Both Sides of the Fence 17 – 16 October 2015

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

Timeliness in Workers Compensation Litigation

Introduction

Almost twelve months ago I stood before you at last year's seminar and did the best I could, given the very tight time frame involved then, to explain to you the new dispute resolution system as established by the *Return to Work Act* and the *South Australian Employment Tribunal Act*. At that point in time the Acts had passed both Houses of Parliament, but were yet to be assented to.

Twelve months on, we all know a lot more about the new system and I have had the privilege of playing a leading role towards change in workers compensation dispute resolution. Central to that change is my topic today of *Timeliness in Workers Compensation Litigation.*

But before I commence that discussion, I'd like to first acknowledge the very difficult twelve months that all of you involved in workers compensation dispute resolution have had, it's been an unprecedented year, a year like no other. Not only have we had record levels of disputes in the Workers Compensation Tribunal, we have also had the revival of redemption lump sum payments in disputed matters, leading to even more applications being lodged in the Tribunal – I should know I approved over 430 of them. The hard work and excellent attitude of the parties and of the representatives in the lead up to the revered date of 1 July 2015 is a credit to you all and you are to be commended. So from myself - and my colleagues in the Tribunals - I would like to thank you all publically for your industry and diligence over these most demanding of times.

Timeliness

My topic today is on timeliness and for the need of us all to re-calibrate our practices in workers compensation to have pace and proportionality always in mind when conducting litigation. I have 3 propositions for you to consider:

1. Firstly – the legislation and rules demand timeliness;
2. Secondly – modern judicial case management principles demand timeliness;
3. And thirdly – it's the right thing to do anyway.

1. The legislation and rules

Tight time frames are central features of the *Return to Work Act*, the *South Australian Employment Tribunal Act* and the Tribunal's *Rules.* The specific object of dispute resolution under the Return to Work Act at section 95 - is that the outcome in proceedings is to be based on quick and efficient decision making that resolves disputes expeditiously and fairly. It is undeniable that this specific object talks to timeliness.

In relation to SAET *Applications for Review*, you should now all be familiar with this time table:

- 1 month to lodge an Application for Review;
- An Initial Directions Hearing, or IDH, – within approximately 21 days of lodgment;
- A Compulsory Conference convened approximately 28 days later;
- A 6 week period of conciliation;
- An assessment of the merits of your case promptly at the end of conciliation;
- A Pre-Hearing Conference before a Presidential member; where you should be prepared for trial orders;
- And, the possibility of a trial listing approximately 3 months from referral to Hearing and Determination.

These time frames demanded by the new system are at odds with what dispute resolution had become in the Workers Compensation Tribunal. Unfortunately, practices had crept into the WCT that saw the conciliation phase treated with derision resulting in; too many conferences; over too long a

period. Whilst the settlement rates in the WCT had always been impressively high, it was the timeliness of settlement that was the subject of much criticism last year. As a former plaintiff lawyer, I recall many a client who was happy with the outcome reached in the WCT, but was unhappy at how long it took to get there. Whilst all of us may have played a role in what dispute resolution became in the WCT, we must all now acknowledge that the *Return to Work Act* and SAET demand a more vigorous approach to dispute resolution.

Deputy President Calligeros will talk to you in more detail as to how dispute resolution is progressing and particularly about litigation at the Hearing and Determination level. I don't want to steal too much of his thunder but I hope you all have either experienced, or been told of, the more hands-on approach that we are taking to resolving SAET Applications sooner rather than later. Certainly from my perspective, I am expecting that representatives are fully conversant with their briefs and have up-to-date instructions as to how they wish the matter to proceed. In all instances representatives should be prepared to receive orders from me that actually move the litigation forward with specific tasks to be done and a Settlement Conference or future trial date to work towards. This approach should ensure that when attendances are made in SAET that purposeful litigation takes place, as opposed to simply attending to advise the Tribunal that a medical report is outstanding or that a further claim may be lodged. I hope that by ensuring attendances are purposeful that more time is created in the diaries of busy representatives to actually do the tasks necessary for the litigation rather than attending the Tribunal on ever increasing monotonous return dates. The new approach should see fewer attendances, but more effort and time put into each attendance.

2. Modern judicial case management

This brings me to my second topic – that modern judicial case management demands timeliness. Please don't make the mistake of thinking that it's only myself and my colleagues who are taking this approach. It's quite the opposite – in important civil jurisdictions elsewhere the flexible approach to judicial case management has been adopted as being best practice to resolve disputes quickly, economically and justly. I will take you to some examples.

UK

The issue of civil justice reform has been the subject of two very serious and extensive reviews in the United Kingdom in recent times. Firstly; the *Access to Justice Reforms 1996* by Master of the Rolls Lord Woolf; And then, more recently in the 2009 and 2010 in the *Review of Civil Litigation Costs* by Lord Justice Jackson. The *Woolf* reforms arose out of concerns within the adversarial judicial system of judges being detached from the litigation, leading to matters progressing in a timeframe and manner convenient only to the parties. Lord Woolf said that this hands-off approach raised concerns about the cost, delay and the complexity of litigation.[1] The recommendations about judicial case management made by Lord Woolf were implemented. There were many recommendations, but for today's purposes I emphasize 2 key areas being; the fixing timetables for the parties to take particular steps in a case[2] ; And, to control the cost of litigation, both in time and money, by focusing on real issues rather than every possible issue[3].

Whilst the *Woolf* reforms attempted to encourage courts to adopt a less indulgent approach, by the late 2000's concerns about the escalating cost of civil litigation - particularly where such costs were disproportionate to the issues in dispute - became paramount. The result was the *Jackson* review which concluded that a still tougher and less forgiving approach was required. When discussing this more "robust" approach, in his final report Lord Justice Jackson said:

> *First, the courts should set realistic timetables for cases and not impossibly tough timetables in order to give the impression of firmness.*
>
> *Second, courts at all levels have become too tolerant of delays and non-compliance with orders. In doing so, they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon civil justice system. The balance needs to be redressed.*[4]

[1] *Access to Justice*: *Interim Report*, Lord Woolf MR, Ch 3 at [4]
[2] *Access to Justice: Section 1*: Lord Woolf MR, Overview , para 1
[3] Ibid.
[4] *Access to Justice*: *Final report*, Lord Woolf MR, Ch 39 para 6.5

Lord Justice Jackson's recommendations were incorporated into the *Civil Procedure Rules*. The overriding objective of those rules being such maxims as:[5]

- To deal with cases justly and at proportionate cost;
- To save expense;
- To ensure that matters are dealt with expeditiously and fairly;
- To appropriately share court resources taking into account the need to allot those resources to other cases;
- And, to ensure compliance with rules, practice directions and orders.

When discussing the implementation of his reforms at a lecture in 2013[6] Lord Justice Jackson stressed the point that doing justice in each case is to ensure proceedings are dealt with - justly - and at proportionate cost - which can only be achievable with the proper application of the rules. As to rule compliance he said:

> *The tougher, more robust approach to rule compliance and relief from sanctions is intended to ensure that justice can be done in the majority of cases. This requires an acknowledgement that the achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with the procedural obligations. Those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure that costs are kept within proportionate bounds. But, more importantly, they serve the wider public interest in ensuring that other litigants can obtain justice efficiently and proportionately and that the court enables them to do so*[7]

Not surprisingly the *Jackson* reforms came to the attention of courts in the UK soon after implementation. One of the relevant cases was a defamation matter involving Andrew Mitchell MP. Some of you may recall that furor, referred to as "Plebgate". I will turn to the facts of that case presently, but when discussing the more "robust" approach demanded by the rules, the Court of Appeal ominously had this to say:

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[5] *Civil Procedure Rules* (UK) 1.1(2)
[6] *The Jackson Reforms*, 18th Implementation lecture, 22 March 2013
[7] Ibid, at 27.

> *There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as the "culture of delay and non-compliance" will continue - despite the introduction of the Jackson reforms. No lawyer should have been in any doubt as to what was coming.*

Andrew Mitchell MP[8] took action against the Sun newspaper who reported that he had raged against police officers at the entrance to Downing Street in a foul mouthed rant shouting "you f…ing plebs". Unfortunately, Mr Mitchell's solicitors failed to comply with the relevant Rule to file "a cost budget" prior to a hearing before a Master. The Sun newspapers solicitors argued that due to this default that they did not have sufficient time therefore to consider the cost budget. When asked by the Master why there had been default; Mr Mitchell's solicitors advised that they were "a small firm; two of their trainee solicitors were on maternity leave; a senior associate had recently left the firm; And, the firm was engaged in work on other heavy litigation".[9]

In dismissing Mr Mitchell solicitors application for relief from the relevant rule the Master noted that whilst the firm was "stretched very thin in terms of resources" - the stricter approach under the Jackson reforms dictated that relief should not be granted. The case made its way to the Court of Appeal.

As to the excuses made by Mr Mitchell solicitors the Court of Appeal severely said:

> *[The] mere overlooking of a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand solicitors maybe under pressure and may have too much work. …But, that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in the firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is*

[8] *Mitchell* v *News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 2 All ER 430; [2104] 1 WLR
[9] Ibid, para 14.

> *to giving it conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue.*[10]

The Court of Appeal dismissed the appeal and upheld the decision of the Master to not grant relief. In concluding, the court said this:

> *We hope that our decision will send out a clear message. If it does, we are confident that in time legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past.*[11]

In a subsequent case decided in July 2014 the Court of Appeal felt the need to clarify and amplify its comments in *Mitchell's case*. In proceedings dealing with separate three actions the claimants being a Mr *Denton*, a company called *Decadent Vapours* and a company called *Utilise*,[12] the court considered issues surrounding non-compliance. In doing so the court expressed its concerns that since *Mitchell* some judges were adopting an unreasonable approach to non-compliance; indeed in the two of the three matters before it the court said that the evidence demonstrated an unduly Draconian approach by the lower courts. Whilst acknowledging that the old lax culture of non-compliance should no longer be tolerated, the Court of Appeal said that a more nuanced approach is required having regard to all the circumstances of the case and that relevant factors will vary from case to case.

So, in a jurisdiction as large and complex as civil litigation in the UK - a jurisdiction that vastly outsizes our small world of workers compensation here in SA - the firm but flexible approach to judicial case management has not only been implemented in Rules; but that approach has been endorsed in the country's highest courts.

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[10] Ibid, para 41.
[11] Ibid, para 60.
[12] *Denton*; *Decadent Vapours*; *Utilize TDS Ltd* [2014] EWCA Civ 906; [2015] 1 All ER 880.

When you are pondering what I've said in relation to the UK Rules, I ask you to consider the *South Australian Employment Tribunal Rules 2015* particularly Rule 3 - *the purpose of the Rules* – And, Rule 4 - *cost effectiveness*. In those Rules you will see equivalent words to what I've just discussed which include; the objectives of quick and economical but flexible dispute resolution, which deals with the real issues in dispute and does so at a proportionate cost. You should not only look to our Rules, but also the *Supreme Court Civil Rules* which have very similar objects[13]. I speak for my colleagues when I say that representatives should have these objects in mind when conducting their litigation in SAET

Australia

Of course modern judicial case management is not unique to the United Kingdom. Indeed in many respects Australian courts have been at the forefront of reform. In the 1993 High Court decision of *Sali v SPC*[14] Toohey and Gaudron JJ explained that case management reflected:

> *"the view that: the conduct of litigation is not merely a matter for the parties, but is also one for the court and the need to avoid disruptions in the court's lists with consequential inconvenience to the court and prejudice to the interests of other litigants waiting to be heard…"*[15]

In a 2009 decision that will be familiar to many of you, timeliness in litigation was commented on by the High Court in the seminal case of *AON Risk*.[16] In that matter, Chief Justice French was critical of the unduly permissive approach at trial and appellate level to an application that was made late in the day would altered the course of the litigation. However, I must say that he acknowledged the dissenting appeal judgement of Lander J [now our Commissioner against Corruption] in taking a more robust approach.

In *AON* the ACT Civil Procedure Rules, as to the timely disposal of proceedings and the just resolution of the real issues in dispute were scrutinized. After examining the circumstances of the particular case, Chief Justice French was of

[13] Supreme Court Civil Rules 2006, R3
[14] *Sali* v *SPC Ltd* (1993) 67 ALJR 841
[15] Ibid at 849.
[16] *Aon Risk Services Australia Limited* v *Australian National University* [2009]HCA 27

the opinion that the primary judge and the appeal court erred in allowing the belated application as that action produced further delay which would undermine confidence in the administration of civil justice[17].

In separate, but with similar reasons to French CJ, the majority said this:

> *In the past it has been largely left to the parties to prepare for trial and to seek the Court's assistance when required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognized by the courts that the resolution of disputes serves the public as a whole, not merely the parties to proceedings*.[18]

When discussing the relevant ACT procedural rule, the majority said:

> *Rule 21 recognizes the purposes of case management by the courts. It recognizes that delay and costs are undesirable and that delay has deleterious [harmful] effects, not only upon the party to the proceedings in question, but on other litigants.* [19]

Having spent some time litigating in the Federal Court prior to my appointment, I can comment on the practices employed in that jurisdiction. Many of you may have followed the well-publicized reforms introduced by Chief Justice Allsop in that court. In paper a published this year in the Australian Bar Review -which I commend to your reading - Allsop CJ discusses the topic of *Judicial case management and the problem of costs,*[20] he sets out a history of modern judicial case management; considers its downsides; and, warns against employing a formulaic approach. Perhaps not surprisingly, he commends the reader to the practices employed in his court - the Federal Court of Australia – where case management involves a more flexible approach with judges being attentive to the particular circumstances of each case. He suggests that procedures in the Federal Court do not employ an overly prescriptive regime of case management and seek to remove the counter-productive requirement for practitioners to attend on multiple pre-trial

[17] Ibid, para 35.
[18] Ibid, para 113.
[19] Ibid, para 114.
[20] *Judicial case management and the problem of costs*. Allsop CJ, (2015) 39 Australian Bar Review 228.

directions hearings. Whilst suggesting that it would be generally inappropriate to make a blanket rule to always set a hearing date at the first directions hearing; Allsop CJ acknowledged that by listing a hearing date early in proceedings, practitioners minds would then focus on either settlement or to the timetable for trial. That was certainly my experience - and no doubt the experience of some of you - of litigation in the Federal Court.

Also in his paper Allsop CJ commented that there is less scope for parties and practitioners to treat litigation as a strategic game went the timetable leading up to trial has been established at an early stage.[21] In concluding, he commented on the "responsibility of practitioners" which is a topic I will conclude on.

Finally, when considering the modern Australian context, the 2010 reforms in Victoria are worthy of comment. In recent years, the *County Court of Victoria* has reinvented itself in order to offer timely and cost-effective dispute resolution services to litigants. With the abolition of monetary jurisdictional limits in 2007, the County Court effectively assumed the same jurisdiction of the Supreme Court of Victoria. In order to offer itself as a real alternative to litigants, the County Court resolved to employ simpler processes and to be quicker in the resolution of its cases. In order to achieve its objectives, the County Court employed some of the following practices:

- fixing a trial date soon after an action became defended, usually providing a trial date within approximately six months;
- minimising the need for repeated pre-trial court attendances - that is, the nugatory 'for mention only" type of directions hearing - instead ensuring that more meaningful work was undertaken by practitioners at serious attendances before it,
- Putting the onus on the parties, and their representatives, to cooperate and agree on what the real issues between them were and discouraging parties from losing sight of the overall objective of the proceedings - that is, redirecting the parties away from satellite litigation.

[21] Ibid, 240-241.

- And, to not hesitate to target tardy cases for remedial management that is, getting tough on the parties and their representatives about the pace and extent of pre-trial processes.[22]

Having done some research into the practices of the County Court of Victoria and having spoken to some of its judges, I can report that that court believes that it is meeting many of its objectives to achieve efficient, timely and cost-effective justice. I'm told also that the cultural change made in that court was largely embraced by the Victorian legal profession, who on the whole willingly responded to change as it saw that the promised efficiencies were being achieved.

3. It's the right thing to do

My third, final and briefest topic is that timeliness in litigation is the right thing to do anyway.

For those representatives who legal practitioners the *Australian Solicitors Conduct Rules*[23] would be well known to you. Legal practitioners would be aware of that their paramount duty to the court and to the administration of justice prevails over any inconsistency with any other duty.[24] Also, solicitors would be well aware of their other fundamental ethical duties; not only to act in the best interests of their client and to be honest and courteous in all their dealings, but to deliver legal services competently, diligently and as promptly as reasonably possible.[25] When considering the obligations in relation to the communication of advice to clients[26], solicitors must not only be clear in that advice but also a timely. When discussing costs with the client; a practitioner's duty is to communicate effectively but also promptly.[27] When a solicitor represents a client before a court that solicitor must exercise their forensic judgement to confine any hearing to those issues that the solicitor believes to be the real issues.[28] A solicitor must also present a client's case as quickly and

[22] *Act aims to keep case on track*. Anderson J, (2011) 85 Law Institute Journal (Victoria) 03 at 50.
[23] *Australian Solicitors Conduct Rules 2011.* The Law Society of South Australia 25 July 2011.
[24] Ibid, 3.1
[25] Ibid, 4.1
[26] Ibid, 7.1
[27] Ibid, 16B.1
[28] Ibid, 17.2.1

as simply as may be consistent with its robust advancement.[29] These duties, to my mind at least, are consistent with the modern flexible approach to case management where the timely, efficient and cost-effective administration of justice is required.

Unfortunately, whilst I have seen an excellent attitude from most representatives in my 10 months as a Deputy President of the Tribunals, there is some prevalence of "old thinking" and "resistance to change". In one matter, orders for the filing of a witness statement have been extended 4 times resulting in no advancement in the proceedings for 5 months. Practitioners would make a mistake if they believe that such unpreparedness and disrespect for the orders of the Tribunal will be tolerated in the future.

Therefore, I hope I have been timely myself and what I wanted to say to you all today and that you will now perhaps have a better understanding of what we are trying to achieve in our approach to litigation in SAET.

We hope to be;

- flexible to the circumstances of each case;
- to be prompt in the table timing of litigation processes;
- to display common-sense and to be practical in exploring all avenues for the resolution of a matter;
- And, to be firm, when firmness is needed, to get the poorly prepared case back on track.

Knowing most of you here today, I'm confident that you will embrace change and do your utmost to assist us in strengthening the Tribunal by demonstrating that we can all administer justice in a timely, efficient and cost-effective way. The most important people in this debate - the parties to proceedings – your clients - will thank you for it.

Deputy President Steven Dolphin

[29] Ibid, 17.2.2