SUPREME COURT OF QUEENSLAND

CITATION:	*WorkCover Queensland v. Lucas* [2003] QSC 028
PARTIES:	**WORKCOVER QUEENSLAND** (applicant) **v** **SUSAN ROSE LUCAS** (respondent)
FILE NO:	10986 of 2002
DIVISION:	Trial
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	21 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	22 January 2003
JUDGE:	Helman J.
CATCHWORDS:	WORKER'S COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – CLAIM AND DELAY IN MAKING A CLAIM – EXCUSES FOR DELAY – whether reasonable cause *Acts Interpretation Act* 1954 *WorkCover Queensland Act* 1996 ss.291, 293 *Narayan v S-Pak Pty Ltd* [2002] QSC 373
COUNSEL:	Mr D.O.J. North S.C. for the applicant Mr R.J. Lynch for the respondent
SOLICITORS:	Mullins & Mullins for the applicant Joseph Lyons & Co for the respondent

[1] This is an application by WorkCover Queensland as the insurer of Vita Pacific Ltd for a declaration 'that the Respondent is not at liberty to proceed with her claim for damages for injury which arose in an event on 28 July 1998 in the course of her employment with Vita Pacific Ltd which claim is referred to in a Notice of Claim for Damages delivered to the Applicant on or about 26 July 2001'.

[2] The respondent began an action against Vita Pacific Ltd in the District Court at Brisbane on 27 July 2001 alleging in her statement of claim that it was guilty of negligence, breach of contract, and breach of a statutory duty which caused her to

be injured when employed as a machinist on 28 July 1998. She alleges she suffered a musculo-ligamentous injury and rotator cuff tendinitis to the left side of her neck, left shoulder, and left arm. She claims $250,000 damages. Notice of her claim for damages pursuant to s.280 of the *WorkCover Queensland Act* 1996 was given to the applicant on 26 July 2001, and the applicant's solicitors responded pursuant to s.282 on 24 August 2001 requesting that the respondent remedy certain omissions in the respondent's notice within thirty days. Those matters were attended to, and by a letter dated 17 October 2001 the applicant's solicitors notified the respondent's solicitors that the applicant was satisfied that the respondent's notice of claim then complied with s.280. The applicant gave the written notice required of it under s.285 on 23 October 2001 offering to settle the claim for $5,852.97 'clear of WorkCover statutory benefits refund amount with no costs'. The respondent did not respond to that offer within the fourteen days required by s.285(5) for such a response, or at all.

[3] I come now to the obstacle facing the respondent upon which the applicant relies. It is in s.293(1) which provided that a claimant must organize and hold a conference of the parties within three months after the applicant gives the claimant a written notice under s.285. (On 1 July 2001 a new s.293 was substituted for the original section by s.31 of the *WorkCover Queensland Amendment Act* 2001, but, by operation of s.588 of the principal Act, the section as it was before 1 July 2001 applies to this case.) The respondent did not comply with s.293(1), and so it was submitted on behalf of the applicant that it should be declared that she is not at liberty to proceed with her claim for damages. The respondent, by her solicitors, in a letter dated 9 July 2002 to the applicant's solicitors requested a conference pursuant to s.293(1) be held in August 2002, but the applicant says that was too late, the word 'must' in s.293(1) making it mandatory that the three-month limit be adhered to: s.32 CA(2) of the *Acts Interpretation Act* 1954.

[4] The respondent began her action on 27 July 2001, as I have related, pursuant to a consent order made the day before by White J. on the respondent's application, to which the applicant was the respondent, under s.305(1) of the *WorkCover Queensland Act*. That sub-section provides that, subject to s.303 (Claimant to have given complying notice of claim or WorkCover to have waived compliance), a claimant may start a court proceeding if the court, on the application of the claimant, gives leave to bring the proceeding despite non-compliance with the requirements of s.280. White J.'s order was as follows:

> 1. Pursuant to section 305 of the Workcover Queensland Act 1996 the Applicant be at liberty to bring a proceeding against Vita Pacific Limited in respect of the following injuries:-
>
> a. Her injury to her left shoulder and left arm suffered 28 July 1998;
> b. Her injury to the left side of her neck suffered 28 July 1998.
>
> 2. The Respondent respond to the Notice of Claim pursuant to section 282 of the WorkCover Queensland Act 1996 on or before 25 August 2001.

3. The Applicant remedy any non-compliances of the Notice of Claim identified by the Respondent in its response on or before 24 September 2001.

4. In all other respects the parties comply with the requirements of Parts 5, 6 and 7 of Chapter 5 of the WorkCover Queensland Act 1996.

5. There be no orders as to costs of this application.

Section 293 is in part 6 (Settlement of claims) of chapter 5 (Access to damages, ss. 250-329) of the Act, so that by failing to comply with that section the respondent is in breach of White J.'s order.

[5] On behalf of the applicant it was submitted that the court has no power to excuse the respondent's failure to comply with s.293(1). On behalf of the respondent it was argued, however, that the court did have that power, which it was said proceeded from s.291 which provides that if a party fails to comply with a provision of Chapter 5 a court may order the party to comply with the provision, and may make consequential or ancillary orders that may be necessary or desirable in the circumstances of the case. If the latter argument is correct there would be available to the respondent discretionary relief from the consequences of her failure to comply with s.293 should the circumstances warrant the granting of that relief.

[6] The decision of de Jersey C.J. in *Narayan v. S-Pak Pty Ltd* [2002] Q.S.C. 373 was relied on by Mr North in advancing the applicant's argument. In that case his Honour rejected a submission that s.291 conferred on the court the power to extend beyond sixty days the time for bringing a proceeding for damages for personal injury after the end of the period of limitation provided for bringing such a proceeding by the *Limitation of Actions Act* 1974. Section 308 of the *WorkCover Queensland Act*, which is also in chapter 5, provides in subsection (1) that that time is extended in certain circumstances, but subsection (2) provides that the proceeding must be brought within sixty days after a compulsory conference for the claim is held. His Honour held that the time limit under s.308(2) appeared not susceptible of extension under s.291, that '[w]here the legislature intends that a limitation period may be extended, it tends to accord the discretion directly', and that had not been done in relation to the limitation period provided for in s.308(2). Further, his Honour said, 'the power under s.291 to ensure compliance is not apt to facilitate extension of a limitation period for a commencement of proceedings, simply because there is no obligation to commence proceedings: the relevant requirement is that if proceedings are to be commenced that occur within the prescribed time': paras 6 and 7. Neither difficulty confronts the respondent in this case: making an order under s.291 would not have the effect of extending a limitation period and the power provided for in s.291 could, as I shall explain, be regarded as apt to ensure compliance with s.293(1) but outside the three-month period.

[7] Read narrowly and without reference to the scheme of the Act as a whole, s.291 could be seen as providing only redress *against* defaulting parties and not also, in appropriate cases, an avenue for relief from the rigors of the Act *available to* defaulting parties. The wider construction is, I think, implied in the wording of the section. Relief under s.291 is, as the wording of the section shows, discretionary,

but in a proper case it can, I think, be relied on by a defaulting party. It is as well to remember when one is construing the Act, with its strict requirements and timetable, that it is after all an Act dealing with the remedies available to injured workers and their dependants, so that a reasonable degree of latitude may be presumed to have been intended in the formulation of the requirements and the provisions allowing for discretionary relief from those requirements; and so in this case if no prejudice to the applicant beyond loss of the benefit of reliance on a strict requirement can be demonstrated the respondent should, in my view, have the relief sought - particularly when an acceptable explanation can be offered for her failure to comply.

[8] No relevant prejudice to the applicant has been shown as a likely result of giving the respondent the relief she seeks. She has given an acceptable explanation for her failure to comply with the strict requirement of s.293(1): on 12 November 2001 she underwent surgery on her left shoulder under a general anaesthetic. Dr Mark Robinson, hand and upper limb surgeon, performed a left arthroscopic acromioplasty with soft tissue and bone resection at the Mater Private Hospital. The effect of her undergoing that surgery would have been to deny any utility to a conference of the parties within three months of the applicant's giving the notice under s.285. In a report dated 13 January 2002 to the applicant Dr Robinson recorded his having reviewed the respondent's condition on 9 January 2002 and finding that she had shown improvement in her condition following the surgery, that she would continue to improve for another three to four months, and that he expected her condition would be 'stable and stationary at around six months from the time of surgery'. It was reasonable to conclude that the quantum of her claim could not be accurately assessed until her condition had stabilized and so the extent of her disability was known.

[9] It follows from what I have said that I conclude that in the circumstances of this case the applicant should not have the declaration it seeks and that the respondent is entitled to the discretionary relief provided for in s.291. There were two further arguments advanced on behalf of the applicant with which, however, I should deal. The first proceeded from the mandatory requirement of s.293(1) and the second from s.252, which is also in chapter 5.

[10] It was argued for the applicant that since the requirement in s.293(1) was mandatory and since the three months had passed it was now too late and so not possible to secure compliance with the requirement. That would seem to me to proceed from too narrow a view of the power provided for in s.291, and too wide a view of the failure of which the respondent has been guilty. She failed to organize and hold a conference within the time required it is true, but such a failure should not be seen, in an appropriate case, to be one incapable of rectification. The conference cannot now be held within the time limit, but it can be held at a time when no relevant prejudice will be suffered by the applicant. To that extent it can be said to be held timeously, which is after all the evident reason for the imposition of the timetable in the Act.

[11] It was also argued on behalf of the applicant that another provision in chapter 5, s.252, prevents the court's permitting the respondent's claim to proceed. Section 252 provides:

> **252.(1)** If a provision of an Act or a rule of law is inconsistent with this chapter, this chapter prevails.
>
> **(2)** All the provisions of this chapter are provisions of substantive law.
>
> **(3)** However, subsection (2) does not affect minor variations in procedure.

Since, it was argued, the requirement for the organizing and holding of a conference under s.293(1) is mandatory subsection (1) of s.252 prevents any consideration of absence of prejudice to the applicant to enter any consideration of the respondent's position; furthermore, subsection (2) of s.252 makes the mandatory provision in s.293(1) a provision of substantive law. Subsection (3) of s.252 cannot save the respondent's position it was argued because her delay could not be regarded as a minor variation in procedure. The difficulty with that analysis lies, however, in s.291. If that section provides a power to deal with failures strictly to comply with provisions such as s.293(1), s.252 will not prevent the exercise of the power since it is conferred in chapter 5.

[12] The application will be dismissed. It was proposed on behalf of the respondent that the parties organize and hold a compulsory conference pursuant to s.293 on or before 22 March 2003. That day is a Saturday, but the suggestion appears to me to be otherwise reasonable. I shall invite further submissions on the terms of the order to be made under s.291 and on costs.