

# SUPREME COURT OF QUEENSLAND

CITATION: *Canning v Brisbane City Council & Ors* QSC 149

PARTIES: **PAUL ANDREW CANNING**  
(applicant)  
v  
**BRISBANE CITY COUNCIL**  
(first respondent)  
**ECCO PERSONNEL PTY LTD**  
(second respondent)  
**ADECCO INDUSTRIAL PTY LTD**  
(third respondent)  
**WORKCOVER QUEENSLAND**  
(fourth respondent)

FILE NO/S: S4075/2000  
DIVISION: Trial Division  
PROCEEDING: Application for leave to commence proceedings pursuant to s 305 *WorkCover Queensland Act 1996*

ORIGINATING COURT: Supreme Court at Brisbane  
DELIVERED ON: 19 May 2000  
DELIVERED AT: Brisbane  
HEARING DATE: 18 May 2000  
JUDGE: Williams J  
ORDER: **Grant the applicant, Paul Andrew Canning, leave pursuant to s 305 of the *WorkCover Queensland Act 1996* to start a proceeding for damages despite non compliance with the requirements of s 280;**  
  
**Order that the fourth respondent, WorkCover Queensland, pay the costs of the applicant and the first respondent, Brisbane City Council, of and incidental to the application to be assessed on the standard basis.**

CATCHWORDS: WORKERS COMPENSATION - PROCEEDINGS TO OBTAIN COMPENSATION - PRELIMINARY REQUIREMENTS - CLAIM AND DELAY IN MAKING CLAIM - GENERALLY - *WorkCover Queensland Act 1996* sections 280, 282, 302, 304, 305, 308 considered - limitation period expiring before decision pursuant to s 282 - held in those circumstances there was non compliance with s 280 for purposes of s 305 - leave granted.

COUNSEL: *Limitation of Actions Act 1974*  
*WorkCover Queensland Act 1996*  
A Munt for the applicant  
G W O'Grady for the first respondent  
G W Diehm for the fourth respondent

SOLICITORS: Plastiras Meredith Mohr for the applicant  
 David Askern for the first respondent  
 O'Mara Patterson & Perrier for the fourth respondent

- [1] **Williams J:** This is an application for an order pursuant to s 305 of the *WorkCover Queensland Act 1996* ("the Act") that the applicant, Paul Canning, be given leave to start proceedings in this court claiming damages for personal injuries sustained in a master-servant relationship. The application calls for a consideration of at least sections 280, 282, 302, 303, 304, 305 and 308 of the Act. The application is opposed by the fourth respondent, WorkCover, and I have been told by counsel that the precise point at issue has not yet been the subject of a decision of this court.
  
- [2] The applicant suffered the relevant personal injuries on 21 May 1997. It is immediately obvious that the 3 year limitation period applicable to an action for damages is about to expire, and that is what gives rise to this application.
  
- [3] A complication is the dispute between the first respondent, Brisbane City Council, and WorkCover as to who would be liable to satisfy any judgment for damages. The first respondent is a "self insurer" in accordance with the provisions of the Act and if it was the relevant employer of the applicant it would satisfy the claim rather than WorkCover. There is a dispute between the respondents as to the terms of the applicant's employment at the relevant time. The first respondent claims that at the time in question the applicant was still strictly an employee of the second and/or third respondents, in which case WorkCover would be obliged to satisfy any judgment. On the other hand WorkCover contends that the relevant employer was the first respondent and that the first respondent must satisfy the claim.
  
- [4] Section 302 provides that a claimant may start a proceeding for damages only if there has been compliance with certain requirements of the Act. One of those requirements is the giving of a notice under s 280 "within the period of limitation for bringing a proceeding for the damages under the *Limitation of Actions Act 1974*".
  
- [5] The applicant gave the first respondent a s 280 notice on 18 April 2000, and on 17 May 2000 the first respondent notified him in accordance with s 282 that it was a complying notice. After that latter date there was no obstacle to the applicant starting proceedings against the first respondent for damages.
  
- [6] But the applicant did not give a s 280 notice to WorkCover until 16 May 2000 which was in fact after this application had been filed on 10 May 2000. That notice was in the same terms as that given to the first respondent and counsel for the applicant submitted it complied with s 280. The delay in serving WorkCover was allegedly due to the confusion as to who was the relevant insurer under the Act.

- [7] Section 282(2) of the Act gives WorkCover 30 days within which to give either a written notice stating it is satisfied that the claimant's notice complies with s 280 or a notice stating that it is not so satisfied and identifying the non compliance. That time limit had not expired by the date on which this application was heard, namely 18 May; nor will it have expired by the date on which the limitation period expires. It is, however, significant that WorkCover has had the applicant's notice for some two days and its counsel was unable to point to any specific non compliance therein. It is not as if the receipt of the notice on 16 May was the first occasion on which WorkCover was aware of the matters in question. Weekly workers' compensation was paid to the applicant from 12 July 1997 to 16 January 1998, and a lump sum offer of compensation was made in July 1998. That offer was rejected by the applicant in February 2000.
- [8] Section 308 of the Act provides that, if the claimant has given a complying notice of claim (that is a notice under s 280) before the end of the applicable limitation period, the limitation period is to be extended in accordance with the provisions of the Act; it is not necessary to set out those further requirements here. The proposition was accepted by all counsel that a "complying notice of claim" for purposes of s 308(1)(a)(i) was a notice which WorkCover had determined under s 282 to be a notice complying with s 280. That was not the factual situation here, no decision on that yet having been made. Therefore s 308(1)(a)(i) could not apply to extend the limitation period applicable to the applicant's cause of action against WorkCover and the second and third respondents. It would apply to the proposed action against the first respondent.
- [9] It is in those circumstances that the applicant seeks an order pursuant to s 305(1) which is in these terms:
- "Subject to section 303, the claimant may start the proceeding if the court, on application by the claimant, gives leave to bring the proceeding despite non compliance with the requirements of s 280."
- [10] WorkCover submits that the court in the circumstances here does not have jurisdiction to make an order under that section because it is not established as a fact that there has been "non compliance with the requirements of s 280", a fact which can only be established once it has made its determination pursuant to s 282.
- [11] Counsel for WorkCover appreciated that a consequence of his submission was that, if WorkCover determined after 21 May 2000 that the notice given by the applicant on 16 May did not comply with s 280, the applicant would be absolutely barred from commencing proceedings claiming damages against it and the second and third respondents. It was his submission that a consequence of reading the Act and the limitation statute together was that the s 280 notice had to be given a sufficient time before the expiration of the limitation period to permit WorkCover to make a decision pursuant to s 282 prior to that date.

- [12] But that submission in my view indicates the way out of the dilemma confronting the applicant. If the notice has not been given in sufficient time to enable WorkCover to make its decision by the expiration of the limitation period then in practical terms there has been “non compliance with the requirements of s 280” so that the court has jurisdiction to make an order pursuant to s 305.
  
- [13] If no notice at all had been given pursuant to s 280 by the eve of the expiration of the limitation period it seems clear that non compliance with s 280 would be established and the court would have jurisdiction to consider making an order pursuant to s 305. If that is so, why is the court deprived of jurisdiction where a notice, probably complying with s 280, has been given but no notice of acceptance by WorkCover of the fact that it was a complying notice has been given to the claimant pursuant to s 282?
  
- [14] All the problems can be overcome if “non compliance with the requirements of s 280” is read as including the situation where a decision by WorkCover pursuant to s 282 has not been communicated to the claimant. In other words there is always non compliance with s 280 until WorkCover communicates a decision that the notice is a complying one.
  
- [15] In all the circumstances this is an appropriate case in which to make an order pursuant to s 305 granting the applicant leave to start a proceeding despite non compliance with the requirements of s 280.
  
- [16] The first respondent does not oppose the order sought on condition that there be compliance with the other requirements of the Act. In those circumstances the first respondent submits that its costs should be met by the applicant or WorkCover. That submission is primarily based on the delay which has occurred since the offer of lump sum compensation was made.
  
- [17] The only additional fact which need be recorded is that the applicant’s present solicitors took over the file in about January 2000.
  
- [18] As already noted the applicant in fact received Works Compensation for his injuries and in those circumstances it is almost beyond comprehension that there could still be an ongoing dispute between the first respondent and WorkCover as to who would be liable to meet the damages claim. The first respondent has adopted a reasonable attitude towards the s 305 point. By contrast WorkCover has put forward a submission which would be draconian in its consequences. I cannot accept that the legislature intended that a consequence of the sections to which reference has been made would be that an injured worker was deprived of all rights to recover damages because WorkCover had not determined whether or not the s 280 notice in fact given was a complying one before the expiration of the limitation period.

[19] In all the circumstances WorkCover should pay the costs of the other parties to the application.

[20] My orders will therefore be:

- (i) Grant the applicant, Paul Andrew Canning, leave pursuant to s 305 of the *WorkCover Queensland Act 1996* to start a proceeding for damages despite non compliance with the requirements of s 280;
- (ii) Order that the fourth respondent, WorkCover Queensland, pay the costs of the applicant and the first respondent, Brisbane City Council, of and incidental to the application to be assessed on the standard basis.