 SR (NSW) 11
Maddolozzo v Maddick (1992) 84 NTR 27
Rivard v NT of A (1999) 150 FLR 33
Swanson v NT of A [2006] 204 FLR 392
Barnett v NT of A [2010] NTMC 70
Global Insulation Contractors (NSW) Pty Ltd v Keating [2012] NTSC 4
Millar v ABC Marketing and Sales Pty Ltd [2012] NTSC 21
Corbett v NT of A [2015] NTSC 48
Andreasen v ABT (NT) Pty Ltd [2015] NTMC 026

REPRESENTATION:

Counsel:

Worker:	Kerry Sibley
Employer:	Alan Lindsay

Solicitors:

Worker:	Maurice Blackburn
Employer:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	018
Number of paragraphs:	58

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

No. 21625860

BETWEEN:

LUCAS McAULEY

Worker

AND:

NT POLICE FIRE AND EMERGENCY SERVICES

Employer

REASONS FOR JUDGMENT

(Delivered 27 July 2017)

JUDGE NEILL:

1. The Worker Lucas McAuley was a police officer. He made two separate claims for injuries and commenced two separate sets of proceedings against the Employer, the NTPFES, pursuant to the *Return to Work Act* ("the Act').

2. The first claim and proceedings in time bears file number 21625851. In those proceedings the Worker claimed an injury to his lower back said to have occurred on 4 July 2014 in the course of his employment with the Employer. The Employer accepted that claim. The Worker said he suffered a deterioration of that back injury on around 11 November 2014 which reduced his capacity for work. The Employer disputed this. The Worker commenced those proceedings by Application filed 26 May 2016.

3. The second claim and proceedings in time bears file number 21625860. In these proceedings the Worker claimed a mental injury, particularised as "stress and mild depression", said to have arisen as a consequence both of disciplinary proceedings taken against him by the Employer and of criminal charges initiated against him by the Employer, from and after 18 October 2014. The Employer disputed this claim after first deferring its response, in

accordance with the Act. The Worker commenced these proceedings by Application also filed on 26 May 2016.

4. The two proceedings were ordered to be heard together by an order of Judicial Registrar Johnson made 18 January 2017.

The Issues in the Mental Injury Proceedings 21625860

5. The Worker's case was that he had formed the belief senior police officers were wrongfully targeting him in his role as a police officer. He believed that he was improperly made the subject of disciplinary charges and of criminal charges. He claimed that he was eventually vindicated but his belief concerning the actions of the Employer by the senior police officers led him to develop the mental injury, leading to total and/or partial incapacity for work at different times after 18 October 2014.

6. The Employer disputed any impropriety on the part of its senior officers and said that all actions of the Employer by its senior officers adverse to the Worker constituted reasonable disciplinary or administrative action taken in connection with the Worker's employment.

7. These proceedings along with the proceedings relating to the back injury were listed before me to be heard together for 7 hearing days commencing on 24 July 2017.

Time Bar Issues

8. Time bars arising under the Act were raised by the Employer in its pleadings in both proceedings. Specifically in these mental injury proceedings the Employer had pleaded:

(i) The Worker did not give notice to the Employer of the mental injury "as soon as practicable", as required by sub section 80(1) of the Act ; and

(ii) The Worker did not give notice of the injury to the Employer before the Worker voluntarily left the employment with the Employer, and the claim for compensation was not made within 6 months after the occurrence of the alleged injury, both contrary to section 182 of the Act.

9. If established, a breach of the Worker's time limit obligations pursuant to Section 182 of the Act would be a bar to the Worker's recovering any remedy to which he might otherwise be entitled under the Act. The breach would not be a bar to his maintaining the proceedings. Those time limits can be extended by the Court, or be found by the Court not to apply, for a number of reasons.

10. The time bar established by sub section 80(1) of the Act is more fundamental than any time bar under section 182 of the Act. The requirement to give notice "as soon as practicable" to the Employer of a Worker's claimed injury is a condition precedent to any right to pursue compensation. It is not merely a procedural provision, whereas section 182 is a procedural provision – see *Maddalozzo v Maddick* (1992) 84 NTR 27 ("*Maddolozzo*") per Mildren J at page 32.8.

11. The effect of this is that the Court cannot extend time where notice of the injury was not given to the Employer as soon as practicable – *Maddolozzo* per Mildren J at page 36.4. Accordingly if this were made out then these proceedings would not be maintainable.

The Application Dated 15 June 2017

12. By interlocutory application dated 15 June 2017 and filed on 16 June 2017 the Employer sought a separate determination of the issue whether the Worker gave notice of the mental injury as soon as practicable in compliance with sub section 80(1) of the Act.

13. This application raised two issues. The first was whether the question of the giving of notice as soon as practicable could and should be dealt with separately from and in advance of all the other issues raised between the parties and listed to be heard on and from 24 July 2017.

14. The second arose if the separate determination was allowed. That second issue was whether notice of the mental injury was in fact given to the Employer as soon as practicable, within the meaning of sub section 80(1) of the Act.

15. This application was heard before me on Friday 23 June 2017. Both parties were legally represented by counsel from the independent Bar. I ruled that the issue of compliance with sub section 80(1) of the Act could and should be determined separately. I then proceeded to hear the second issue, namely whether the Worker gave notice of the mental injury as soon as practicable.

16. The Worker had made a separate interlocutory application filed on 20 June 2017 and returnable at the same time as the Employer's application on 23 June 2017. In that the Worker sought leave to file a second Further Amended Statement of claim. The sole amendment proposed to be made was to identify a third candidate for notice of the mental injury to the Employer, to meet the requirement in sub section 80(1). The Worker now sought in addition to two previously pleaded candidates for such notice to rely upon a complaint he had initially made to the Office of the Ombudsman on about 17 June 2015, which complaint was forwarded to the Employer.

17. Counsel for the Employer did not consent to this further amendment but did not actively oppose it. I made an order on 23 June 2017 granting the Worker leave to include this amendment in his Statement of Claim. Although the Employer had yet to file a Defence in response, the interlocutory argument proceeded on 23 June 2013 on the clear basis that the Employer traversed this third candidate for notice.

18. At the hearing of its application on 23 June 2017 the Employer conceded that it bore the onus of proving any failure to comply with sub section 80(1) of the Act. Subsequently the Employer filed further written submissions to the contrary. It now argued the Worker bore the onus of proving he had complied. Accordingly, I needed to rule on that issue.

19. On 29 June 2017 I delivered my conclusions orally and made Orders on all issues and said I would provide my formal Reasons for Decision at a later date. Both proceedings settled on 24 July 2014, the first day of their hearings. I nevertheless now provide my Reasons for Decision because the issues in question are important and will arise again in future proceedings before the Work Health Court.

Onus

20. A very similar question as to onus was raised in these proceedings by the Employer's pleading of reasonable administrative or disciplinary action,

namely which party had to raise that issue and which party bore the legal and evidential onus. That issue arose in a line of Decisions in the NT, starting with *Rivard v NT of A* [1999] 150 FLR 33 per Priestley JA, then *Swanson v NT of A* [2006] 204 FLR 392 per Martin (BF) CJ at 86, then *Barnett v NT of A* [2010] NTMC 70 at (11) per Dr Lowndes SM (as he then was), then *Corbett v NT of A* [2015] NTSC 48 per Barr J and finally *Andreasen v ABT (NT) Pty Ltd* [2015] NTMC 026 per Armitage SM. These Decisions establish that under the Act the Employer bears the onus of raising any defence of reasonable administration or disciplinary action, and both the evidential and legal onus of establishing it.

21. The basis for this was considered by Mildren J in *Millar v ABC Marketing and Sales Pty Ltd ("Millar")* [2012] NTSC 21. His Honour discussed from first principles the onus of proof in what have been termed "avoidance" cases. He said the general rule is "he who asserts must prove" and this usually involves an evidential as well as a legal onus on the same party. He cited with approval *Currie v Dempsey* (1967) 69 S.R. (NSW) 11 where Walsh JA said at p.125:

> "The burden of proof in establishing a case lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element of his cause of action, for example if its existence is a condition precedent to his right to maintain the action. The onus is on the Defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claims, which *prima facie*, the plaintiff has".

22. I consider that the essential elements of the Worker's cause of action involve whether he sustained an injury and if so whether it was work related. I consider the question of lack of notice as soon as practicable is one which, if established, would constitute a good defence, that is, an "avoidance" of the Worker's claim.

23. By parallel reasoning with the line of cases in the NT on reasonable administrative or disciplinary action and applying the "avoidance" reasoning considered by Mildren J in *Millar*, I rule that it is the Employer who must raise the issue of compliance or non-compliance with sub section 80(1) of the Act. I rule that once this is raised, it is the Employer who bears the onus, both legal and evidential, of establishing any non-compliance on the balance of probabilities.

24. In this case the Employer did raise such non-compliance in its pleadings. I considered the relevant evidence in arriving at my conclusions.

The Evidence

25. The Employer filed and relied on the following affidavit material in support of its application:

(i) first affidavit of Pamela Tregear promised 16 June 2017 and annexures A to I inclusive - EX E1;

(ii) second affidavit of Pamela Tregear promised 16 June 2017, and annexure A - EX E2;

(iii) affidavit of Lukas David promised 17 June 2017 – EX E3.

26. The Worker filed and relied on :

(i) affidavit of Lucas McAuley made 20 June 2017 and annexures LM1 to LM15 inclusive – EX W4;

(ii) affidavit of Mathew Little John affirmed 20 June 2017 and annexure ML1 – EXW5;

(iii) affidavit of Matthew Littlejohn affirmed 23 June 2017 and annexure ML1 to this – EX W6;

(iv) email Lucas McAuley to James J O'Brien sent 16 October 2014 at 4:33pm – EX W7;

(v) email Lucas McAuley to Peter Bravos sent 17 June 2015 at 12:33pm – EX W8;

(vi) email Peter Bravos to Lucas McAuley sent 17 June 2015 at 3:34pm – EX W9;

(vii) email Lucas McAuley to Peter Bravos sent 19 June 2015 at 10:18am – EX W10;

(viii) email Lucas McAuley to Peter Bravos sent 19 June 2015 at 10:23am – EX W11;

(ix) email Lucas McAuley to Peter Bravos sent 19 June 2015 at 10:43am – EX W12; and

(x) affidavit of the Worker made and filed 26 July 2017 – EX W13.

Notice

27. Whether notice has been given is a question of fact – see *Global Insulation Contractors (NSW) Pty Ltd v Keating ("Keating")* [2012] NTSC 04 per Blokland J at paragraph [64].

28. Section 81(1) of the Act provides:

"(1) Notice of an injury:

(a) may be given orally or in writing;

(b) shall, subject to section 84(2), be given to:

(i) the employer, or, if there is more than one employer, to one of the employers;

(ii) a person under whose supervision the worker is employed; or

(iii) a person designated for the purpose by the employer;

(c) shall include the name and address of the person injured; and

(d) shall include the date on which the injury occurred and the cause of the injury."

29. Notwithstanding sub section 81(1)(c) of the Act it is not required that notice given by a Worker must include a statement of the Worker's name and address where circumstances make that otiose. For example, if the Worker is an established employee of the Employer and his name and address are well known to the Employer. To interpret s.81 otherwise so as to exclude a Worker from the operation of the Act "…does not accord with the principles of interpretation of the Act" – See *Keating* per Blokland J at paragraphs 69 and 70.

30. I am satisfied on the evidence before me and I find that the Employer at all times from its first employment of the Worker up to his resignation from that employment on 31 October 2014 must be taken to have known the Worker's name and address.

31. I am satisfied and I find that at all material times after 31 October 2014 the Employer must be taken to have known the Worker's name. Whether it knew the Worker's address after that date is a separate question.

The First Notice – Referral to Psychologist

32. The Worker was suspended from his employment with the Employer on 18 October 2014. On the same day, he was served with a summons to face criminal charges.

33. Also on 18 October 2014, the Worker was contacted by telephone by a psychologist Mr Julian Robinson. The affidavit of Lukas David EX E3 is evidence that Constable David on 18 October 2014 directly contacted Julian Robinson and told him that the Employer was that day going to serve documents on the Worker in relation to a criminal investigation. He requested that Mr Robinson contact the Worker that day.

34. Constable David was at that time an employee of the Employer. He deposes in EX E3 to having been instructed to contact a psychologist by Superintendent Christopher Board, a senior police officer and also an employee of the Employer.

35. I am satisfied on the evidence before me that the actions of the Employer by its employees in arranging for a psychologist to contact the Worker on 18 October 2017 were pre-emptive in nature. That is, the Employer was aware that suspending the Worker from his employment and simultaneously charging him with a criminal offence on 18 October 2014 was likely to be distressing to the Worker. For that reason it arranged for a psychologist to contact the Worker on that date to provide such counselling and psychological assistance as may be required.

36. However, this pre-emptive action in and of itself is not evidence that the Employer was aware of any psychological injury actually suffered by the Worker on or after 18 October 2014, as a consequence of the suspension or of the criminal charge, or at all.

37. Psychologist Julian Robinson provided a report to the Worker at the Worker's request. That report is dated 30 July 2015. It refers to the Worker's request for a report made 26 June 2015. The report appears as annexure "D" to the affidavit of Pamela Tregear being EX E1.

38. Mr Robinson's report discloses that Mr Robinson had eight telephone consultations with the Worker between 18 October 2014 and 11 November

2014. Mr Robinson noted the Worker indicated to him "high levels of distress, which you reported to include: reduced appetite, low mood and feelings of "burnout" ". He noted the Worker considered that these symptoms were precipitated by the criminal investigation.

39. Mr Robinson stated he did not undertake any face to face psychological treatment or assessment of the worker. He stated that "no diagnoses were made".

40. Mr Robinson stated unequivocally in his report that "no information about you was communicated by me or any other NTPFES psychologist to any other police member, person or party".

41. There was no other evidence before me concerning the Worker's involvement with Mr Robinson or any disclosure of information concerning the Worker's mental health by Mr Robinson or any awareness on the part of the Employer or its employees of communications between the Worker and Mr Robinson after the referral on 18 October 2014.

42. I am satisfied and I find that the referral of the Worker by the Employer to Mr Robinson and/or the Worker's consultations with Mr Robinson did not constitute to notice to the Employer in October and/or November 2014 of any psychiatric or psychologist injury suffered by the Worker arising out of the events of 18 October 2014 or otherwise out of or in the course of his employment with the Employer.

The Second Notice – The Ombudsman Complaint

43. In paragraph 15 of his affidavit EXW7 the Worker deposed to emailing a complaint to the Office of the Ombudsman on or about 16 June 2015. That complaint is annexure LM5 to that affidavit.

44. The complaint is lengthy and detailed. It sets out allegations about false and misleading conduct by senior police officers in respect of the Worker, including the suspension and the criminal charge on 18 October 2017. The complaint concludes on its last page in numbered paragraph 43, that "as a result of this (suspension and criminal charge and consequential developments) Lucas McAuley suffers depression". In its final, unnumbered paragraph, the complaint states: "I now suffer from depression and anxiety

as a direct result of this incident". Mr McAuley concluded by asking for his complaint to be investigated by the "relevant body".

45. On 17 June 2015 the Worker caused a copy of that complaint to be provided to Commander Peter Bravos of the Professional Standards Command section of the Northern Territory Police. Commander Bravos by email dated 17 June 2015 advised the Worker that he would "make initial enquiries into the matter". The Worker has deposed in his affidavit affirmed on 26 June 2017 EXW13 that he had a telephone conversation with Commander Bravos on 17 June 2015 when he was told that all aspects of his complaint were being considered by police "including the fact that I had complained of the conduct causing me anxiety and depression".

46. The complaint to the Office of the Ombudsman adequately identifies the Worker. It identifies his email address. It does not specifically identify the date the injury occurred but it is clear that the depression and anxiety referred to on the last page of the complaint were attributed by the Worker to the events which commenced on 18 October 2014 and to their unfolding over the period up to the hearing and dismissal of the criminal charge against him on 11 June 2015.

47. The suspension of the Worker and the criminal charge against the Worker initiated on 18 October 2014 were at all material times within the purview of the Professional Standards Command section of the Northern Territory Police – see affidavit Lukas David EX E3. I am satisfied and I find that notice of a work-related mental injury allegedly suffered by the Worker was given to Commander Bravos of that section on or about 17 June 2015 and therefore was given to the Employer within the meaning of sub section 81(1)(a), (b)(i) and (c) of the Act, on or about that date.

<u>As Soon as Practicable</u>

48. Whether notice has been given "as soon as practicable" is a question of law – see *Keating* per Blokland J at paragraph [59].

49. The Worker consulted GP Dr Gunawardhana on 18 and 24 October 2014. The GP on that date recorded reported symptoms of "feeling depressed and lethargic….no energy". The GP recorded her impression of "stress mild depression". She prescribed medication to help the Worker sleep.

50. The Worker contacted Mr Julian Robinson on 26 June 2015 requesting he provide a report as to the Worker's mental health and wellbeing during the period October 2014 to November 2014. This contact and request appear in annexure LM7 to EXW4, being an email sent on 26 June 2015 to Mr Robinson. Mr Robinson in his report provided in response states: "you indicate that this request is to support a worker's compensation application". I infer that this indication must have been set out in a separate communication on or around 26 June 2015 because it does not appear in the email being annexure LM7- perhaps a telephone communication. I am satisfied on the evidence before me on the balance of probabilities that the Worker did indicate this purpose to Mr Robinson on or about 26 June 2015.

51. In *Maddalozzo* Mildren J ruled that the date of injury is not necessarily the reference point for determining whether notice has been provided "as soon as practicable" - lines 35 to 40 page 37. His Honour referred with approval to a discussion in the English case of *Allison v Newroyd Mill Ltd* (1925) 134 LT 171 where the Court held the important question was: "at what time did the worker realise that he had suffered an injury entitling him to compensation under the Act?" Mildren J added to this: "But it is also clear that the realisation therein referred to need not be a matter of certainty; it is sufficient if the Worker realised he might have to make a claim".

52. The evidence before me discloses that the Worker suffered some symptoms of distress and even mild depression immediately following the events on 18 October 2014. On that date he was suspended from his work as a police officer and charged with a criminal offence. He consulted a GP on 18 and again on 24 October 2014 concerning his distress in response to these events. He engaged in telephone communications with psychologist Julian Robinson initially organised by the Employer, on 8 occasions between 18 October 2014 and 4 November 2014. He resigned from his employment as a police officer on 31 October 2014.

53. However, there is no evidence before me of any medical or psychological consultation or treatment in relation to anxiety or depression or any related condition, between the last telephone consultation with psychologist Mr Robinson on 4 November 2014 and the giving of notice to the Employer on about 17 June 2015. The Worker did consult psychologist Arthur Van Eigin in this period but he told Mr Robinson that commenced before 18 October 2014 and was limited to marriage counselling. This explanation also appears on page 5 of annexure LM 10 to Mr McAuley's first affidavit EXW4 in the notes of psychologist Ms Phuong Tu Prowse whom the Worker consulted in January 2016. I accept this explanation of the role of Mr Van Eigin.

54. The criminal proceedings against the Worker were dismissed on 11 June 2015.

55. In paragraph 12 of his first affidavit EXW4 the Worker deposed to having been unsure whether he could make a claim for compensation once he had resigned from the police force and while he was waiting for the criminal charges against him to be finalised.

56. In paragraph 13 of the same affidavit the Worker deposed to having been hopeful that once the criminal proceedings were finalised his mental symptoms would resolve, or at least improve.

57. I rule on the basis of the foregoing evidence that the earliest date when it was practicable for the Worker to have given the Employer notice of his mental injury was shortly after 11 June 2015, the date the criminal proceedings against him were dismissed.

58. I rule that the giving of notice to the Employer on or about 17 June 2015 was as soon as practicable in the circumstances of this case and in compliance with sub section 80(1) of the Act.

Dated this 27th day of July 2017

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John Neill
Work Health Court Judge