

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Montesin v Brisbane City Council* [2024] QIRC 068

PARTIES: **Montesin, Darren**
(Applicant)

V

Brisbane City Council
(Respondent)

CASE NO: TD/2021/47

PROCEEDING: Unfair Dismissal – Application for Reinstatement
Application – Application for Suppression Order

DELIVERED ON: **28 March 2024**

MEMBER: Hartigan DP

HEARD AT: On the papers

ORDER: **The application is dismissed.**

CATCHWORDS: INDUSTRIAL LAW – UNFAIR DISMISSAL – where an application for suppression was made – where the decision was previously released and published – where the proceedings are discontinued – where application for suppression order is dismissed.

LEGISLATION: *City of Brisbane Act 2010* (Qld), s 193

Industrial Relations Act 2016 (Qld), s 451, 484

Industrial Relations (Tribunals) Rules 2011 (Qld), r 16, 78, 97

Local Government Act 2009 (Qld), sch 4

CASES:

Australian Rail, Tram and Bus Industry Union of Employees v Aurizon Operations Ltd [2021] QIRC 263.

EB v CTT (No 2) (2008) QSC 306

J v L & A Services Pty Ltd (No 2) [1993] QCA 012; [1995] 2 Qd R 10

R v Dempsey (no 3) [2017] QSC 338.

Reasons for Decision

Introduction

- [1] The Applicant has filed an application seeking that his "matter be removed entirely from public records or at the very least, [his] name – in particular from search engines such as Google etc."
- [2] The Applicant was employed by the Brisbane City Council ('Council') between 14 July 2005 and 13 May 2021 when he was dismissed from his employment.
- [3] On 28 May 2021, the Applicant filed an application for reinstatement.
- [4] During the course of the matter, Council filed an application to be legally represented in the proceedings.
- [5] The Applicant objected to Council's application for legal representation.
- [6] Following the filing of submissions, a decision was delivered on 8 February 2022 granting Council leave to be legally represented pursuant to s 530(4) of the *Industrial Relations Act 2016* (Qld) ('IR Act') ('Decision').¹
- [7] The Decision was subsequently published on the Supreme Court Library Queensland website.
- [8] On 14 October 2022, the Applicant requested that his application for reinstatement be discontinued prior to the determination of his application.

¹ *Montesin v Brisbane City Council* [2022] QIRC 031 ('Decision').

- [9] The current application was filed in the Industrial Registry on 13 December 2023 some 14 months after the proceedings were discontinued.
- [10] As noted above, the relief the Applicant has sought is that the "matter be removed entirely from public records or at the very least, [his] name – in particular from search engines such as Google etc.". The Applicant does not identify the basis upon which he says the Commission has the power to issue such relief.
- [11] Relevantly, r 16 of the *Industrial Relations (Tribunals) Rules 2011* (Qld) ('IR Rules') provides that a document becomes a record of the court or commission and may be used before the court, commission or registrar, only if it has been filed.
- [12] Accordingly, the matters filed in the Applicant's unfair dismissal proceedings have become a record of the Commission. Whilst the Commission has certain powers to direct who may inspect documents and modify documents, it has no power to remove a proceeding from the public record.²
- [13] The Applicant also seeks an order (in vague terms) that his name be removed from search engines such as Google.
- [14] In the circumstances of this matter, the Commission does not have the power to issue directions to a non-party corporate entity, such as "Google", who administers search engines and require that entity remove the Applicant's name from those search engines.
- [15] For those reasons, the Commission refuses to issue orders in the terms set out in the Applicant's application.
- [16] However, the Applicant's submissions do not specifically press the relief sought in the application as, relevantly, the Applicant submits *inter alia* that the matter be amended in order for him not to be identified.
- [17] Such a submission is consistent with an application made pursuant to r 97 of the IR Rules which permits the Commission to modify a document if it is appropriate.
- [18] Accordingly, noting that the Applicant is a self-represented litigant, I will deal with the Applicant's application as if it were an application to modify the Decision by de-identifying his name pursuant to r 97 of the IR Rules.
- [19] However, because the proceedings have been discontinued, I will also need to consider whether the Applicant should be granted leave to reopen the proceedings in order to be permitted to make the application.

² There is no power contained in either the *Industrial Relations Act 2016* (Qld) or the *Industrial Relations (Tribunals) Rules 2011* (Qld) to remove the Applicant's matter from the record.

Relevant legislation and authorities

[20] Section 451 of the IR Act bestows general powers on the Commission, and relevantly provides:

451 General powers

- (1) The commission has the power to do all things necessary or convenient to be done for the performance of its functions.
- (2) Without limiting subsection (1), the commission in proceedings may—
 - ...
 - (c) make an order it considers appropriate.

[21] Section 484 of the IR Act sets out that the Commission has the power to reopen proceedings in the following circumstances:

484 Power to reopen proceedings

- (1) On application by a person mentioned in section 485 , proceedings may be reopened by—
 - (a) for proceedings taken before the full bench—the full bench; or
 - (b) otherwise—the commission.
- (2) If the commission reopens proceedings, it may—
 - (a) revoke or amend a decision or recommendation made by it; and
 - (b) make the decision or recommendation it considers appropriate.
- (3) If a recommendation of the commission has been acted on by the Governor in Council and the commission later revokes or amends the recommendation, the Governor in Council may—
 - (a) cancel the action taken on the recommendation to accord with the commission’s revocation or amendment; or
 - (b) amend the action to accord with the commission’s revocation or amendment.
- (4) Failure to give notice to a person of the proceedings reopened under this section, or any part of the proceedings, leading to the making by the commission of a decision binding on the person—
 - (a) does not invalidate or otherwise affect the decision; but
 - (b) the person may apply to further reopen the proceedings if—
 - (i) the person may apply for reopening of proceedings under section 485 ; and
 - (ii) the person’s failure to participate in the previously reopened proceedings was because of the failure to give the notice.
- (5) If the commission grants an application for reopening, it may give the retrospective operation to its decision made in the reopened proceedings it considers appropriate.

[22] Rule 78 of the IR Rules provides that an application to reopen must be in an approved form:

78 Application to reopen

An application to reopen proceedings under section 484 of the Act must be in the approved form and state the grounds relied on.

[23] Rule 97 of the IR Rules provides the Commission with a power to de-identify judgments and redact information for judgments if there is good reason to do so. Rule 97 relevantly provides as follows:

97 Publishing decisions etc.

- (1) The registrar may publish on the QIRC website –
 - (a) a decision of the court, commission, or registrar; and
 - (b) the notice of the making or the amended of a bargaining instrument
- (2) The registrar must, if the commission directs, publish an amendment of an instrument on the QIRC website.

Note -

For other documents the registrar must publish on the QIRC website, see sections 160, 215, 230 and 459 of the Act.

- (3) The court, commission or registrar may, in the public interest or for another reason the court, commission or registrar considers appropriate –
 - (a) withhold publication of a document; or
 - (b) modify a document, before publication, in a way that does not affect the essence of the document.

[24] Schedule 4 of the *Local Government Act 2009* (Qld) ('LGA') defines 'local government employee' as meaning:

- (a) the chief executive officer; or
- (b) a person holding an appointment under section 196.

[25] Section 193 of the *City of Brisbane Act 2010* (Qld) ('City of Brisbane Act') sets out the circumstances in which an employee is appointed as a 'council employee' as follows:

193 Appointing other council employees

- (1) The council must adopt, by resolution, an organisational structure that is appropriate to the performance of the council's responsibilities.
- (2) The council may employ council employees for the performance of the council's responsibilities.
- (3) The chief executive officer must appoint the council employees, other than senior executive employees.
- (4) A council employee is employed on—
 - (a) the conditions contained in any relevant industrial instrument; and
 - (b) any other conditions that the council decides.

Principles relevant to an application to reopen proceedings

[26] The Queensland Court of Appeal in the case of *J v L & A Services Pty Ltd (No 2)*,³ (*J v L & A Services Pty Ltd*) established six principles governing the exercise of discretion to issue suppression orders which are as follows:

1. Although there is a public interest in avoiding and minimising disadvantages to private citizens from public activities, paramount public interest in the due administration of justice, freedom of speech, a free media and an open society require that court proceedings are able to be reported and discussed publicly.
2. The public may be excluded and publicity prohibited when public access or publicity would frustrate the purpose of a court proceeding by preventing the effective enforcement of some substantive law and depriving the court's decision of practical utility...
3. The permitted exceptions to the requirement of open justice are not based upon the premise that parties would be reasonably deterred from bringing court proceedings by an apprehension that public access or publicity would deprive the proceeding of practical utility, but upon the actual loss of utility which would occur, and the exceptions do not extend to proceedings which parties would be reasonably deterred from bringing if the utility of the proceedings would not be affected. Courts do not have access to the information needed to determine whether or not parties are reasonably deterred by openness or publicity from bringing particular kinds of proceedings; for example, sexual complaints. Legislatures are better equipped than courts to make informed decisions on such matters.
4. No unnecessary restriction upon public access or publicity in respect of court proceedings is permissible.
5. Different degrees of restraint are permissible for different purposes. Although the categories tend to coalesce, they are broadly as follows:
 - (a) Exclusion of the public or a substantive restraint upon publicity is not permissible unless abstractly essential to the practical utility of a proceeding; for example, prosecutions for blackmail or proceedings for the legitimate protection of confidential information...
 - (b) A limited exclusion or restraint is permissible if necessary to ensure that a proceeding is fair; for example, witnesses may be required to absent themselves from hearings, parts of jury trials may take place in the absence of the jury and limited or temporary restrictions on publicity may be imposed during the course of jury proceedings.
 - (c) An incidental, procedural restriction is permissible if necessary in the interests of a party or witness in a particular proceeding; for example, identities of witnesses or details of particular activities which are not directly material such as engaging in covert law enforcement operations or providing information to police may be suppressed.

³[1993] QCA 012; [1995] 2 Qd R 10.

6. ... information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or other 'collateral disadvantage', to use the expression adopted in *R. v. Tait*. Additionally, when it is the interests of a party or a witness which is relied on as the basis for a proposed restraint, those considerations must be balanced against other factors, including the interests of others involved in the proceeding and others who may be affected. Open justice is non-discriminatory, whereas exceptions to the principle of open justice deny equal rights to the disputing litigants and provide a benefit to some litigants which is unavailable to members of the general public...

[27] In *Australian Rail, Tram and Bus Industry Union of Employees v Aurizon Operations Ltd*⁴ ('Aurizon') the respondent sought to have the names of the individual workers who were involved in the dispute de-identified. The application was supported by the applicant union. His Honour, O'Connor VP, relevantly held as follows:

- [40] The starting point in considering an application to suppress or to withhold names of witnesses or parties is a fundamental principle of open justice; 'that justice should not only be done but should manifestly and undoubtedly be seen to be done'. This is a central feature of the administration of justice under the common law.
- [41] The open justice principle operates not only as an overarching principle guiding judicial decision-making and various aspects of procedure, it also gives rise to a number of substantive open justice rules that, in the usual course of events, a court must follow. Such rules include: first, that judicial proceedings are conducted, and decisions pronounced, in 'open court'; second, that evidence is communicated publicly to those present in the court; and third, that nothing should be done to discourage the making of fair and accurate reports of judicial proceedings, including by the media.
- [42] However, the rules to which the open justice principle gives rise are not absolute. Whilst the principles of open justice will usually require the publication of the names of those involved in the proceedings, there are numerous statutory exceptions.
- [43] The Commission has the power to de-identify judgments and redact information from judgments if there is a good reason to do so. Rule 97 of the Industrial Relations (Tribunals) Rules 2011 (Qld) recognises that power.
- ...
- [44] It is accepted that the discretion to anonymise a decision might be exercised in favour of not identifying persons who are the victim of sexual assault or discrimination, children, or persons whose private financial affairs are relevant to a decision. It is also accepted that the discretion may be exercised in circumstances where it is necessary to avoid prejudice to the administration of justice in particular proceedings or to avoid some other relevant harm.
- [45] In my opinion, the application to withhold the names of the two workers can be best explained on the basis that in the absence of a restriction on publicity, damage will be caused to the individuals to such an extent and of such a kind as requiring some relief, in the interests of justice
- [46] As was observed by Mahoney J in *John Fairfax Group Pty Ltd v The Local Court of New South Wales*, these are the 'unacceptable' consequences that sometimes arise in litigation.

⁴ [2021] QIRC 263 [40] – [46].

Of course, as observed by Pincus JA in *J v L A Services Pty Ltd (No 2)*, 'there is a balancing exercise involved, with an initial heavy weighting in favour of publicity – an exercise involving considerations of fairness'.

(Citations omitted).

Council opposes the application

- [28] Council opposes the application and relies on three "threshold issues", being that the Applicant did not file the application in the appropriate form ('threshold issue one'), the documents the Applicant is presumably seeking to be amended are beyond the scope of the Commission's amendment power ('threshold issue two') and finally, that the Applicant does not meet the definition of a Local Government employee or Council employee ('threshold issue three').
- [29] In relation to threshold issue one, Council submits that as the matter was discontinued by the Applicant on 8 November 2022, and in absence of the Applicant filing an application to reopen the proceedings,⁵ the issues the subject of the application do not fall for determination. To the extent it may be inferred that the Applicant seeks to reopen the proceedings, Council submits that the Commission should not exercise its discretion as the interests of justice do not favour reopening the proceedings, the Applicant has not explained the delay in bringing the application or why the issue was not raised while the proceeding was on foot, and the application is not of substantive merit.
- [30] In relation to threshold issue two, Council submits that the Applicant did not identify the document he seeks to be amended⁶ and the relief that Council presumes the Applicant is seeking, being amendments to the Decision, is beyond the scope of the amendment power in rule 97(3)(b) of the IR Rules.
- [31] In relation to threshold issue three, Council submits that the Applicant is not and was never a 'local government employee' for the purposes of the LGA⁷. Whilst Council accepts Practice Direction 4's⁸ guidance that the LGA is intended to include (by analogy) 'council employees' under the equivalent provision of section 193 of the City of Brisbane Act, Council submits that the Applicant's employment as a council employee with Council was terminated on 13 May 2021, some 15 days prior to the commencement of the proceeding.
- [32] Notwithstanding the above, Council further submits, in summary, that the Commission should dismiss the application on its merits as the application:

⁵ *Industrial Relations Act 2016* (Qld), s 484 ('IR Act'); *Industrial Relations (Tribunals) Rules 2011* (Qld) ('IR Rules') r 78.

⁶ Pursuant to r 97 of the IR Rules.

⁷ *Local Government Act 2009* (Qld) Sch 4.

⁸ Industrial Court of Queensland and Queensland Industrial Relations Commission, *Practice Direction Number 4 of 2023: Guideline for The Modification of A Document Before Publication*, 5 April 2023.

- a. is unsupported by compelling particulars or any evidence beyond bare (unsworn) assertion, and relies upon inherently implausible circumstances;
- b. does not articulate a basis upon which a suppression order might aid the administration or interests of justice, nor is there such a basis in Council's view given the matter is finalised and the application does not relate to the substantive reinstatement application;
- c. fails to overcome the presumptions and weighting in favour of open justice and public interest in the Commission's proceedings; and
- d. fails to disclose any reason for delay in filing the application, and why it is that the sudden redaction of documents would address any risk associated with the existing publication of the Decision for nearly two years.

Consideration

[33] The Applicant made the following brief written submissions:⁹

Under section 4,a,vii of the ' Practice Direction Number 4 Of 2023, it states that -

“ The circumstances where the Tribunal may consider it appropriate, in the public interest or for another reason, to modify a document before publication may include:

-a local government employee within the meaning of the Local Government Act 2009, where identification of the local government employee may endanger the local government employee”

As I was assaulted on one occasion and physically threatened numerous times (including being threatened to be set on fire where police action was taken)over my 16 years with Brisbane Council as a bus driver, with the advent of the internet and social media, and given the high proportion of mentally ill passengers on public transport, I fear for my safety as this avenue makes it possible for me to be identified as a local government employee, and possibly tracked down and harmed with a simple search engine entry such as Google.

As my school age children too use public transport, in particular council buses, I fear for their safety as well.

I therefore request that this matter is removed from all public searches or at the very least, amended so that I cannot be identified.

[34] It should be noted at the outset, the parties were provided with an opportunity to request an oral hearing after they had received each other's respective submissions. Neither party sought an oral hearing and consequently the information I have before me is contained in the written submissions.

[35] As Council correctly notes, the Applicant has not filed an application to reopen proceedings.

⁹ Affidavit of DJ. Montesin filed on 3 January 2024.

[36] As noted above, pursuant to s 484(2) of the IR Act, if the Commission reopens proceedings it may, *inter alia*, revoke or amend a decision it has made. Granting leave to reopen proceedings is an exercise of discretion by the Commission.

[37] The following principles¹⁰ have been identified as a guide in the exercise of the discretion:

Relevant principles

[2] The guiding principle in deciding whether to grant leave to re-open is whether or not the interests of justice are better served by allowing or rejecting the application. Reference is made in *Finborough Investments Pty Ltd v Airlie Beach Pty Ltd* and in the cases referred to in it to the need for finality in litigation.

[3] In *Smith v New South Wales Bar Association* the High Court stated that different considerations may apply depending on whether the case is simply one in which the hearing is complete, or one in which reasons for judgment have been delivered. As to the former situation, the court said it was difficult to see why the primary consideration should not be that of embarrassment or prejudice to the other side.

[4] In *Reid v Brett* the criteria governing the exercise of the discretionary power to re-open a case to admit further evidence where the hearing has concluded but judgment has not been delivered, were said to be as follows:

- (a) the further evidence is so material that the interests of justice require its admission;
- (b) the further evidence, if accepted, would most probably affect the result of the case;
- (c) the further evidence could not by reasonable diligence have been discovered earlier; and
- (d) no prejudice would ensue to the other party by reason of the late admission of the further evidence.

[5] Reference by the High Court to prejudice to the other party, and the guiding principle of the interests of justice, require account to be taken of the strain that litigation imposes on personal litigants. The prejudice caused by delay in the delivery of an expected judgment at the end of stressful litigation cannot always be measured in terms of money or cured by an order for costs. The interests of justice are served by finality in litigation, particularly where prolonged litigation imposes a strain on personal litigants.

(Citations omitted).

[38] Even if the Commission were to waive compliance with the IR Rules, in particular r 78, there is limited material by way of submissions by the Applicant before the Commission as to why the Applicant should be permitted to reopen the proceedings.

[39] Relevantly, there is no new evidence relied on that goes to the substance of the matter, nor do the submissions address why the Applicant did not seek the orders at the time of the determination of the application for legal representation.

[40] The highest the material goes as to why the application is made at this late stage is that a Google search of the Applicant's name produces a link to the Decision.

[41] The Applicant then attempts to draw a connection between the fact that the Decision is available online as posing a safety risk to the Applicant as he is fearful it makes it

¹⁰ *EB v CTT (No 2)* (2008) QSC 306.

possible for him to be identified as a local government employee and "possibly tracked down and harmed".

- [42] The Applicant also refers to the fact that his children catch public transport, and he fears for their safety as well.
- [43] Other than the Applicant's bare assertion that he holds a fear, there is no evidence relied on by him that provides a factual foundation for the concern that he holds.
- [44] Relevantly, the Applicant does not point to any occasion since 8 February 2022, when the Decision was published, to provide a basis for the relief sought.
- [45] Further, at the time the Applicant commenced the now discontinued proceedings, he was not a local government employee having had his employment terminated prior to filing the proceedings.
- [46] Accordingly, there are no new or fresh evidentiary matters that weigh in favour of the discretion to reopen the proceedings.
- [47] I also consider that the lengthy delay between the delivery of the Decision on 8 February 2022 and the filing of the application on 13 December 2023 does not weigh in favour of the exercise of the discretion. The application was made more than 22 months after the delivery of the Decision and 14 months after the proceedings were discontinued. Council is entitled to finality in litigation. I consider it would not be in the public interest for leave to be granted to reopen proceedings.
- [48] For these reasons I do not consider the matters raised by the Applicant are matters that weigh in favour of reopening the proceedings.
- [49] For completeness, I will also briefly address the remaining components of the application. As noted above, the Commission does not have the power to remove the Applicant's matter from the public record, nor does the Commission have the power to direct non-parties to do certain things, for instance directing Google to remove any reference to the Applicant's name or the Decision from its search engine.
- [50] The Commission does however have power to amend a document to, for instance, de-identify the name of the Applicant, if it is in the interests of justice to do so.
- [51] The information the Applicant relies on in support of this application is the same information I referred to when considering whether the proceedings should be reopened. That is, he held a concern that it poses a risk to his safety and that of his children insofar as he may be tracked down and harmed.
- [52] The Applicant refers to having previously been allegedly assaulted by members of the public in the course of his employment when he was employed by Council. That employment ceased on 13 May 2021.

- [53] The Applicant does not adduce any evidence at all, but in particular, does not adduce any evidence to support a conclusion that the concerns he holds are reasonable.
- [54] The Commission must have regard to the principle of open justice. The principle is said to be one of the most fundamental aspects of the justice system in Australia.¹¹
- [55] On the state of the material currently before me, the matters relied on by the Applicant fall into the category of the matters referred to in *J v L & A Services Pty Ltd* as the type of information that should not be withheld from the public.
- [56] In order to make an order de-identifying the Applicant, the evidence would need to establish that withholding the information goes beyond withholding information from the public to save a party from the loss of privacy or other "collateral damage".
- [57] For this reason, even if leave were to be granted to reopen the proceedings, the matters relied on by the Applicant do not weigh in favour of the exercise of my discretion pursuant to r 97 to issue directions amending the Decision.
- [58] Further, for the reasons referred to above, the Commission does not have power to grant the relief sought by the Applicant, namely, to issue an order removing his matter entirely from the public record or to have his name removed from internet search engines.
- [59] Consequently, the application is dismissed.

Order

- [60] I make the following order:

The application is dismissed.

¹¹ *R v Dempsey (no 3)* [2017] QSC 338 [2] per Applegarth J.