

# SUPREME COURT OF QUEENSLAND

CITATION: *Edmunds v D. Dunn Industries Pty Ltd and WorkCover*  
[2006] QSC 238

PARTIES: STEPHEN ALEXANDER EDMUNDS  
(Applicant)

AND

D. DUNN INDUSTRIES PTY LTD (ACN 075 710 619)  
trading as CD PROJECTS  
(First Respondent)

AND

WORKCOVER QUEENSLAND  
(Second Respondent)

FILE NO/S: S343 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING  
COURT: Supreme Court at Townsville

DELIVERED ON: 18 July 2006

DELIVERED AT: Townsville

HEARING DATE: 10 July 2006

JUDGE: Cullinane J

ORDER: **Application is dismissed.**

**The parties have liberty to apply on the issue of costs.**

CATCHWORDS: DAMAGES - PERSONAL INJURIES – where a compulsory conference was held between the Applicant and the Second Respondent after the time limitation pursuant to the *WorkCover Queensland Act 1996* – Where the parties have proceeded as if conference had been held - Whether the requirements of s 293 (pre 1<sup>st</sup> July 2001) in s293(A) (post 1<sup>st</sup> July 2001) were mandatory – Whether the conference not a nullity where the Applicant does not contend that any prejudice was suffered.

*WorkCover Queensland Act 1996*

*Project Blue Sky Inc. v Australian Broadcasting Authority*  
(1998) 194 CLR 355 regarded

*Narayan v S-Pak Pty Ltd* [2003] 2 Qd.R 387 cited

*WorkCover Queensland v Lucas* [2003] 2 QdR 456 cited

COUNSEL: Mr K.F. Holyoak for the Applicant  
Mr R. Douglas SC for the First and Second Respondent

SOLICITORS: Murphy Schmidt for the Applicant  
Roberts Nehmer McKee for the First and Second Respondent

- [1] This is an application by the Applicant, Stephen Alexander Edmunds for a declaration that a conference held at Townsville on 21<sup>st</sup> September 2005 between the Applicant and the Second Respondent by their representatives was not a compulsory conference held within the meaning of s 308(2) of the *WorkCover Queensland Act 1966*. The application also seeks a declaration that the parties hold a conference which complies with the requirements of the Act within three months from the date of the making of the order.
- [2] The Applicant alleges that he sustained two injuries in the course of his employment with the First Respondent. The first is alleged to have occurred in the first part of 2001 and the second in August 2001.
- [3] Because of the dates upon which the injuries were sustained, different legislation applies to each, the *WorkCover Queensland Act* having been amended in July 2001.
- [4] Senior counsel for the Applicant has set out in a very extensive and helpful outline the factual and legislative histories relevant to the matter.
- [5] There is an Affidavit of the solicitor for the Applicant which details the history of each of the claims and this is reflected in the outline to which I have referred.
- [6] Although different legislation is involved and the specifically relevant provisions of the legislation differ, the basic issues are common to both applications.
- [7] By late August or early September 2005 the parties were ready to proceed to hold the compulsory conference provided for in the legislation. There is correspondence passing between the parties' solicitors at this time on this subject.
- [8] The history of the matters prior to this, is not it seems to me directly relevant to the issues I am concerned with. The two claims proceeded differently with some difficulties being encountered in relation to the second claim. However the parties had complied with the relevant provisions of chapter 5 relating to pre-court procedures (see part 5 of chapter 5) and were ready to address the obligations imposed by part 6 (settlements of claim) of chapter 5.

- [9] Section 293 dealing with compulsory conferences provided as it stood prior to 1<sup>st</sup> July 2001 as follows:

***“Compulsory conference***

*293.(1) A claimant must organise and hold a conference of the parties within 3 months after WorkCover gives the claimant a written notice under section 285.*

*(2) The conference may be held with a mediator if both parties agree.*

*(3) The mediator must be a person –*

*(a) independent of, and agreed to, by the parties;  
and*

*(b) approved –*

*(i) for the Supreme Court – under the Supreme Court of Queensland Act 1991; or*

*(ii) for the District Court – under the District Courts Act 1967; or*

*(iii) for a Magistrates Court – under the Magistrates Courts Act 1921.*

*(4) If the parties are unable to agree within 30 days on the person to be appointed, the claimant must apply to the registrar of the court to nominate a mediator.*

*(5) At least 4 days before the compulsory conference is held, each party must give the other party –*

*(a) copies of any documents relevant to the claim not yet given to the other party; and*

*(b) a statement verifying that all relevant documents in the party’s possession have been given as required;  
and*

*(c) details of each party’s legal representation.*

*(6) The claimant in person and a person authorised to settle on WorkCover’s behalf must attend the conference and actively participate in an attempt to settle the claim unless the claimant or person has a reasonable excuse.*

*(7) If it would be unreasonable for all parties to attend at the same place, for example, because of distance or illness, the conference may be conducted by telephone, closed-circuit television or*

*another form of communication agreed to between the parties or, if agreed between the parties, at another time.*

- [10] The amendments which took effect on 1<sup>st</sup> July 2001 made separate provision for the procedure to be followed at a compulsory conference by the introduction of s.293A. Section 293 and section 293A in their post 1<sup>st</sup> July 2001 form provided respectively as follows:

***“293 Compulsory conference***

*(1) Before the claimant starts a proceeding for damages, there must be a conference of the parties (the “compulsory conference”).*

*(2) Either party may call the compulsory conference.*

*(3) The compulsory conference must be held within 3 months after WorkCover gives the claimant a written notice under section 285.*

*(4) However, if the parties agree, the conference may be held at a later date.*

*(5) WorkCover must advise the worker’s employer of the time and place of the compulsory conference.*

*(6) On application by a party, the court –*

*(a) may –*

*(i) fix the time and place for the compulsory conference; or*

*(ii) dispense with the compulsory conference for good reason; and*

*(b) may make any other orders the court considers appropriate.*

*(7) In considering whether to dispense with the compulsory conference, the court must take into account the extent of compliance by the parties with their respective obligations in relation to the claim.*

*(8) The claimant in person and a person authorised to settle on WorkCover’s behalf must attend the conference and actively participate in an attempt to settle the claim, unless the claimant or person has a reasonable excuse*

*(9) If it would be unreasonable for all parties to attend at the same place, for example, because of distance or illness, the conference may be conducted by telephone conferencing, video conferencing or another form of communication that allows reasonably*

*contemporaneous and continuous communication between the parties.*

**293A procedure at conference**

- (1) *The compulsory conference may be held with a mediator if both parties agree.*
- (2) *An agreement that the compulsory conference is to be held with a mediator must specify how the costs of the mediation are to be borne.*
- (3) *The mediator must be a person independent of the parties –*
  - (a) *agreed to by the parties; or*
  - (b) *nominated by the registrar of the court on application under subsection (4).*
- (4) *If the parties are unable to agree on the appointment of a mediator within 30 days after the date for the compulsory conference is fixed, either party may apply to the registrar of the court for the nomination of a mediator.*
- (5) *At least 7 days before the compulsory conference is to be held, each party must give the other party –*
  - (a) *copies of all documents not yet given to the other party that are relevant and required to be given for the claim; and*
  - (b) *a statement verifying that all relevant documents in the possession of the party or the party's lawyer have been given as required; and*
  - (c) *details of the party's legal representation; and*
  - (d) *if the party has legal representation – a certificate (a “certificate of readiness”) signed by the party's lawyer to the effect that the party is ready for the conference.*
- (6) *A certificate of readiness must state that –*
  - (a) *the party is completely ready for the conference; and*
  - (b) *all investigative material required for the conference has been obtained, including witness statements from persons other than expert witnesses; and*
  - (c) *medical or other expert reports have been obtained from all persons the party proposes to rely on as expert witnesses at the conference; and*

- (d) *the party has complied fully with the party's obligations to give the other party material that is relevant and required to be given for the claim; and*
- (e) *the party's lawyer has given the party a statement ( a "**financial statement**") containing the information required under subsection (7).*

**(7)** *A financial statement must state –*

- (a) *details of the legal costs payable by the party to the party's lawyer up to the completion of the conference; and*
- (b) *an estimate of the party's likely legal costs and net damages if the claim proceeds to trial and is decided by the court; and*
- (c) *an estimate of the party's likely legal costs and net damages if the claim is settled without proceeding to trial; and*
- (d) *the consequences to the party, in terms of costs, in each of the following cases if the claim proceeds to trial and is decided by the court –*
  - (i) *the amount of the damages awarded by the court is equal to, or more than, the claimant's written final offer.*
  - (ii) *The amount of the damages awarded by the court is less than the claimant's written final offer but equal to, or more than, WorkCover's written final offer;*
  - (iii) *The amount of the damages awarded by the court is equal to, or less than, WorkCover's written final offer.*

**(8)** *WorkCover must give a copy of the certificates of readiness and WorkCover's costs statement to the worker's employer at least 7 days before the compulsory conference."*

- [11] The legislation as it stood both before and after 1<sup>st</sup> July 2001 required each party to make an offer to the other in the event that the claim was not settled at the conference. This was the case here and mandatory offers were made by the parties in each matter.
- [12] These provisions form a central and indeed culminating part of the process provided for in the parts of chapter 5 to which I have referred. Their purpose is evident and can be briefly stated as being to require the parties to make full disclosure to each other and to genuinely attempt to resolve the claim

without the necessity for the institution of proceedings. No proceedings can be instituted until these steps are taken.

- [13] The parties and their representatives attended a conference at 11 a.m. on 21<sup>st</sup> September 2005. According to the material before the court it lasted for some two hours and involved discussions about liability and quantum. Informal offers were obtained and as I have said written final offers were exchanged between the parties as required by the Act.
- [14] The limitation period applicable to the claims was altered by virtue of the operation of s 308. However subsection (2) of s 308 provides that the proceeding must be brought within 60 days after a compulsory conference for the claim is held.
- [15] Here the proceedings were instituted a short time after that period had expired and it is, I think, an obvious enough inference that this application is motivated by the difficulties arising from the failure to institute proceedings within the time provided for in s 308(2).
- [16] The non compliance which is relied upon in support of the application does not appear to be in dispute.
- [17] In relation to the first claim the non compliance relied upon is a failure by the Second Respondent to comply with the obligations imposed by s.293(5)(b) and (c).
- [18] In relation to the second claim the non compliance relied upon is the failure to comply with s 293A(5)(b) and (c) and (d).
- [19] It appears that the Applicant also failed to comply with the requirements of s 293(5)(b) and (c) in relation to the second claim.
- [20] There is evidence before the court from the solicitor acting on behalf of the Respondents at the time that all documents required to be disclosed to the Applicant prior to the conference were in fact disclosed. This was not challenged.
- [21] It is common ground that no issue was taken by the Applicant at or prior to the holding of a compulsory conference about the failure to comply with the statutory requirements. Indeed it does not seem that any point was taken until after the solicitors for the Second Respondent pointed out to the solicitors for the Applicant that the proceedings which were instituted had been instituted outside of the extended limitation period provided for in s.308.
- [22] It seems to me that on the arguments advanced before the court the following issues arise:
- (a) Are the requirements of s.293 (pre 1<sup>st</sup> July 2001) in s293(A) (post 1<sup>st</sup> July 2001) which were not complied with mandatory.
  - (b) If so, is the consequence of such non compliance that the purported conference was of no effect, that is a nullity.

The Applicant did not contend that this was the case. The principles expressed in cases such as *Project Blue Sky Inc. v Australian Broadcasting Authority* 194 CLR 355 would seem to justify this concession.

- (c) If no to (b) does the validity of the conference held depend upon the Respondents obtaining an order under s.291 of the Act relieving it from the consequences of its non compliance. The Respondents have not sought such relief.
- (d) If yes to (c) should an order be made in the Applicant's favour under s.291 ordering that a further compliant conference be held.

[23] Section 291 provides as follows:

***“291 Court’s power to enforce compliance with chapter***

*If a party fails to comply with a provision of this chapter 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 each case.”*

- [24] It is now established that a party may invoke this section for the purposes of seeking relief from his own default. See *WorkCover Queensland v Lucas* (2003) 2 QdR 456.
- [25] Having regard to the language used in ss 293 and 293A imposing the obligations which were not complied for here are in their terms mandatory.
- [26] The real issue is what if anything flows from the failure to comply with such requirements.
- [27] The Respondents contended that once it is accepted that the conference was not a nullity that is the end of the matter. They rejected the argument that the conference, though not a nullity, might yet be denied legal effect unless an order under s 291 was obtained.
- [28] I accept this argument. There is in my view no principle nor was one cited which would justify the stance taken by the Applicant that though the conference was not a nullity it depended for its legal effect upon the obtaining of an order relieving them from their non compliance under s 291.
- [29] Once it is accepted that the conference is not a nullity it must in my view also be accepted, that is, a conference which meets the requirements of the Act. This has unfortunate consequences for the Applicant in terms of the limitation period.
- [30] I should add for the sake of completion that if the court had to consider the matter by reference to discretionary considerations I think these strongly favour the refusal of any order that a further conference should be held. The

parties attended a conference which to use the words of de Jersey CJ in *Narayan v S-Pak Pty Ltd* (2003) Qd.R 387 at 388 “bore all the hallmarks of the statutory conference, and the parties regarded it as such.” Offers were exchanged. The parties have since proceeded upon the basis that the conference had been held. The non compliance is non compliance with requirements which whatever their importance in ensuring that the parties attend the conference fully prepared and fully informed can hardly be described as fundamental to the scheme. The legal representatives acting for each of the parties that had dealings with each other for a considerable time in respect of these matters. There is as I have said uncontradicted evidence that all of the relevant documentation had been provided by the Respondents.

- [31] The non compliance relied upon appears to have been without any consequences to the parties. The Applicant does not contend that any prejudice was suffered.
- [32] It is true that in the events that have happened the Applicant cannot pursue her claim without being faced with a likely pleas of the statute. However this is not to suggest that she will be without a remedy in respect of her losses.
- [33] The application is dismissed. I give the parties liberty to apply on the issue of costs.