Van Dongen v Northern Territory of Australia [2005] NTSC 4

PARTIES:	VAN DONGEN, KEITH v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
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CATCHWORDS:

WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS

Claim for compensation – not made within 6 months of injury – whether failure to make claim within time occasioned by reasonable cause

Work Health Act (NT), ss 80, 182(1), 182(3)

Tracy Village Sports and Social Club v Walker (1992) 111 FLR 32, applied

REPRESENTATION:

Counsel:

Appellant:	J Reeves QC
Respondent:	S Gearin

Solicitors:

Appellant:	Mark Heitman
Respondent:	Collier & Deane

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Van Dongen v Northern Territory of Australia [2005] NTSC 4
No. AS 6 of 2004 (20104578)

BETWEEN:

KEITH VAN DONGEN
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 11 February 2005)

[1] This is a work health appeal which is confined to questions of law.

[2] The appellant appeals against that part of a decision of the Work Health Court which dismissed the appellant's claim for compensation on the basis it was not maintainable because his claim for compensation was not made within six months after the occurrence of his injury and the failure to make the claim within time was not occasioned by reasonable cause.

[3] There are three grounds of appeal. First, it is said the learned magistrate erred in law in holding the appellant was required by s 182(1) Work Health Act (NT) to make a claim for compensation within six months of the

occurrence of his injury notwithstanding that he had no entitlement to any compensation under the Work Health Act (NT) during that period. Secondly, it is said the learned Magistrate erred in law in failing to deal with the issues raised by paragraph 4 of the appellant's Further Amended Reply to Defence and Counterclaim in relation to the requirements of s 182 of the Work Health Act (NT). Thirdly and finally in the alternative it is said the learned magistrate erred in law and fact in holding the appellant's failure to make his claim for compensation within six months of the occurrence of his injury was not occasioned by reasonable cause in accordance with s 182(3) Work Health Act (NT).

[4] The appellant first joined the Northern Territory Police Force in January 1986, graduating just before Christmas that year.

[5] The appellant's claim arises from two incidents which were referred to in evidence as the first and second Curtis incidents. The first Curtis incident occurred on 12 August 1996 at Yulara. On that day the appellant was on duty at Yulara with Police Officer Kathy Brett. A call came through indicating that the Aboriginal Community Police Officer at Mutijulu was in trouble. Officer Brett and the appellant travelled by car to Mutijulu. As they approached the community they saw many people standing around. They saw the Police Aide's car. They saw a man named Bob Curtis running towards the aide's car with a smoking stick. Bob Curtis was hitting the Police car. He had a star picket in the other hand. The appellant approached Bob Curtis with his Police baton in his hand. He swung the

baton towards Curtis. Officer Brett was nearby. Curtis was 6 foot 6 inches and approximately 120 kilograms in weight. He was in his early to mid–thirties and was fit. The offender produced a knife. Officer Brett was approximately 50 kilograms and 5 foot 4 inches tall. The appellant said the offender raised the knife and slashed towards Officer Brett's head area. While missing Police Officer Brett the knife got very close to her. At this point Police Officer Brett raised her gun which was loaded and put it in the face of the offender. Officer Brett swore at the offender and told him to back off. The appellant then pushed the offender with the baton and got the gun off Police Officer Brett. The appellant said he did not know why he did that. He said he did not want Police Officer Brett to shoot the offender. He told Police Officer Brett to go and phone Alice Springs and say they were in trouble and although distressed, she did leave the area. The appellant estimated there was some 80 to 100 people in the area including children, women and old men. The appellant screamed at Bob Curtis to put the knife down on the ground but Curtis refused to comply with this direction. The appellant raised Police Officer Brett's gun towards Curtis and they both moved around in a spinning motion. The appellant told Curtis to put the knife down and Curtis said "shoot me". Curtis was also speaking in an Aboriginal language. The appellant said he was focused on Curtis and that he was aware that some people were screaming out words to the effect of "kill him". Some were saying not to kill him. Some were calling him a murderer. Curtis thumped his chest and repeated words to the effect "kill

me". For an hour or so Curtis was coming back and forth with various incidents occurring. Ultimately Curtis eluded arrest and went to Amata. There was no doubt in the learned magistrate's mind, having heard the appellant's evidence, that the incident was prolonged and very serious. That incident was reported and a crime report was submitted and an accident/injury report was also submitted by the appellant to his employer which became Exhibit W4.

[6] It was not contested on appeal that the accident/injury report constituted notice for the purposes of s 80 Work Health Act (NT). In that form which was signed by the appellant the appellant described his injury as to the "mind". In the nature of the injury he wrote "psychological". As to the cause of the injury he said "attack by offender". In answer to the question "do you intend claiming compensation" the box "Yes" was marked. The appellant was not absent from work as a consequence of that incident. No medical attention was sought or provided and no medical expenses were incurred.

[7] The appellant, whom the learned magistrate found to be both an honest and reliable witness, gave evidence that after that incident his life changed. He said it was a huge step for him to put the form in acknowledging that he had a problem with his mind as a consequence of the incident. He felt he had failed and felt he could not cope. He was concerned about how others were going to think of him. He felt it struck at his manhood and at his pride. His

evidence was that he had an injury and that the first Curtis incident had injured him mentally.

[8] No claim for work health compensation was made with respect to the 12 August 1996 incident. The appellant made a claim for compensation under the Crimes (Victims Assistance) Act (NT) with respect to that incident, however, the claim being dated 11 August 1997.

[9] Mr Mike Tyrell, a psychologist, prepared a report in support of the appellant's claim. Mr Tyrell assessed the appellant on 2 September 1997. The report set out two critical incidents involving the appellant, the first, the incident of 12 August 1996 and the second an incident of 9 November 1996.

[10] Following the first Curtis incident the appellant did not seek any treatment. He said he could get over it and whilst he was pretty shaken up he needed "closure". He believed that once he had locked Curtis up he would have "closure". Curtis was found and arrested on 9 November 1996 in the course of what came to be called the second Curtis incident. Early that morning Curtis was waiting for the Police. He had a belt around his hands with the studs facing out. There was a fight in a confined space. The appellant struggled to get Curtis down. Curtis threatened that he would find the appellant's wife and children and threats were made towards them. The arrest was exhausting hard work and was a lot harder than the appellant expected. Curtis was taken into custody and later charged and subsequently convicted of various offences. The appellant's evidence was that after the

arrest he expected to be relieved of the burden and regain what he had lost but that that did not happen. He continued to have trouble sleeping and woke up at night.

[11] As I have said, Mr Tyrell, the psychologist, prepared a report in respect of each Curtis incident. He diagnosed the appellant to be suffering from an "Adjustment Disorder with features of mixed emotions from the first incident and particularly Depression after the second incident". Mr Tyrell said the appellant required counselling assistance and medical oversight. He also opined that without further assistance the appellant's condition could become substantial and more impairing.

[12] The appellant gave evidence that the crunch came with an incident in February 1998 in the course of his work as a police officer. The appellant punched an offender who had picked up and lifted a knife and subsequently wrestled him. The offender threw punches and the appellant received two punches to his rib cage while he has struggling to arrest the offender. The appellant sustained an injury to his ribs although no x–ray was taken. His evidence was that it was at this point he decided he was not going to work any more as a police officer. The appellant resigned from the Northern Territory Police on 9 June 1998. He went to Western Australia with his wife. He made applications for several jobs. The appellant accepted a job with the Public Advocate.

[13] The appellant lodged a claim for Crime Victim Assistance and Workers Compensation with respect to the 1998 incident. In September 1998 he came back to the Northern Territory to give evidence in the Crime Victim Assistance cases involving Curtis. After returning to Perth he sought psychological counselling. He did not consider he received any great benefit from the session. At that time he was beginning to get tearier and more confused. He was struggling to keep on top of things. There was a struggle inside his head. In the latter half of 1999 he suffered a major mental breakdown.

[14] The learned Magistrate found:

(1) that the appellant sustained a mental injury on 12 August 1996 which arose out of or in the course of his employment with the Northern Territory Police Force;

(2) that the appellant gave notice to his employer of that injury by way of the accident/injury report (Exhibit W4) which fulfilled the notice requirements of s 80 Work Health Act (NT);

(3) that the appellant was partly incapacitated as defined in s 3 Work Health Act (NT) during the six month period during which he was required to commence a claim for compensation, that is to say, the period from 12 August 1996 to 12 February 1997;

(4) that during that period the appellant was not able to carry out all his duties as an operational police officer although he nevertheless received increased entitlements for undertaking operational duties which, in part, he could not undertake, and further, that these were matters of which the appellant was aware and his employer was unaware;

(5) that the appellant did not incur any medical expenses or suffer any loss of earnings during the relevant six month period;

(6) that no claim for compensation was brought within the six month period after the occurrence of the injury as required by s 182(1)(a) Work Health Act (NT);

(7) that the appellant voluntarily left his employment with the Northern Territory Police Force to return to Western Australia;

(8) that for the purposes of s 182(3) Work Health Act (NT) there was no "other reasonable cause" for the appellant's failure to make a claim for compensation within the relevant six month period in respect of the injury of 12 August 1996.

[15] The learned magistrate also found that within the six month period the appellant had no treatment and did not seek to obtain a medical opinion as to whether or not he had a psychological injury or to diagnose the nature of any injury. The learned magistrate found that at no stage did the appellant

seek any medical attention or seek to have his symptoms documented or treated. She also found that nothing was said to the appellant's employer sufficient to put the employer on notice that the appellant should be taken off operational duties or that he was suffering a mental injury. The magistrate found the appellant hoped that his symptoms would end but that did not transpire. She found that the worker hoped to put matters behind him. She also found the worker hoped that in his work he would not be subjected to the same sort of stress again but that in all the circumstances of the case, that was unreasonable. She further found the appellant lodged work health claims in relation to separate incidents both before and after the first Curtis incident and that during the relevant six month period he had lodged a work health claim in respect of the second Curtis incident. The learned magistrate found that the appellant was not an immature person. As at 1996 he was 35 years of age. He was able to seek assistance for compensation claims prior to and during the relevant period. He was educated to University level.

[16] The learned magistrate said "In the whole of the circumstances of the case the fact that he did not make any claims for, inter alia, medical expenses in the relevant period is not determinative of whether his failure to make a claim for compensation was occasioned by other reasonable cause". The learned magistrate said it was a relevant factor albeit one which did not overshadow other reasons for rejecting the appellant's s 182(3) argument.

[17] The principal submission of counsel for the appellant was that during the relevant period, the appellant having incurred no expenses or loss of income therefore had no entitlement to compensation, that is, he had no "claim to compensation", and that, as a matter of law, was a reasonable cause for not making a claim for compensation within the terms of s 182(3) Work Health Act (NT). It was submitted that the learned magistrate had erred in law in having regard to the whole of the circumstances of the case rather than isolating a single reasonable cause. A single reasonable cause, it was submitted, was the fact that during the relevant period the appellant had no claim to compensation to pursue.

[18] The learned magistrate referred to the following passage from the judgment of Mildren J in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 40:

> "A hope and expectation that a worker might make a complete recovery may amount to reasonable cause as a matter of law. In *Fenton v Owners of Ship Kelvin* [[1925] 2 KB 473], Pollock MR said (at 481):
>
> > 'Efforts have been made from time to time to give some sort of indication of what is 'reasonable cause'. It is impossible, of course, to give an inclusive definition of it, but in *Webster v Cohen Brothers* (1913) 6 BWCC 92 at 97, to which our attention has been drawn, Buckley LJ says: "We must distinguish between two different sets of facts: in the one the workman says, 'If things continue as they are, I shall never require to give notice of any claim for compensation'; that might be reasonable cause for not giving notice. The other state of facts is this; the workman says to himself, 'I have had an accident, the results of which are serious, but I think they will alter for the better. I shall not give my employer notice of the accident, because if, as I hope, the results alter for the better, I shall never have to give notice of a claim for

> compensation at all.' That is not reasonable cause for the failure to give notice of the accident." '
>
> The learned Master of the Rolls went on to say that there could be difficulty in appreciating the line of demarcation between these two contrasted statements, but that, in cases where the injury is latent, difficulty of diagnosis and perhaps of prognosis, it is easier to find that there was reasonable cause."

The learned magistrate pointed out that following the second Curtis incident and the failure of the appellant's symptoms to dissipate the appellant was not in any position to say "if things continue as they are, I shall never require to give notice of any claim for compensation", during the relevant period.

[19] I agree with the conclusion of the learned magistrate that the appellant failed to establish on the balance of probabilities other reasonable cause for not lodging a claim in respect of the 12 August 1996 incident within the relevant six month period. He was found to have knowingly incurred an injury which incapacitated him from work. He was incapacitated from doing the job for which he was paid. To his knowledge he was only fit for work of a non–operational type for which the pay was less. That entitled him to compensation for the difference. In my opinion the learned magistrate was fully entitled to take account of the full circumstances of the case. The appellant was duty bound to apprise his employer of the situation. By not coming forward as the learned magistrate found and seeking assistance, the appellant did not give his employer the opportunity to take steps for his rehabilitation. As the learned magistrate pointed out the Work Health Act

(NT) is a scheme which aims to rehabilitate workers as well as compensate them. On the findings of the learned magistrate the appellant was entitled to compensation under the Work Health Act (NT) during the six month period.

[20] The first and third grounds of appeal should be dismissed.

[21] In ordering dismissal of the appellant's claim for compensation the learned magistrate apparently overlooked the further issues raised by paragraph 4 of the appellant's Further Amended Reply to Defence and Counterclaim in relation to the appellant's 1999 mental breakdown and the requirements of s 182 Work Health Act (NT) in regard thereto. Those issues centred upon the appellant's mental breakdown in the latter half of 1999 which was said to arise out of his employment with the Northern Territory Police Force. In these circumstances the appellant ought to have the opportunity to re-agitate those issues before the learned magistrate. Findings of fact relevant to those issues not having been addressed by the Work Health Court it is inappropriate that I seek to determine those matters on appeal. The order dismissing the appellant's claims for compensation should be set aside. I will hear the parties as to the appropriate formal orders and as to costs.
