CITATION: *Paula Chung v Territory Insurance Office (2018) NTLC 033*

PARTIES:	PAULA CHUNG v TERRITORY INSURANCE OFFICE
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	21539747
DELIVERED ON:	13 March 2018
DELIVERED AT:	DARWIN
HEARING DATE(s):	29 January 2018
JUDGMENT OF:	Chief Judge Lowndes

CATCHWORDS:

WORK HEALTH – DEFAULT / SUMMARY JUDGEMENT – PROPER CONSTRUCTION OF THE PHRASE "AS SOON AS PRACTICABLE" IN RULE 5.03(2) OF THE WORK HEALTH COURT RULES – WAS THE APPLICATION TO THE COURT SERVED "AS SOON AS PRACTICABLE" – CONSEQUENCES OF THE WORKER'S FAILURE TO COMPLY WITH RULE 5.03(2)

Work Health Court Rules r 5.03(2)
McMillan v Territory Insurance Office (1998) 57 NTR 24 considered
Maddalozzo v Maddick (1992) 84 NTR 27 followed
Horne v Retirement Guide Management Pty Ltd [2017] VSCA 47 applied
Nicholl v Hunter 20 MVR 384 applied
State of Western Australia & Anor v Rothmans of Pall Mall (Australia) Ltd [2001] WASC 25 applied

REPRESENTATION:

Counsel:

Worker:	Mr M Littlejohn
Employer:	Ms K Frost

Solicitors:

Worker:	Ward Keller
Employer:	Hunt & Hunt
Judgment category classification:	A
Judgment ID number:	[2018] NTLC 033
Number of paragraphs:	135

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

No. 21539747

BETWEEN:

Paula Chung
Worker

AND:

Territory Insurance Office
Employer

REASONS FOR JUDGMENT

(Delivered 13 March 2018)

CHIEF JUDGE LOWNDES

THE EMPLOYER'S APPLICATION

1. The employer has filed an interlocutory application pursuant to rules 5.03(2), 21.01(1)(a) and (b), 21.02(d) and 1.12 of the *Work Health Court Rules* and rule 28.01(1) of the *Local Court (Civil Jurisdiction) Rules*.

2. The employer seeks the following orders:

(1) Default judgment for the employer;

(2) In the alternative, summary judgment for the employer;

(3) In the further alternative, the worker's proceedings commenced by Application to the Work Health Court, filed on 25 August 2015, be permanently stayed;

(4) The worker pay the employer's costs of and incidental to the interlocutory application and proceedings at 100% of the Supreme Court scale, to be taxed in default of agreement.

3. The interlocutory application is supported by the affidavit of Chris Osborne affirmed on 2 January 2018 and the affidavit of Kate Elizabeth Frost affirmed on 22 January 2018.

4. The worker opposes the application and the orders sought, relying on the affidavit of Markus Andreas Spazzapan affirmed on 29 January 2018.

5. The Court received written decisions and heard oral decisions on 29 January 2018 and reserved its decision. This is the Court's ruling on the application and reasons for decision.

THE EMPLOYER'S ARGUMENT

6. The employer's application is based on the failure of the worker to serve the Application to the Court as "soon as practicable" in accordance with rule 5.03 of the *Work Health Court Rules* which provides as follows:

7. A party must file sufficient copies of an application made under this Division to enable the party to serve a sealed copy on each other party.

8. The party must serve a sealed copy of the application and, if applicable, the documents referred to in rule 5.02(2() personally on the other parties as soon as practicable.

9. The appropriate reference from which that time is be measured is the date of filing of the application.

10. The employer contends that as the Application was filed on 25 August 2015, but not served until 1 August 2017 (nearly two years' after the issue of a Certificate of Medication), the worker has failed to serve the Application as soon as practicable; and thereby has failed to comply with rule 5.03(2) (2) of the Rules. As a result of this non –compliance with the rules of court, the employer says that it is entitled to the relief sought in the interlocutory application.

11. The employer submits that service of the Application so long after it was filed simply cannot be "as soon as practicable".

12. The employer points out that the *Return to Work Act* imposes strict time frames in relation to:[1]

    (a) giving notice of injury;

    (b) submission of a claim for compensation and the subsequent determination of liability;

    (c) the time within which a worker must apply for mediation; and

    (d) the time within which a worker must make an application to the Court.

13. In light of these strict time requirements, the employer contends that the phrase "as soon as practicable" in rule 5.03(2) should be "construed exactly as it is expressed".[2] The employer submits that such a construction is consistent with the stated objects of the *Return to Work Act* as set out in s 2 of the Act – namely:[3]

    (a) to provide for the effective rehabilitation and compensation of injured workers;

[1] See paragraph 18 of the written submissions of the employer dated 15 January 2018.
[2] See paragraph 19 of the submissions.
[3] See paragraph 19 of the submissions.

(b) to provide for the prompt and effective management of workplace injuries in a manner that promotes and assists the return to work of injured workers as soon as practicable;

(c) to ensure that the scheme for the rehabilitation and compensation of injured workers in the Territory:

(i) is fair, affordable, efficient and effective; and

(ii) provides adequate and just compensation to injured workers; and

(iii) is balanced to ensure that the costs of workers compensation are contained to reasonable levels for employers.

14. The employer says that the delayed service of the Application in the present case is "inconsistent with the spirit and intention of the Act and any delay in service, without proper explanation, should be construed as a breach of rule 5.03(2) or an abuse of process and default judgment should follow".[4]

THE WORKER'S POSITION

15. The worker submits that the phrase "as soon as practicable" in rule 5.03(2) should not be strictly and narrowly construed as argued by the employer.[5] The words should be given a wide and beneficial interpretation;[6] and having regard to that broader construction, the worker says that the contents of the affidavit of Markus Spazzapan disclose that the Application was served as soon as practicable. As the worker has complied with rule 5.03(2) the employer's application should be dismissed.

[4] See paragraph 20 of the submissions.
[5] See generally the worker's written submissions dated 29 January 2018.
[6] See paragraphs 4, 10 and 14 of the submissions.

THE PROPER CONSTRUCTION OF THE PHRASE "AS SOON AS PRACTICABLE"

16. Whether or not the worker has failed to comply with the requirements of rule 5.03(2) depends upon the meaning of the phrase "as soon as practicable".

17. As stated by Pearce and Geddes, the phrase "as soon as practicable" is a temporal expression, indicating the time within which some action must be taken.[7] In the present context, the phrase indicates the time within which an Application to the Work Health Court must be served.

18. It is clear that the phrase "as soon as practicable" bears a different meaning to the similar phrase "as soon as possible". The latter has been described as "a relative concept to be measured by reference to limiting factors".[8] As Pearce and Geddes point out: [9]

> The expression does not require that whatever it is that has to be done must be carried out as soon as anyone could possibly do it. It means as soon as possible in the circumstances which prevail and apply to the party concerned: *Amann Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527 at 558; 92 ALR 601 at 632. Starke J in *Bowes v Chaleyer* (1923) 32 CLR 159 at 193 put the expression as meaning "within a reasonable time" but this seems too generous to the person obliged to carry out the activity unless reasonableness is judged against the criteria referred to in the Amann case.
>
> The South Australian Full Supreme Court applied an approach similar to that in the Amann case when considering a requirement to act "with all convenient speed": *Registrar of Motor Vehicles v Vu* [2013] SASCFC 10; (2013 115 SASR 385.

[7] Pearce and Geddes *Statutory Interpretation in Australia* 8th edition at [12.16].
[8] Pearce and Geddes n 7 at [12.17].
[9] Pearce and Geddes n 7 at [12.17].

19. As Pearce and Geddes also point out, the phrase "as soon as practicable" is a "little more flexible than "as soon as possible": [10]

> The length of time permitted is to be judged against what is practicable from the viewpoint of the person or body who has to comply with the requirement having regard to its normal procedures and all other surrounding circumstances: *Martin v Commonwealth* (1975) 7 ACTR 1.

20. The authors proceed to discuss two cases that are illustrative of this approach: *McMillan v Territory Insurance Office* (1988) 57 NTR 24 and *Maddalozzo v Maddick* (1992) 84 NTR 27).[11]

21. In *McMillan v Territory Insurance Office* (1998) 57 NTR 24 at 26-27 Gallop J said:

> My present task is to ascertain the meaning of the phrase "as soon as practicable" as used in s 31(1) and to consider its relevance to the exercise of the discretion conferred by s 31(2). The phrase "as soon as practicable" is designed to impose a reasonably practical time limit…for making a claim under the Act. What is a reasonably practicable time must vary according to circumstances. No doubt all the surrounding circumstances relative to the claimant must be taken into consideration, as in every other case where it falls to a tribunal to decide what is reasonable. Those circumstances would include the physical and mental capacity of the injured person at the time in question, his degree of business knowledge, the nature and time of his injuries, the result of such inquiries, any difficulties encountered, the magnitude of any injuries, whether they had stabilised and such similar matters.

22. This approach was disavowed by Mildren J in *Maddalozzo v Maddick* (1992) 84 NTR 27 in relation to a requirement for a worker to give notice of his injury as soon as

[10] Pearce and Geddes n 7 at [12.18].
[11] Pearce and Geddes n 7 at [12.18].

23. practicable under the *Work Health Act*. Referring to the statement made by Gallop J in *McMillan v Territory Insurance Office* as to the meaning of "as soon as practicable", Mildren J said:

> In my opinion, this statement is not helpful in understanding the requirements of s 80(1) of the *Work Health Act*. His Honour was there dealing with a totally different statutory regime, and the requirement of s 31 of the *Motor Accidents (Compensation) Act* , with which his Honour was dealing, was a requirement to make a claim under the Act " as soon as practicable after the accident". There is no requirement under that Act to give notice of an injury as well as to make a claim, similar to that contained in the *Work Health Act*.
>
> The provisions of the *Work Health Act* relating to notice of injury and the need to make a claim, have as their origins, the provisions of s 25 of the *Workers' Compensation Act*. That section is similar to s 53 of the *New South Wales Compensation Act* and to the provisions of the *Workmens' Compensation Act* 1906 (UK). The meaning to be given to the requirement that notice must be given "as soon as practicable" had been well settled in England by the early part of this century by decisions of both the House of Lords and the Court of Appeal. The relevant authorities are discussed in the judgment of the Court of Appeal in *Albison v Newroyd* Mill Ltd (1925) 134 LT 171. In that case, the court held that the important question was: "at what time did the worker realise that he had suffered an injury entitling him to compensation under the Act?". 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….
>
> Similarly, Atkin LJ in *Albison v Newroyd Mill Ltd* at 177 observed: "…the learned judge has, I think, misdirected himself, because he has not taken into account the question which is the material question, whether at that time she had reasonable ground for supposing that the injury was such that she might have to make a claim under the Act for compensation…..

Albison v Newroyd Mill Ltd has been followed in Australia by the Worker's Compensation Commission of New South Wales in *Jordan v Metropolitan Water, Sewerage and Drainage Board* [1943] WCR (NSW) 80 at 82.

Section 80(1) does not refer to the time of the injury as the reference point after which notice must be given "as soon as practicable". Therefore the date of the injury is not necessarily the appropriate reference from which that time is to be measured. Section 182(1)(a) requires claims to be made within six months of an injury or, in the case of disease, of the incapacity arising from a disease. This might suggest that the reference point for the giving of notice in the case of an injury is the date of the injury, and the reference point for a disease is the date of incapacity; but I do not think that s 80(1) can be so construed. In my opinion the relevant reference point will often be the date that financial loss begins to occur. If an injury is not immediately productive of financial loss, it may not be practicable for a worker to give notice if the injury appears to be minor and not likely to lead to a claim. So much was recognised by Atkin LJ in *Albison v Newroyd Mill Ltd* at 177 when his Lordship observed: "It is quite plain that if claims for compensation by workmen, whenever they receive slight and most trivial injuries, depend on notice being given at once, the object of the Act would be defeated, and, more than that, the employers and their insurance companies would be worried with a great many more notices which, I think, on the whole they would be sorry to receive. At any rate, that is not the law".

The question of whether or not a worker has failed to give notice as soon as practicable is a question of law. The facts which bear upon this question are for the Work Health Court to determine, but the ultimate conclusion is necessarily a question of law. As Lord Parker observed in *Farmer v Cotton's Trustees* [1915] AC 922 at 932: "…where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only".

24. Further guidance as to the meaning of the phrase "as soon as practicable", as appears in rule 5.03(2), can be gleaned from a consideration of the following authorities.

25. As noted earlier, the words "as soon as practicable" are a temporal expression. Indeed, the words impose a time limit. As pointed out in *Horne v Retirement Guide Management Pty Ltd* [2017] VSCA 47 at [88] and [108]:

> The content of a time requirement of "forthwith" or "as soon as practicable" will vary depending on the facts of each case, but there is nevertheless a fixing of time. As the applicants submitted it is a way of fixing time not by direct specification of dates but by reference to facts which will establish what the time limit is.

26. The phrase "as soon as practicable" does not require the thing to be done as soon as it is physically capable of being done. Although the phrase "as soon as" is emphatic in tone[12] – meaning "at the very time or moment when"[13] – the word "practicable" introduces a degree of flexibility,[14] leaving the content of the time requirement to be determined on the facts of each case.

27. In *Minister of Agriculture v Kelly Lord MacDermitt* LC said that the expression "as soon as practicable" did not mean "as soon as possible", but referred to what was "reasonable in the circumstances and appropriate to the requirements of the situation".[15]

28. In *Nicholl v Hunter* 20 MVR 384 at 389 Smith J echoed this view:

> While the words do not impose a standard of perfection they do require more expeditious action than when something needs to be done within "a reasonable time". The phrase "as soon as practicable" requires the practicalities to be considered and for the certificate to be

[12] *Santhirararajah v Attorney General (Cth) (2012) 296 ALR 625* at [74].
[13] See *Nicholl v Hunter* (1994) 20 MVR 384 at 389.
[14] See *Santhirararajah v Attorney General (Cth) (2012) 296 ALR 625* at [74].
[15] This was cited with approval in *Tampion v Chiller* [1970] VR 361 at 365.

given to the person at the moment when the circumstances of the given situation allow it to be done. A reasonable approach is to be taken in assessing any given case.

29. In *The State of Western Australia & Anor v Rothmans of Pall Mall* (Australia) Ltd [2001] WASC 25 at [24] the Court held that the phrase should be read "as soon as reasonably practicable". The Court held that it was appropriate to "read in the qualification of reasonableness, although it is probably inherent in the phrase in any event".[16]

30. The Court also helpfully pointed out that in order to determine whether the notice that was given was given as soon as practicable, "all relevant circumstances must be taken into consideration, but these considerations must relate to the giving of a notice…"[17] To be a relevant circumstance, "the matter must impact on the ability of the respondent to give the notice required by the section".[18]

31. In my opinion, the phrase "as soon as practicable" contained in rule 5.03(2) of the ….is to be construed as follows:

    (1) the words in question impose a time limit which is fixed by reference to facts which will establish what the time limit is;

    (2) the words make it clear that the appropriate reference point from that time limit is to be measured is the date of filing of the application;

    (3) the words do not require the application to be served "as soon as possible" – that is to say as soon as the application is physically capable of being served;

[16] *The State of Western Australia & Anor v Rothmans of Pall Mall (Australia) Ltd* [2001] WASC 25 at [24].
[17] *The State of Western Australia & Anor v Rothmans of Pall Mall (Australia) Ltd* [2001] WASC 25 at [26].
[18] *The State of Western Australia & Anor v Rothmans of Pall Mall (Australia) Ltd* [2001] WASC 25 at [27].

(4) the words allow for a degree of flexibility, leaving the time within which the application is to be served to be determined on the particular facts of each case;

(5) the words do not impose a standard of perfection, though they do require more expeditious action than when something needs to be done within "a reasonable time";

(6) the words require the practicalities of the given situation to be considered and for the application to be served at the moment when the circumstances of the given situation allow it to be served;

(7) the words require a reasonable approach to be taken in assessing each case;

(8) the words refer to what is reasonable in the circumstances and appropriate to the requirements of the situation;

(9) the words should be read "as soon as reasonably practicable", although the qualification of reasonableness is probably inherent in the phrase in any event;

(10) the words require that the application be served without delay once circumstances, objectively assessed, render it reasonably practicable to serve the application;

(11) the words impose a reasonably practicable time limit for the service of an application;

(12) the words implicitly require that all circumstances that are relevant to the service of the application must be considered when determining whether the application was served " as soon as [reasonably] practicable";

(13) the words contemplate that to be a relevant circumstance the matter must impact upon the ability of the worker to serve the application as required by the rule of court;

(14) the words permit consideration of the conduct of the worker and his or her state of mind following the filing of the application in determining whether the application was served as "soon as practicable".

WAS THE APPLICATION SERVED AS "AS SOON AS PRACTICABLE"

32. In order to determine whether the application was served "as soon as practicable" it is necessary to apply the proper construction of that phrase to the factual matrix of this case.

The Factual Matrix

33. The factual matrix is to be distilled from the affidavit evidence before the Court – most of which is on "information and belief".

34. The employer relied upon the affidavit of Chris Osborne affirmed on 2 January 2018.

35. Ms Osborne, the solicitor for the employer, deposed that on or about 18 March 2015 the worker submitted a claim for compensation for an injury to her neck, shoulder and upper back suffered on 6 March 2015. The solicitor further stated that the employer's insurer deferred liability for the worker's claim; and on 8 May 2015 issued a Notice of Decision disputing liability. She went on to depose that the worker requested a mediation in relation to the decision, and following a mediation, which was conducted on or about 9 July 2015, a "no change" certificate was issued on 10 July 2015.

36. Ms Osborne stated that she was informed by the insurer's senior claims manager that the insurer proceeded to close its file on or about 9 November 2015 when no

documentation was received indicating that the worker had made an application to the Work Health Court. She further deposed that on or about 1 August 2017 the solicitors for the worker served on the employer the application together with an Index of Documents and Additional Index of Documents.

37. The employer also relied upon the affidavit of Kate Elizabeth Frost affirmed on 22 January 2018.

38. Ms Frost, the solicitor with carriage of the matter on behalf of the employer, deposed that before disputing liability in respect of the worker's claim on 8 May 2015 the insurer had deferred liability on or about 31 March 2015. The solicitor stated that during the deferral period the insurer had arranged for the worker to be examined by Dr Michael Bowles, occupational physician, who issued a medical opinion (dated 8 April 2015) and a final medical certificate (dated 24 April 2015).[19]

39. Ms Frost deposed that despite disputing liability for the worker's claim, on or about 8 May 2015 the insurer provided, on a without admission of liability basis, a:

    (i) Return to Work Plan dated 19 May 2015;

    (ii) Worksite Assessment Report dated 20 May 2015; and

    (iii) Workplace & Ergonomic Assessment Report dated 15 July 2015.[20]

40. Ms Frost went on to say that correspondence confirming the provision of ongoing support for the worker's Return to Work by the employer and the insurer was sent to the worker by the insurer on or about 18 May 2015.[21] Ms Frost says that correspondence was followed by mediation which was held on 9 July 2015 where it

[19] Both documents are annexures to Ms Frost's affidavit.
[20] These documents are also annexures to Ms Frost's affidavit.
[21] See the annexure to Ms Frost's affidavit.

was agreed that a report would be obtained from the worker's general medical practitioner, Dr Goodhand.

41. Ms Frost says that she was informed by the insurer's senior claims manager that Dr Goodhand was requested to provide a report on 22 July 2015: however it does not appear from the insurer's file that Dr Goodhand ever provided a report in relation to the worker.

42. Ms Frost further deposes that the insurer contacted the employer on or about 18 September 2015, advising that it had not heard from the worker and was unsure what her intentions were in relation to her work injury claim. The insurer also inquired whether the employer was aware of the worker's intentions and whether she was back at work full –time.[22] The employer responded to the insurer on or about 22 September 2015.[23]

43. Ms Frost says that after no documentation or information was received from the worker, indicating her intention to challenge the employer's and insurer's dispute of liability for her claim, the insurer closed its file on 9 November 2015.

44. Ms Frost says that since 16 March 2015 the worker has continued to provide the insurer with worker's compensation certificates.[24] In accordance with the restrictions referred to in the certificates, the worker has continued to work 20 hours per week of her 37.5 hour position since March 2015.[25] Furthermore, Ms Frost says that she has been informed by the insurer's underwriting manager that the worker has never indicated any intention of commencing proceedings in the Work Health Court.

[22] See the annexure to Ms Frost's affidavit.
[23] See the annexure to Ms Frost's affidavit.
[24] See the annexure to Ms Frost's affidavit.
[25] See the worker's leave records from 6 July 2009 to 22 December 2017 annexed to Ms Frost's affidavit.

45. The factual matrix can be further distilled from the affidavit of Marcus Spazzapan, who is the solicitor with the conduct of the worker's matter.

46. The solicitor first had contact with the worker on 7 July 2015 at which time the worker informed him that she had suffered an injury in the course of her employment with the employer, and had made a work injury claim that was deferred and which was subsequently disputed by the employer. The worker also informed the solicitor that she was in the process of mediating the disputed the claim, and she was seeking his assistance in explaining the process to her. The solicitor gave her such advice.

47. The solicitor next saw the worker on 22 July 2015 when she informed him that the mediation, which had taken place on 10 July 2015, had been unsuccessful. She also informed him that she had received a Certificate of Mediation in the post on 16 July 2015.

48. At that time the solicitor advised the worker that she had 28 days within which to make an Application to the Court, and that if she did not do so that would jeopardise her entitlement to maintain her right to dispute the employer's rejection of her claim. The solicitor also informed her that he would review the limited material that he had concerning her claim, and provide her with a cost disclosure document and cost agreement.

49. The solicitor drafted a Work Health Court Application and Index of Documents on 23 July 2015. Subsequently, on 27 July 2015 he sent her a letter of advice together with a cost disclosure document and cost agreement for her consideration and action.

50. On 10 August 2015 the worker telephoned the solicitor's office, leaving a message for the solicitor that the Application needed to be filed and requesting a copy of the

filed Application. The worker also requested a return call. However, the solicitor was unable to make contact with the worker.

51. In order to preserve the worker's legal position the solicitor arranged to have the Application and accompanying Index of Documents filed on 12 August 2015. This step was taken despite the fact that the solicitor did not have a costs agreement signed by the worker. The step was taken because it appeared to the solicitor that the worker had a "prima facie reasonable claim" based on her instructions; and the solicitor considered that if he were to allow the limitation period to expire he would be in breach of his professional duties.

52. The solicitor next saw the worker on 3 September 2015. At that time the worker was very unsure about her employment as she was still suffering from the effects of her work injury, and she was hoping that with reduced hours of work (in effect half time) her symptoms would improve. The worker informed the solicitor that she was struggling emotionally.

53. On that occasion the solicitor informed the worker that the Application had been filed, but not served as there were potential cost implications in the event of her application not being successful. The worker was concerned about the costs involved in pursuing her claim. The solicitor referred the worker to the costs agreement provided to her, and informed her that there was insufficient expert medical evidence to support her claim and that on the available evidence it was unlikely that she would have reasonable prospects of success if she were to pursue her claim at that time. The worker became concerned about the cost of obtaining expert medical evidence. The solicitor informed the worker that she should see her general medical practitioner and obtain a referral to a suitable medical specialist, with a view to obtaining a medico-legal report. The solicitor formed the view that without such a

report he would not be able to properly advise the worker as to whether she should pursue her claim.

54. The worker indicated that she would make inquiries with her general practitioner. The worker did not sign the costs agreement. Nor did she formally instruct her solicitor. She was provided with a copy of the Application, which she did not request her solicitor to serve.

55. The worker informed the solicitor that around this period her usual general medical practitioner advised her that he was no longer able to assist her, which necessitated her search for another general practitioner with experience in relation to her type of injury and complaints. This search took some time; but eventually she was able to become a patient of Dr Goodhand.

56. On 30 May 2016 the solicitor received an email from the worker providing him with the name and contact details of a medical specialist (Dr Wilk in Victoria) that Dr Goodhand had recommended that she be referred to.

57. The solicitor made inquiries of Dr Wilk's qualifications and experience and as to a scheduled date for the worker to be examined, as well as the cost of such an examination and provision of a medico-legal report. Dr Wilk responded to the effect that he did not do independent medico-legal assessments. The solicitor informed the worker of this, and suggested that she obtain a referral and travel to see Dr Wilk. The solicitor was not in a position to incur any costs for and behalf of the worker as he had not been retained to carry out any specific work.

58. On 18 August 2016 the solicitor saw the worker. She then informed him that she was reluctant to travel to Victoria to see Dr Wilk due to the expense involved. At that time the solicitor observed the worker's general outlook to be very flat. She also

expressed concern about her lack of sleep, ongoing pain, her future and the fact that her symptoms were not getting better and her work was getting harder. The solicitor urged her to obtain a referral and travel to Victoria to see Dr Wilk. The worker informed the solicitor that she would consider that and get back to him.

59. Although the worker did not tell the solicitor at that time she was very depressed and finding it difficult to maintain a functioning life, as well as being incapable of making any decisions, she informed him of that after the employer had filed its interlocutory application.

60. On 5 September 2016 the solicitor received a telephone call from the worker who informed him that she was at Dr Goodhand's consulting rooms and wished to discuss her treatment, and the need for a specialist diagnosis and medico-legal report. The worker said that she was going to inquire as to the cost of an airfare to travel to Melbourne to see Dr Wilk and attendant accommodation costs. The worker informed the solicitor that she would ask Dr Goodhand to give her a referral to see Dr Wilk.

61. On 6 February 2017 the solicitor attended on the worker who informed him that she had seen Dr Wilk, and relayed what the specialist had said to her, as well as providing a copy of a letter from Dr Wilk to Dr Goodhand dated 24 January 2017.[26] The solicitor advised the worker that as the letter did not address the issue causation, linking her diagnosed medical condition to her workplace, a detailed medico-legal report was required.

62. Between February to the end of the first week of April 2017 the solicitor's workload was particularly challenging, and he overlooked the need to write to Dr Wilk requesting a medico-legal report in relation to the worker. The solicitor wrote to the

[26] This is an annexure to Mr Spazzapan's affidavit.

63. specialist on 6 April 2017, notwithstanding no formal retainer to act was in place.

64. The solicitor was on leave and absent from the office between 10 April and 2 May 2017.

65. On 24 April 2017 a letter was received from Dr Wilk requesting prepayment to allow release of his report. On 24 April 2017 the solicitor requested the worker to pay the fee for the report directly to Dr Wilk.

66. The solicitor received the specialist's report on 24 May 2017. Five days later on 29 May the solicitor attended on the worker, advising her that the report supported her application, as well as informing her of the vicissitudes of litigation and the potential end of her employment. The worker then instructed the solicitor to serve the application and to pursue her claim. At that time the solicitor informed the worker that the only basis upon which he could accept her instructions was on the basis that she sign a costs agreement.

67. The solicitor was unable to provide the worker with the firm's standard cost disclosure and conditional cost agreement until 16 June 2017 because he had travel to Adelaide for personal and family issues. This delayed the provision of the cost agreement for a week.

68. The worker returned the signed cost documents dated 13 July 2017 which the solicitor countersigned on 15 July 2017.

69. On 16 July 2017 the solicitor asked the worker to provide him with updated medical certificates. Those were provided to the solicitor on 20 July 2017 together with medical expenditure documents.

70. On 21 July 2017 the solicitor arranged an Additional Index of Documents to be filed in the Work Health Court.

71. On 1 August 2017 the solicitor personally served the application and Index of Documents and the Additional Index of Documents on the employer.

72. In his affidavit the solicitor deposes that the worker informed him that since 2016 to date she has been greatly concerned about her financial independence and obsessive about not spending any money that she has because of the uncertainty regarding her future. The worker says that she has been drawing down her accumulated sick leave entitlements since the end of her deferred/disputed liability for the work injury claim period in 2015 to date, and which are now coming to an end. Thereafter she will have to live on approximately half pay of her current income.

73. The solicitor further deposes that the worker informed him that she was overcome with depression since the last quarter of 2015 with marked deterioration during 2016, for which she sought treatment in 2017.

74. The solicitor also deposes that the worker informed him that no one from the employer or the insurer has spoken to her about her incapacity/work injury claim since the 2015 mediation, apart from her work supervisor (Sean Marson) inquiring of her whether her work health medical certificates were up to date. The worker says that she was in the habit of providing her certificates to Temira at HR until Temira went on maternity leave in mid-2017. Since then until recently the worker was unsure of to whom the medical certificates should be given. She has recently been informed of the appropriate person.

75. The worker has subsequently provided the employer with up to date medical certificates for the period 18 August 2017 to 14 February 2018.[27]

76. Finally, the solicitor deposes as follows:

[27] The certificates were annexed to the affidavit of Marcus Spazzapan.

> In relation to paragraph 15 of the affidavit of Kate Frost dated 22 January 2017 the worker has informed me and I honestly believe that she is quite reluctant to speak to anyone about her injury, however in the event that she was asked about her intentions in relation to her injury and the Application to the Work Health Court she would have responded honestly.

77. The question that needs to be answered is whether the facts and circumstances of this case support a finding that the application was served "as soon as practicable".

78. Soon after the application was filed the worker received advice from her solicitors that it would be necessary to obtain medico-legal evidence to support her claim for worker's compensation in the Work Health Court, as on the available evidence her claim lacked reasonable prospects of success. The worker was also advised that it would be necessary for her to sign a cost agreement if she wished to retain the services of her solicitors in order to pursue the proceedings she commenced in the Work Health Court. The worker was also made aware of the costs implications of an unsuccessful application in the Work Health Court.

79. The chronology shows that it took about 16 months after her application was filed for the worker to obtain the necessary medical evidence to support her claim in the Work Health Court.

80. Whilst accepting that the requirement in rule 5.03(2) does not require the application to be served as soon as it is physically capable of being served, the rule does require more expeditious action than effecting service within a reasonable time.[28] Whether or not service was effected with the requisite degree of expedition falls to be determined by reference to all of the circumstances of the case, including the

[28] Though it is difficult to see how service 16 months after the filing of the Application could be considered to be service within a reasonable time.

practicalities of the situation, and the conduct and state of mind of the party filing the Application. As regards the party's conduct during the material period, it is relevant to consider whether that party exercised due diligence in relation to the service of the Application. In deciding whether the party exercised due diligence account must be taken of any physical, emotional or psychological factors that may have impacted upon the party's ability to serve the Application as required by rule 5.03(2). Ultimately, it is a question of whether it was reasonable in the circumstances and appropriate to the requirements of the situation not to have served the Application until 1 August 2017.

81. The question that needs to be answered is whether the worker proceeded to obtain the necessary medical evidence with due expedition and due diligence.

82. The first observation to be made is that the worker does not appear to have had any contact with her solicitors during the period 3 September 2015 to 30 May 2016. Notwithstanding that the worker was to take the necessary steps and action to obtain the requisite medical evidence(following her attendance on her solicitors on 3 September 2015) it was not until 30 May 2016 that she informed her solicitors that Dr Goodhand had recommended that see the Melbourne specialist. The intervening period was about nine months.

83. The worker explained that the cause of the delay was that as her general medical practitioner (who was not identified) was no longer able to assist her she had to find another general practitioner. Although the worker says that it took some time to find another general practitioner she does not explain the delay. The worker does not refer to the steps she took to find another practitioner. She does not mention what, if any, inquiries she made concerning another practitioner. Nor does she say whether, as a result of such inquiries, she saw other medical practitioners; and if so why she

did not continue to consult them. Although the worker eventually became a patient of Dr Goodhand, she does not say when she became his patient. Furthermore, the worker has provided no history as to the care and treatment she received from Dr Goodhand from the time she became his patient up until the 30 May 2016 when she informed her solicitors that Dr Goodhand had recommended that she see Dr Wilk.

84. It is not clear from Mr Spazzapan's affidavit when he suggested to the worker that she obtain a referral and travel to Victoria to attend upon Dr Wilk, although it would have been some - time after 30 May 2016. However, what is clear is that on 18 August 2016 the worker informed her solicitor that she was reluctant to travel to Victoria due to the expense – something one would suspect would have been in her mind at the In my opinion, this bespeaks indecision and procrastination on the worker's part, as from the outset financial considerations were an issue for the worker; and were to remain an issue for the simple reason that her financial situation was not going to improve. time she emailed the solicitor on 30 May 2016, providing him with Dr Wilk's details. Indeed, as far back as 3 September 2015, the worker had expressed concern over the cost of pursuing her claim in the Work Health Court – in particular the cost associated with the gathering of expert medical evidence.

85. When, on 18 August 2016, the solicitor pressed upon the need for the worker to obtain a referral and travel to Victoria to see Dr Wilk, the worker said that she would consider that, and get back to him.

86. Whilst the worker indicated on 5 September 2016 that she was going to make inquiries about the cost of an airfare and accommodation costs in relation to travelling to Victoria to be examined by Dr Wilk, it was not until 23 January 2017 that she travelled to Melbourne and was examined by the specialist.

87. In my opinion, the worker failed to take the necessary steps and action to obtain the requisite expert medical evidence with due expedition and due diligence.

88. Although the worker sought to attribute her delay in obtaining the medical evidence to her inability to make decisions because of depression and the fact that she was struggling emotionally throughout the material period of time, the weight to be given to this explanation requires very careful consideration, as the supporting affidavit evidence was on information and belief.

89. Rule 17.06(2) of the *Work Health Court Rules* provides that in an interlocutory application an affidavit may contain a statement of fact based on information and belief if the grounds are set out in the affidavit.[29]

90. Section 75 of the *Evidence Act* is to similar effect.[30] In *Wily v Terra Cresta Business Solutions Pty Ltd* [2006] NSWSC 949 at [11] Palmer J stated:

> The purpose of s75 of the *Evidence Act* is to facilitate the conduct of interlocutory proceedings in circumstances where it is often difficult, at short notice, to adduce evidence in direct and admissible form. For that reason, evidence on information and belief is accepted. However, the requirement of the section that the source of information be revealed goes some way to assisting the court in assessing the reliability of that evidence. Without any indication of the source of the evidence proffered on information and belief, the Court is unable to assess its weight nor can the opponent test the evidence or make any sensible submission as to its weight.

91. These observations apply with equal force to rule 17.06(2) of the *Work Health Court Rules*.

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[29] See also s 172 of the *Evidence Act* which is in similar terms.

[30] The section provides:
"In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source".

92. Although I consider the evidence given by Mr Spazzapan (on information and belief) concerning the worker's depression and emotional state during the relevant period of time to be admissible - as the source of information was identified in his affidavit (namely the worker) - what remains to be considered is the weight to be attached to the evidence.

93. Given that the evidence is highly relevant as to when it was practicable to serve the Application - and is evidence that the worker is in the best position to give - one would have expected direct evidence from the worker explaining her mental and emotional state during the relevant period. Who better than the worker, who has direct knowledge of the primary facts, to explain how her state of depression and general emotional state impacted upon her ability to obtain the requisite expert medical evidence – and ultimately upon her ability to serve the Application as required by rule 5.03(2) of the *Work Health Court Rules*. However, for reasons unknown, there is no affidavit evidence from the worker explaining how her state of depression and emotional state impacted upon the time taken to obtain the medical evidence, and hence upon the time taken to serve the Application.

94. In *Buttonwood Nominees Pty Ltd v Sundowner Minerals NL* (1986) 10 ACLR 360 at 363 Young J observed that although hearsay evidence can be received in interlocutory applications, it normally is not, if the matter sought to be established by that evidence goes to the very heart of the case and proper precautions would have enabled evidence to be given in affidavit form by the relevant witnesses.

95. In the present case – without reversing the onus of proof borne by the employer - the length of the delay in serving the Application called for an explanation from the worker as to why it was not practicable to serve the Application until the time it was in fact served. An explanation in those terms can properly be considered to be a

matter going to the heart of the employer's interlocutory application. Although the Court is prepared to receive the evidence on information and belief in relation to the worker's state of mind, clearly the weight to be given to that evidence must be affected by the centrality of that evidence as to whether the Application was served as soon as practicable.

96. In *Ashby v Commonwealth of Austra*lia (No 3) [2012] FCA 788 at [10] and [11] Rares J considered in the particular circumstances of that case whether evidence on information and belief would be sufficient to satisfy the applicable standard of proof. It must follow that whenever evidence on information and belief is relied upon a party, the probative value of the evidence needs to be assessed by the court. In the present case, the weight to be given to the evidence on information and belief – the probative value of that evidence – must be determined by the Court.

97. In my opinion, the weight to be given to the evidence on information and belief in the present case should be much less than the weight that would have been accorded to the evidence had it been the subject of an affidavit from the worker herself. In my opinion, the evidence should be given little weight.

98. Furthermore, no medical evidence was adduced in support of the explanation that the worker's state of mind impacted upon her ability to obtain the medical evidence and therefore upon her ability to serve the Application. Given that the worker was overcome with depression since the last quarter of 2015 with marked deterioration during 2016 for which she sought treatment for in 2017, one would reasonably expect supporting medical evidence to have been available or readily obtainable – and indeed put before the Court.[31] Had such evidence been adduced, that would have

[31] Although the medical certificates annexed to Mr Spazzapan's affidavit refer to an "adjustment disorder" that condition was not elaborated upon in the affidavit. No medical report from Dr Goodhand was annexed to the affidavit.

gone some way towards overcoming the shortcomings of the evidence on information and belief.[32]

99. In my opinion, the evidence on information and belief to the effect that the worker's psychological state impacted upon her ability to obtain the expert medical evidence – and in turn upon her ability to serve the Application - carries little weight. This is reinforced by the lack of supporting medical evidence.

100. The worker also relied upon her inability to fund the litigation and the costs implications of an unsuccessful application in the Work Health Court.

101. Inability to fund litigation is commonly a problem for workers bringing a claim in the Work Health Court. In such circumstances a worker has to make a considered decision, usually on the basis of legal advice, as to whether to pursue a claim in the Work Health Court, knowing full well the potential costs consequences. It is prudent for a worker to have reasonable prospects of success before deciding to proceed with a claim. Hence, in this case there was a need to obtain expert medical evidence in order for the worker to be properly advised.

102. In most cases, a worker will have to fund the cost of obtaining medical evidence in support of his or her claim. This was the case here.

103. Although the worker was reluctant to obtain such evidence by travelling to Melbourne to be seen by a specialist, that is what she ultimately did – albeit very belatedly, over 7 months after it was recommended that she be examined by Dr Wilk. There is no evidence to indicate that she was in a better financial position at that time than when the recommendation was made, or indeed earlier in September 2015 when she first expressed concern about the cost associated with the gathering

[32] See for example *Dalton & Anor v TCN Channel Nine Pty Ltd & Ors* [2009] NSWSC 492.

of expert medical evidence. It would appear that the financial obstacles to obtaining the evidence were no greater in either September 2015 or May 2016 than they were in January 2017. Accordingly, the worker's explanation that her ability to serve the Application was affected by financial considerations lacks substance.

104. The employer carries the burden of satisfying the Court on the balance of probabilities that the Application was not served as soon as practicable. In my opinion, on the whole of the evidence the employer has discharged that burden.

105. First, the time taken to serve the Application gives rise to a powerful inference that the Application was not served as soon as practicable. Secondly, the various explanations proffered on behalf of the worker for the time taken to serve the explanation are both individually and collectively inadequate or otherwise lacking in probative value - and therefore insufficient to rebut that inference. All things considered, the Application was not served as soon as practicable; and the worker failed to comply with rule 5.03(2) of the *Work Health Court Rules*.

THE CONSEQUENCES OF THE WORKER'S FAILURE TO COMPLY WITH RULE 5.03(2)

106. Having found that the worker failed to serve the Application to the Work Health Court as soon as practicable, it remains to consider whether the employer should be afforded any of the remedies sought in its interlocutory application.

- **The Application for Default Judgment**

107. The employer has applied for default judgment on the basis of the failure of the worker to comply with the requirements of rule 5.03(2) of the Rules.

108. Rule 21.01(1) of the *Work Health Court Rules* provides that a party may apply for default judgment:

(a) on the ground that the other party has failed to comply with these Rules or with an order of the Court; or

(b) as provided by these Rules.

109. Rule 21.03 (1) provides that an application for default judgment is to be made in accordance with Part 6 of the Rules. Such an application is in the nature of an interlocutory application which must be in accordance with Form 6A unless the Court orders otherwise: rule 6.03(a). The application may be supported by an affidavit: rule 6.03(c).

110. In support of its application for default judgment the employer relies upon the affidavit of Kate Elizabeth Frost affirmed on 22 January 2018.

111. After outlining the usual claim and dispute process (at paragraphs 16 – 18), Ms Frost deals with the prejudice that the employer would suffer if the proceedings were to continue as a ground that favours default judgment being entered. She deposes as follows:

> 19. At this stage, I expect that the employer would want to adduce evidence from, among other people in response to and in defence to the worker's substantive application:
>
> a. Ms Kym McMaster, physiotherapist, who provided Konekt's Worksite Assessment Report and Return to Work plan dated 20 and 19 May 2015 respectively;
>
> b. Ms Erin Coote, occupational therapist, who provided Konekt's Workplace & Ergonomic Assessment Report dated 15 July 2015; and
>
> c. the worker's colleagues.
>
> as to causation, liability and incapacity.
>
> 20. On or about 22 January 2918, I telephoned Konekt's Darwin Office and queried whether McMaster and Ms Coote were still employed. I was informed and verily believe to be true that they are no longer employees of Konekt.
>
> 21. I am further advised by Mr Sean Marson, Underwriting Manager of GIO, and verily believe to be true that he had to refer to his records to answer queries directed by GIO's solicitor, Hunt & Hunt, to TIO in relation to the worker's claim, proceedings and TIO's conduct of same over the preceding 3 years.

> 22. In the circumstances, GIO and the employer believes that they have been prejudiced by the delay in the worker's serving her substantive application and seeking to progress same through the Court, given the protracted period of time that has elapsed since the issue of the Certificate of Mediation in relation to her disputed claim. In particular, GIO and the employer are concerned that the employer's position is prejudiced and it may not be able to properly respond and defend the worker's application/proceeding due to:
>
> (a) the time that has elapsed since the worker's injury and her claim to date;
>
> (b) the difficulty with relevant witnesses' memories and recall of events in relation to the worker's alleged injury and claim;
>
> (c) the location and availability of witnesses that the employer may wish to obtain information on in relation to this matter and call as witnesses at any hearing of the worker's application/proceeding;
>
> (d) the added difficulty of obtaining contemporaneous medical records and factual information which the employer may have required in support of its dispute of liability for the worker's claim on issues of pre-existing conditions, credit, evidence from other lay witnesses and other lines of inquiries which may no longer be relevant or available to the employer as a result of the worker's delay;
>
> (e) the additional costs to the employer and its insurer, GIO, in having to deal with and respond to the worker's substantive application/proceeding after GIO had closed its file in relation to same;
>
> (f) the employer and its insurer, GIO, has now lost the opportunity to properly deal manage and/or deal with the employer as a result of the worker's delay.

112. In my opinion, where a party has failed to comply with a rule of court, default judgment should not be entered against the defaulting party unless the non – compliance is so egregious that it cannot be condoned, and can only be addressed by entering default judgment in favour of the other party. A prime example of such egregious conduct is a deliberate or wilful disregard of the rules of court or a consistent failure to comply with a rule of court once an initial non-compliance with the rule has been brought to the attention of the defaulting party. The present case does not fall within either category. The worker's failure to comply with rule 5.03(2) boils down to a simple case of procrastination.

113. However, there may be cases where although the failure to comply with a rule of court is neither deliberate nor persistent, the prejudice caused to the other party as a result of the non-compliance may be so significant that it would be unfair to allow

the proceedings to continue, and in the circumstances default judgment in favour of the other party would be entirely justified.

114. In my opinion, the employer has failed to demonstrate sufficient prejudice to persuade the Court to enter default judgment in its favour.

115. First, the employer has failed to adduce any evidence as to the current location and availability of Ms McMaster and Ms Coote, and the steps taken by it to ascertain their whereabouts and availability. There is no evidence that these two persons are no longer contactable or available to support the employer's case. Accordingly, the employer cannot rely upon the unavailability of these potential witnesses as matter that may prejudice the conduct of its defence of the worker's claim.

116. Secondly, as is apparent from Ms Frost's affidavit, there are records in relation to the worker's claim over the past three years. This contemporaneous documentation of the worker's claim militates against the employer's claim of prejudice.

117. Furthermore, and significantly, the worker has since 16 March 2015 continued to provide the employer with worker's compensation medical certificates spanning from 16 March 2015 through to 13 July 2017. The worker has also in recent times provided the employer with up to date medical certificates covering the period 18 August 2017 to 14 February 2018. In addition, the worker has remained in the employ of the employed, albeit for reduced hours. There has been a continuing employment relationship between the worker and the employer since the Certificate of Mediation and the filing of the Application. This continuing relationship has afforded the employer a reasonable opportunity to observe the worker and her performance at work - including her capacity for work - over a continuous and significant period of time since the date of her work related injury. The fact that the worker has consistently provided the employer with medical certificates relating to

her capacity for work has also afforded the employer ample opportunity to consider and investigate her fitness for full time employment. In my opinion, the combination of these circumstances also militates against the employer's claim of prejudice.

118. The belief on the part of the employer and the insurer (as deposed to in Ms Frost's affidavit) that they have been prejudiced by the delay in the worker serving the Application is not based on material evidence; and does not amount to sufficient proof of prejudice.

119. Furthermore, in my opinion, it is far from too late for the employer/insurer to arrange medical examinations and vocational assessments in relation to the worker with a view to defending and responding to the worker's claim. Notwithstanding the insurer has closed its file, the employer/insurer still have a reasonable opportunity of garnering sufficient evidence in support of their defence of the worker's claim. Given the documented history of the worker's claim and her post injury continuing employment with the employer (during which medical certificates have been provided by the worker) I fail to see how it can be said that the employer has been prejudiced, in terms of its defence of the worker's claim, by the delay in the Application being served.

120. As deposed to in Ms Frost's affidavit, both the employer and insurer claim prejudice in terms of the additional costs involved in dealing with and responding to the worker's Application after the worker's file had been closed. If these additional costs had been identified and explained in Ms Frost's affidavit, they may have demonstrated an element of prejudice that would be capable of being addressed by an order for costs. However, particulars of the claimed additional costs were not provided to the Court by way of affidavit evidence.

121. In my opinion, the employer has failed to demonstrate sufficient prejudice (occasioned by the worker's delay in serving the Application) justifying default judgment being entered in its favour. Nor, in my opinion, has the employer proved to the satisfaction of the Court any element of prejudice that may be capable of being addressed by way of an order for costs against the worker.

- **The Application for Summary Judgement**

122. As an alternative to default judgment, the employer seeks summary judgment in its favour.

123. The employer relies upon the provisions of rule 21.02(1) of the *Work Health Court Rules* which provide as follows:

> (1) A party may apply for summary judgment on relevant grounds, including the following:
>
> (a) the other party, having filed a notice of defence, has no real defence to the claim made in the proceeding;
>
> (b) the notice of defence filed in the proceedings discloses a good defence on the merits;
>
> (c) the other party has no real cause of action;
>
> (d) the proceeding is frivolous, vexatious or an abuse of the process of the Court.

124. Pursuant to rule 21.02(1)(d) the employer seeks summary judgment on the basis that the worker's Application to the Work Health Court is, in the circumstances, an abuse of process.

125. The employer relies upon the decision in *Lexcray Pty Ltd v Northern Territory of Australia (No 3)* [2015] NTSC 69 where Martin J dealt with rule 23.01 of the

Supreme Court Rules, which is in similar terms to rule 5.03(1) of the *Work Health Court Rules*.

126. In *Batistatos* (2006) 226 CLR 256 the High Court made the following observations concerning the concept of abuse of process:[33]

- What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues;[34]
- The concept of "abuse of process" is not at large or without meaning…It "extends to proceedings that are quite seriously and unfairly burdensome, prejudicial or damaging";[35]
- The concept extends to the use of the court's procedures which would be "unjustifiably oppressive to one of the parties" or which would "bring the administration of justice into disrepute";[36]
- Any properly instituted procedural step in the course of proceedings is capable of amounting to an abuse of the court's process;[37]
- Failure to take procedural steps, and delay in the conduct of the proceedings, are capable of amounting to an abuse of process.[38]

127. The employer submits that the worker's delay in serving the Application (being a procedural step in the course of the proceedings) amounts to an abuse of process; and is therefore a proper basis for granting summary judgment in favour of the employer.

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[33] These observations are referred to in *Lexcray Pty Ltd v Northern Territory of Australia* (No 3) [2015] NTSC 69 at [162].
[34] (2006) 226 CLR 256 at [9].
[35] (2006) 226 CLR 256 at [14].
[36] (2006) 226 CLR 256 at [15].
[37] *Lexcray Pty Ltd v Northern Territory of Australia* (No 3) [2015] NTSC 69 at [162].
[38] *Lexcray Pty Ltd v Northern Territory of Australia* (No 3) [2015] NTSC 69 at [162].

128. The employer relies upon the delay in service of the worker's Application, which it says has been unexplained. However, that is not strictly true. Although the Court has found that the Application was not served as soon as practicable, the worker did proffer an explanation for the delay based on financial difficulties and difficulties in obtaining medical evidence to support her claim. However, procrastination and indecision on the part of the worker also contributed to the delay. It should also be noted that part of the delay can be attributed to the solicitors' conduct of the matter, though that portion of the delay has been satisfactorily explained.

129. The delay has been explained. It is clear that the delay was neither deliberate nor contumelious. Nor was it designed to advantage the worker or to disadvantage the employer with respect to the proceedings. The delay did not exhibit any of the characteristics that are commonly associated with the concept of "abuse of process". Nor can the worker's delay in serving the Application be characterised as conduct bringing the administration of justice into disrepute.

130. It is noted that both parties were silent throughout the period of delay. However, as noted earlier the worker provided the employer with medical certificates during the course of her continuing employment. These circumstances do not support the employer's contention that the worker's delay amounted to an abuse of process.

131. Prejudice to the employer as a result of the delay has already be dealt with in the course of considering the application for default judgment. In my opinion, the delay in serving the Application does not give rise to a substantial risk that a trial of the issues in the proceedings would be manifestly unfair and likely to be oppressive, or cause significant prejudice to the employer if the proceedings were to continue.

132. In my opinion, the employer has failed to establish that a continuation of the proceedings would amount to an abuse of process.

- **Permanent Stay of the Proceedings Due to Abuse of Process**

133. In the further alternative, the employer seeks a permanent stay of the proceedings, presumably on the basis that the Work Health Court has inherent jurisdiction to prevent "a misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right- thinking people".[39]

134. As the employer has failed to establish an abuse of process for the purposes of rule 21.02(1)(d) of the *Work Health Court Rules*, it follows that a permanent stay on the grounds of abuse of process should also be refused.

CONCLUSION AND DECISION

135. The *Work Health Court Rules* are designed to facilitate the orderly and expeditious conduct of litigation in the Work Health Court, which is an element in the administration of justice. This case highlights the need for all parties in proceedings in the Work Health Court to comply with the rules of court to ensure the achievement of that objective. Parties and their legal representatives need to be aware that a failure to comply with the rules may have serious consequences for the defaulting party, such as default or summary judgment or a permanent stay.

136. However, in the present case, the Court has determined that although the employer has satisfied the Court that the worker failed to serve the Application as soon as practicable (as required by rule 5.03(2)), the employer's interlocutory application seeking the specified relief should, in the interests of justice, be refused.

[39] *Batistatos* (2006) 226 CLR 256 at [6].

137. Accordingly the employer's application is dismissed. I propose to hear the parties in relation to the question of costs and any consequential orders or directions in relation to the future conduct of the proceedings.

Dated 13 March 2018

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Dr John Lowndes
Chief Judge of the Local Court of the Northern Territory