Van Dongen v Northern Territory of Australia [2005] NTCA 6

PARTIES:	VAN DONGEN, Keith
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 2 of 2005 (20104578)
DELIVERED:	13 October 2005
HEARING DATES:	15 August 2005
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN AND RILEY JJ

CATCHWORDS:

WORKERS' COMPENSATION – APPEAL – PROCEEDINGS TO OBTAIN COMPENSATION

Work Health Act (NT) – whether worker's claim for compensation was not made within the relevant period through 'other reasonable cause' – the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of the worker must be considered – worker chose not to make a claim and continued to receive remuneration and allowances for work that he could not and did not perform – reasons for failure to make a claim were not those to be expected of a reasonable person – there was no reasonable cause for failure to make a claim within time.

Supreme Court Act s 55(2)(b)
Work Health Act (NT) s 3, s 116, s 182, s 182(1)(a), s 182(2), s 182(3)
Worker's Compensation Act 1949 (NT) former, s 25
Workmen's Compensation Act (Eng) s 14(1)

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and Others (1997) 115 NTR 25, referred to.
Collector of Customs (NSW) v Southern Shipping Co Ltd [1962] 107 CLR 279, referred to.
Dare v Bellette (1994) 4 Tas R 138, referred to.
Dowell Australia Ltd v Archdeacon (1974-1975) 132 CLR 417, applied.
Horton v Burton [1999] WASCA 82, referred to.
Kitchen v C. Koch & Co [1931] AC 753, referred to.
Murray v Baxter (1914) 18 CLR 622, referred to.
Fazlic v Milingimbi Community Inc (1981-1982) 150 CLR 345, referred to.
Tiver Constructions Pty Ltd v Clair (1992) 110 FLR 239, referred to.
Black v City of South Melbourne [1963] VR 34 at 38, considered.
Tracy Village Sports & Social Club v Walker (1992) FLR 32 at 41, applied.
Quinlivan v Portland Harbour Trust [1963] VR 25 at 28, applied.
Fenton v Owners of Ship 'Kelvin' [1925] 2 KB 473 at 482, cited.
Butt v John W Eaton (1920) 29 CLR 126, cited.
Webster v Cohen Bros (1913) 6 BWCC 92 at 97, cited.
Melbourne & Metropolitan Tramways Board v Witton [1963] VR 417 at 420, considered.
Banks v Comcare (unreported, Federal Court of Australia, 22 May 1996), considered.

Bennion *Statutory Interpretation* 2nd ed.
Broom's Legal Maxims 10th ed. (1939)
Maxwell *On Interpretation of Statutes* 12th ed.

REPRESENTATION:

Counsel:

Appellant:	J. Reeves QC with I. Morris
Respondent:	S. Gearin

Solicitors:

Appellant:	Mark Heitmann
Respondent:	Collier & Deane

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

Van Dongen v Northern Territory of Australia [2005] NTCA 6
No AP 2 of 2005 (20104578)

BETWEEN:

KEITH VAN DONGEN
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 13 October 2005)

MARTIN (BR) CJ:

[1] I agree with Riley J that the appeal should be dismissed for the reasons given by his Honour. I wish to add only the following brief observations.

[2] The narrow point advanced by the appellant was that as he did not suffer a compensable loss by way of expenses or income, it was "impossible" for him to pursue a claim for compensation within the relevant six month period. In those circumstances, for the purposes of s 182(3) of the Work

Health Act, it followed that the failure to make a claim was occasioned by "reasonable cause".

[3] On the appellant's own evidence and the findings of the learned magistrate, as a consequence of the injury sustained during the course of his employment on 12 August 1996 in the first Curtis incident, the appellant was suffering from a reduced capacity for work. The appellant was unable to carry out properly the terms of his employment. Although the appellant was hoping that his condition would improve, after the second Curtis incident on 9 November 1996 he was aware that his inability was ongoing and that he was unlikely to recover in the foreseeable future. With that awareness, the appellant refrained from informing his employer of his inability brought about by injury sustained in the course of his employment. The appellant refrained from conveying that information to his employer in the knowledge that if he did so the employer would have changed the appellant's terms of employment thereby causing a compensable loss to be suffered by the appellant.

[4] On one view, it might seem odd that a worker who has suffered an injury in the course of the worker's employment resulting in an inability to carry out properly the terms of employment, but who has not thereby suffered a compensable loss, should be required to make a claim within the six month period or run the gauntlet of establishing that the failure to make the claim within that period was occasioned by reasonable cause. However, the interpretation for which the appellant contended would leave the employer

without notice of the inability brought about by injury sustained in the course of employment until such time as the worker sees fit to inform the employer of that inability. In the meantime the worker is recompensed by full salary notwithstanding that the worker is unable to carry out properly the terms of the worker's employment. In addition the employer is denied the opportunity of placing the worker in appropriate conditions of employment and of both avoiding exacerbation of the injury and arranging appropriate rehabilitation.

[5] The terms of the legislation are not ideally suited to the circumstances under consideration. If the employer's construction is correct, the appellant was required to make a claim at a time when he had not incurred a compensable loss. The loss would have followed the making of the claim. Notwithstanding that difficulty, however, in my opinion it was not "impossible" to make the claim and the construction for which the employer contended is to be preferred. The appellant's construction tends to undermine the purposes of the statutory scheme in significant respects.

[6] While a delay beyond six months occasioned by the hope of recovery might amount to reasonable cause in appropriate circumstances, if a worker fails to disclose to the employer an inability to carry out properly the terms of employment caused by injury in the course of employment, the absence of compensable loss will not necessarily amount to reasonable cause. On the facts found by the magistrate, the appellant failed to establish reasonable cause.

MILDREN J:

[7] This appeal raises a short question of construction relating to s 182 of the Work Health Act.

Factual Background

[8] For the purposes of understanding the arguments of counsel for the appellant and the respondent, it is necessary to refer briefly to the factual findings of the learned magistrate who constituted the Work Health Court at the first instance. These are summarised by the learned judge who heard the appeal from the Work Health Court as follows:

> "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 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.

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 that 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 that the appellant lodged work health claims in relation to separate incidents both before and after the [injury on 12 August 1996] and that during the relevant six month period he had lodged a work health claim in respect of [a second incident. Both injuries were concerned with the arrest of the same person.] 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."

[9] Section 182 of the Work Health Act provided [at the relevant time]:

"182 TIME FOR TAKING PROCEEDINGS

(1) Subject to subsections (2) and (3), proceedings for the recovery under this Act of compensation shall not be maintainable unless notice of the injury has been given before the worker has voluntarily left the employment in which he was injured and unless the claim for compensation has been made –

(a) Within 6 months after the occurrence of the injury or, in the case of a disease, the incapacity arising from the disease; or

(b) In the case of death, within 6 months after the advice of death has been received by the claimant.

(2) The want of notice or a defect or inaccuracy in the notice shall not be a bar to the maintenance of the proceedings referred to in subsection (1) if it is found in the proceedings for settling of the claim that the employer is not, or would not if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy or that the want, defect or inaccuracy was occasioned by mistake, absence from the Territory or other reasonable cause.

(3) The failure to make a claim within the period specified in subsection (1) shall not be a bar to the maintenance of the proceedings if it is found that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable case.

(4) For the purposes of subsection (1), where a worker left his employment only by reason of the fact that, because of an injury received in that employment, he was unable to continue in that employment, he shall be taken not to have voluntarily left that employment.

(5) Without limiting the generality of the meaning of "reasonable cause" in subsection (3) –

(a) the making of a payment to a person which the person believes to be a payment of compensation; or

(b) any conduct on the part of the employer or his insurer or agent, or on the part of an employee of any of them purporting to act on behalf of the employer, by which a person is led to believe that compensation will or will probably be paid to him or by which he is led to believe that he is not entitled to compensation,

shall be taken to be a reasonable cause within the meaning of that expression."

[10] The learned magistrate held that, "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", although she held that it was a relevant factor to be considered with other relevant facts within the six month period commencing from the date of the appellant's injury. In the result the learned magistrate found that the appellant had not made a claim for compensation within six months from the occurrence of the injury and had failed to establish a reasonable cause for not doing so within the meaning of s 182(3). In arriving at her conclusion, the learned magistrate found that the appellant knew he was partially incapacitated and suffering incapacity as a consequence of the injury in the relevant period which had a relatively severe and negative impact upon him and his work. Whilst initially he had a hope and expectation that his condition might improve he knew his condition had not improved and was

unlikely to improve well before the six month period was up. He continued to perform duties for which he received increased entitlements which he knew, in part, he could not undertake. By not coming forward and seeking assistance, he did not give his employer the opportunity to assist him.

The appellant's submissions

[11] The appellant submitted that during the "relevant period" as the appellant neither suffered a loss of earnings nor incurred medical or other expenses compensable under the Act, he had no claim for compensation under the Act. It is not in contention that the "relevant period" for the purposes of s 182(3) of the Act is the initial six months period following the injury on 12 August 1996: see *Murray v Baxter* (1914) 18 CLR 622; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 40-41. In s 3 of the Act "compensation" is defined to mean "… a benefit, or an amount paid or payable, under this Act as the result of an injury to a worker…" Therefore it was submitted that as there has been no financial loss incurred, there was no benefit or amount paid or payable under the Act.

[12] Mr Reeves QC for the appellant next submitted that it followed therefore that it was impossible for the appellant to have made a valid claim for compensation within the relevant period. He further submitted, relying on obiter dicta falling from Lord Atkin in *Kitchen v C. Koch & Co* [1931] AC 753 at 764-5, that the obligation to make a claim does not exist where it is impossible in fact and in law to make a valid claim. Therefore, so the

argument went, s 182(1) did not apply to the circumstances of this case or, alternatively, that it amounted to a reasonable cause as a matter of law, within the meaning of s 182(3).

The respondent's submissions

[13] Counsel for the respondent, Ms Gearin, submitted that the appellant's argument that it was impossible for the worker to make a claim is circular. It was submitted that, on the facts as found, the worker deliberately chose not to make a claim for this own purposes. But, so the submission went, the appellant could have made a claim and if he had done so, the respondent would have been liable to meet it to the extent that the appellant's partial incapacity resulted in financial loss. It was submitted that had the worker made a claim, on the facts, he would have lost the entitlement to an allowance for certain duties he was unable to perform and therefore he would have suffered financial loss. Consequently the appellant was obliged to make a claim within six months and his failure to do so could not be excused under s 182(3) because the learned magistrate found that he did not have a reasonable cause for not doing so. It was also submitted that as there was an evidentiary basis for that finding, it cannot be disturbed on appeal because that is a question of fact and not of law.

Lex non cogit ad impossibilia

[14] The first of the appellant's contentions is based on the maxim that the law does not compel a person to do that which he cannot possibly perform – *lex non cogit ad impossibilia*. Consequently, where a statute provides for the doing of a thing within a particular time or in a particular manner or by a particular individual the question is whether it was the intention of the legislature that the consequences of non-compliance must be visited upon the person affected by the statute even where it was impossible for the person to have complied with the statute: see *Dare v Bellette* (1994) 4 Tas R 138 at par 12; *Horton v Burton* [1999] WASCA 82 at par 21; *Collector of Customs (NSW) v Southern Shipping Co. Ltd.* [1962] 107 CLR 279 at 287, 291, 295; *Dowell Australia Ltd v Archdeacon* (1974-1975) 132 CLR 417 at 426; Maxwell, *On Interpretation of Statutes*, 12th ed., pp 327-328; Bennion, *Statutory Interpretation*, 2nd ed., at 788. Generally speaking, unless the language of the statute is clear on the subject, the principle has been held to apply so as to excuse non-compliance. In *Kitchen v C. Koch & Co* [1931] AC 753, the House of Lords considered whether a worker who contracted an industrial disease but who had failed to obtain a certificate as to his illness was prevented from bringing an action to recover workmen's compensation. The scheme of the English provisions required the worker to claim compensation within six months from the date of the accident which in the case of a disease was taken to mean the date upon which the certifying

surgeon certified as the date on which the disablement commenced. Section 14(1) of the Workmen's Compensation Act (Eng) provided that:

> "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof… and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing injury…"

[15] Only Lord Atkin, at 764-765, thought that, as the worker was unable to comply with the provision, the worker could be excused because of impossibility, whilst the other members of the House held that the failure was occasioned by reasonable cause.

[16] Be that as it may, it is well established that if the failure to be able to comply was due to the fault of the person whose responsibility it was to comply, the failure cannot be excused. In *Dowell Australia Ltd v Archdeacon* (supra) at 426, McTiernan J approved of the following passage from *Broom's Legal Maxims*, 10th ed. (1939) at 162-163:

> "… the law, in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling than to impossibilities, and the administration of law must adopt that general exception in the consideration of all particular cases. 'In the performance of that duty, it has three points to which its attention must be directed. In the first place, it must see that the nature of the necessity pleaded be such as the law itself would respect, for there may be a necessity which it would not. A necessity created by a man's own act, with a fair previous knowledge of the consequences that would follow, and under circumstances which he had then a power of controlling, is of that nature. Secondly, that the party who was so placed used all practicable endeavours to surmount the difficulties which already formed that necessity, and which on fair trial he found

> insurmountable. I do not mean all the endeavours which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion, and an ordinary knowledge of business. Thirdly, that all this shall appear by distinct and unsuspected testimony, for the positive injunctions of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation.' (*The Generous*)."

[17] It might well be said that the appellant did not use all practical endeavours to "surmount the difficulties which already formed that necessity". He could have sought medical assistance, which on the learned magistrate's findings he ought to have done and had he done so, it probably would have resulted in his being able to lodge a claim within the relevant period. On the findings of the learned magistrate the maxim lex non cogit ad impossibilia does not apply.

Other reasonable cause

[18] The next question is whether on the facts as found by the learned magistrate, the Court ought to have found as a matter of law that the failure to lodge a claim, although not impossible, was occasioned by "other reasonable cause".

[19] The argument of the appellant was that since the appellant had suffered no loss in that period, there was nothing by way of compensation for him to claim and therefore the appellant had reasonable cause for failing to lodge his claim within the relevant period.

[20] It was submitted by counsel for the respondent that this was a question of fact for the learned magistrate to determine and from which there is no

appeal under s 116 of the Work Health Act which is limited to questions of law. In *Fenton v Owners of Ship 'Kelvin'* [1925] 2 KB 473, Atkin LJ (as he was then) said, at 490:

> "The other question which arises is whether the learned judge was right in finding that there was reasonable cause for not giving notice earlier than it was given. To my mind there was evidence on which he could so find. I do not think that is quite conclusive, because what is or is not reasonable cause is plainly, I think, on the authorities a question of law. But having determined the question of law whether a cause could exist which might be a reasonable cause, then obviously it is for the county court judge to find on the facts whether they bring the case within that reasonable cause."

[21] That passage was referred to in *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32 at 37, but later decisions of this Court have made it plain that whether or not the facts as found by the learned magistrate at first instance or which are not in dispute fall within or without the provisions of a statute is a question of law: see *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 245; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation and Others* (1997) 115 NTR 25 at 32 and the authorities therein referred to. That being so, the question of whether or not on the facts there was reasonable cause within the meaning of s 182(3) of the Act is a question of law.

[22] The appellant's submission, however, in effect was that a finding that there was nothing to claim in the relevant period must amount to reasonable cause regardless of the circumstances of the case. In other words, factors such as whether or not the appellant behaved reasonably in not seeking medical

assistance were irrelevant to that question. Initially, I was attracted to this argument, because it seemed to me that fairness to the parties required that the unreasonable failure to seek medical assistance was a matter which was best taken into account as a matter going to a failure to mitigate. It is well established that a failure to mitigate is a matter which can be taken into account in Workmen's Compensation proceedings: see *Fazlic v Milingimbi Community Inc* (1981-1982) 150 CLR 345 at 353-354.

[23] However, on further reflection it seems to me that whilst the fact that there is nothing to claim in the relevant period will often, if not usually, amount to reasonable cause for the failure to make a claim, there can be no hard and fast rule, as the court is bound to consider all of the circumstances of the case in determining what is and what is not reasonable cause. If, as is the case here, the worker deliberately delayed seeking medical advice in circumstances which were not that which a reasonable person might do in looking after his own interests, and if, had he done so, a claim for compensation would probably have arisen, even if for no more than the cost of medical treatment, within the relevant period, thus enabling him to have made a claim, that might result in a finding that there was no "reasonable cause".

[24] In this case, it was not argued that in all of the circumstances the learned magistrate's conclusion was wrong in law, nor that there was no evidence to support her conclusions, but on the very narrow grounds indicated above. As those grounds cannot succeed, the appeal must be dismissed.

RILEY J:

[25] With respect, I agree with the conclusion of Mildren J that this is not a case in which the maxim lex non cogit ad impossibilia has application.

[26] The issue in this case is whether the claim for compensation was not made within the relevant period through "other reasonable cause". Section 182(3) provides that the failure to make a claim within the specified period shall not be a bar to the maintenance of the proceedings if the failure "was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause". The same expression is employed in s 182(2) of the Act dealing with the failure to give notice of injury. In the absence of compelling reason to the contrary, the expression must be given the same meaning in each subsection. Over the years, and in various jurisdictions, efforts have been made to give some guidance in relation to what amounts to "other reasonable cause" for the purposes of this and other like legislation.

[27] In *Black v City of South Melbourne* [1963] VR 34 the Full Court compared the expression "reasonable cause" with the concept of mistake under s 34(1) of the Victorian Limitation of Actions Act 1958. The court noted (at 38) that the inquiry in relation to reasonable cause justifies "a more liberal attitude" being adopted to its interpretation compared with "mistake" and went on to observe that the expression refers to "some act or omission which operated to prevent the giving of notice, and which was an act or omission which was in the circumstances reasonable".

[28] Some further observations regarding the expression can be made. The test of reasonableness is an objective one: *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32 at 41. It is a "cause which a reasonable man would regard as sufficient, a cause consistent with a reasonable standard of conduct, the kind of thing which might be expected to delay the giving of notice by a reasonable man": *Quinlivan v Portland Harbour Trust* [1963] VR 25 at 28. A hope or expectation that a worker may make a complete recovery may amount to a reasonable cause and may more readily do so where the injury is latent, difficult of diagnosis or, possibly, difficult of prognosis: *Fenton v Owners of Ship 'Kelvin'* [1925] 2 KB 473 at 482; *Butt v John W Eaton Ltd* (1920) 29 CLR 126.

[29] Mere ignorance of the law alone will not be sufficient. However ignorance of the law when combined with other factors may amount to reasonable cause. For example in *Melbourne & Metropolitan Tramways Board v Witton* [1963] VR 417 the Full Court held that there may be reasonable cause for failure to give notice of an intended action where the proposed plaintiff was ignorant of the requirements of the relevant legislation and was reasonably waiting for her injuries to stabilise before consulting a solicitor and taking proceedings. In that case Sholl J said (at 420):

> "In my opinion, the conduct of the applicant was conduct which a reasonable man would consider proper and sensible in the circumstances, and sufficient to constitute such a cause for her failure to give notice as was consistent with a reasonable standard of conduct."

[30] It is clear that each case must be assessed upon its own facts and circumstances. Contrary to the submission of the appellant the whole of the circumstances of the case as they impact upon the reasonableness or otherwise of the conduct of the worker must be considered in order to determine whether reasonable cause is established. It would be an artificial exercise to do otherwise.

[31] For present purposes it is relevant to note the findings of the learned magistrate included that the appellant suffered an injury in August 1996 (the first Curtis incident), he gave notice of that injury to his employer, he was thereby partially incapacitated for the purposes of the Work Health Act and that he made no claim for compensation within the six month period required by s 182(1)(a) of the Act. Of particular importance is the finding:

> "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."

[32] The appellant had lodged a number of Work Health claims in the course of his employment with the Northern Territory Police Force and could not be said to be unaware of its requirements. In the course of evidence there were at least seven such claims identified, some preceding the incident the subject of these proceedings and some subsequent to it. This is not a case of ignorance of the law. In his evidence the appellant said he believed he had filed a claim for compensation in respect of the first Curtis incident and also

in respect of the second Curtis incident. No claim form with respect to the first incident was found and the learned magistrate determined that no claim for compensation under the Work Health Act was ever made with respect to that incident. In relation to the second incident a Work Health claim form was lodged referring to the physical injuries suffered by the appellant but no claim was made in relation to any mental injury.

[33] In relation to the first incident the evidence of the appellant was that he did not seek any treatment because "he could get over it and, whilst he was pretty shook up, he needed closure". He thought that once he had locked up the offender, Mr Curtis, he would have closure. The second incident occurred when Mr Curtis was arrested on 9 November 1996.

[34] Following the second Curtis incident the appellant experienced problems in his work, including a loss of motivation. He said that early in 1997 he tried to raise the issues that were concerning him with senior officers. He told two visiting officers that he was finding it hard to cope as a result of the Curtis incidents and that he could not shoot anyone. He said that neither senior officer said anything in response and there was an uncomfortable silence. The learned magistrate was unable to determine what words were spoken on this occasion and declared herself not satisfied that what was said was 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 appellant acknowledged that he was aware that if he formally told his employer of his condition "it was likely he would have been taken out of

operational duties". The appellant understood that if he was required to move to non-operational duties his income would be reduced by $10,000 to $15,000 per annum and penalty allowances would be reduced.

[35] The appellant eventually left the Northern Territory Police Force in 1998. He agreed that he could have stayed on as a non-operational police officer but he chose not to do so. He did not tell his employer that he was suffering a mental injury or incapacity. It was not until the year 2000 that he made any claim for compensation in respect of the first Curtis incident of August 1996.

[36] In the hearing in the Work Health Court the parties agreed that the first Curtis incident of 12 August 1996 was "the relevant injury for the purposes of these proceedings". Her Worship found that the worker had established that he sustained an injury, namely a mental injury, on 12 August 1996 and that this injury arose out of or in the course of his employment with the employer. There was no challenge to those conclusions before this Court. It was also agreed between the parties that the relevant six month period for the purposes of s 182(1)(a) of the Act was from the date of that incident through to 12 February 1997 ("the relevant period"). The relevant period encompassed the date upon which the second Curtis incident occurred in November 1996.

[37] The factors to be weighed in the balance in order to determine whether the appellant established that he had reasonable cause for failing to make a claim within the relevant period include:

(a) he was familiar with the Work Health scheme;

(b) he was aware, within the relevant period, that he had suffered a mental injury as a consequence of the first Curtis incident in 1996;

(c) in pursuing claims under the Crimes (Victims Assistance) Act made in November 1996, which related to the two Curtis incidents, he sought to identify part of his claim as relating to a mental injury;

(d) notwithstanding that knowledge he made no Work Health claim for mental injury in respect of either Curtis incident;

(e) during the relevant period he knew that he was unable to fulfil all of his operational duties and that, if he disclosed that state of affairs to his employer, he would probably be taken off such duties with a consequent loss of income;

(f) following the second Curtis incident he was aware that he was not improving;

(g) at that time the appellant knew that he suffered an incapacity for the purposes of the Work Health Act and that he had a limited ability to undertake paid work because of his mental injuries but did not make his employer aware of his incapacity;

(h) although, at the time, he was not experiencing any loss of income as a consequence of his condition that was because he failed to disclose his condition to his employer and the fact remained that he knew he was partially incapacitated for work.

[38] In all of the circumstances it is clear that the appellant suffered a compensable mental injury in August 1996 and that, by November 1996, he

was aware that it was getting worse and he was also aware that he could not carry out the duties required of him as an operational police officer. By that time he had an entitlement to claim compensation pursuant to the Work Health Act. He chose not to make a claim and to keep the information regarding his incapacity to himself and, consequently, he continued to receive remuneration and allowances for work that he could not perform.

[39] In this case there was no "act or omission" present which prevented the appellant from making the claim. He was aware of all the relevant circumstances but, for his own reasons, chose not to make a Work Health claim in respect of his mental injury. This is not a case where the appellant was without the information necessary to enable him to make a reasoned decision or where there was some aspect of his mental condition which contributed to his failure to make a claim. He failed to make a claim and later, well outside the relevant period, changed his mind. His reasons for the failure were not those to be expected of a reasonable person and were not consistent with a reasonable standard of conduct which might be expected to cause such delay. In this case there was no reasonable cause for the failure to make a claim within time.

[40] In my view the learned magistrate was correct in concluding that the claim was not maintainable as a claim for compensation because it was not made within six months after the occurrence of the injury and that the failure was not occasioned by other reasonable cause.

[41] I would dismiss the appeal.

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