SUPREME COURT OF QUEENSLAND

CITATION:	*Blows v Townsville City Council* [2018] QSC 234
PARTIES:	**JEFFREY IAN BLOWS** (applicant) **v** **TOWNSVILLE CITY COUNCIL** ABN 44 741 992 072 (respondent)
FILE NO/S:	BS No 5109 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2018
JUDGE:	Douglas J
ORDER:	**The application is dismissed with costs.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – EVIDENCE TO ESTABLISH RIGHT OF ACTION – where the applicant was an employee of the respondent – where the applicant's employment was terminated – where the Queensland Industrial Relations Commission found that the applicant's termination was invalid – where the applicant alleges that he suffered psychiatric injury as a result of the invalid termination of his employment – where a statutory scheme prevented the applicant from being entitled to seek damages from his employer until he obtained a notice from his employer – where the applicant obtained the notice after the limitation period expired – where the applicant sought an extension under s 31(2) of the *Limitation of Actions Act* 1974 (Qld) – whether there was evidence to establish a right of action in accordance with s 31(2)(b) – whether the respondent owed

the applicant a duty of care

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – GENERALLY – whether the issuing of the notice outside the limitation period was a "material fact of a decisive character" for the purposes of s 31(2)(a) of the *Limitation of Actions Act* 1974 (Qld)

Limitation of Actions Act 1974 (Qld), s 31
Workers' Compensation and Rehabilitation Act 2003 (Qld) s 237, s 302

C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board (2009) 239 CLR 390; [2009] HCA 47, cited
Charlton v WorkCover Queensland [2007] 2 Qd R 421; [2006] QCA 498, distinguished
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12, followed
Hintz v WorkCover Queensland [2007] QCA 72, followed
State of New South Wales v Paige (2002) 60 NSWLR 371; [2002] NSWCA 235, followed

COUNSEL: M Grant-Taylor QC for the applicant
G Diehm QC with J Wiltshire for the respondent

SOLICITORS: Littles Lawyers for the applicant
Keir Steele Lawyers for the respondent

[1] The applicant had been employed as a parking unit officer with the respondent for 20 years until June 2014 when he was presented with a "show cause" letter alleging misconduct against him. He was dismissed from his employment by a letter dated 24 June 2014. He then sought redress in the Queensland Industrial Relations Commission which, on 15 June 2016, declared that his termination was invalid on the basis that it was disproportionate to the gravity of the conduct alleged against him.

[2] On 6 October 2017, after an appearance before the General Medical Assessment Tribunal (Psychiatric), he was diagnosed as suffering from an aggravation of a major depressive disorder having its onset in 2002. The respondent, in conformity with that decision, issued a notice of assessment ("NOA") dated 2 November 2017. It assessed him as having a degree of permanent impairment of 6%, less than 20% for the purposes of s 239(1) of the *Workers' Compensation and Rehabilitation Act* 2003 ("the Act"), and offered him a lump sum of $19,222.20 as workers' compensation. His solicitors then

gave notice of a claim for damages having previously served one dated 9 May 2017 as well. Those forms have compliance issues that remain unresolved.

[3] Pending satisfaction of the requirements of the Act, he wishes to establish his right to sue before the expiration of the applicable period of limitation for his damages claim. That is, he submits, 9 November 2018. The ordinary limitation period would have expired on 4 June 2017. He argues that, for the purposes of s 31(2)(a) of the *Limitation of Actions Act* 1974, the material fact of a decisive character is his receipt on 9 November 2017 of the Townsville City Council's NOA dated 2 November 2017 as that notice created an entitlement for him to bring a common law claim for damages in assessing his degree of permanent impairment as more than 5%.

[4] The respondent submits, however, that the applicant has failed to show a "prima facie case" and, in particular, that any relevant duty of care was owed by the respondent to him. It also submits that, as the applicant could have applied for an NOA more than six months before the expiration of the ordinary period of limitation and thus could have established a right to commence a proceeding for damages, he is not now entitled to an extension of the limitation period pursuant to s 31 of the *Limitation of Actions Act*.

Evidence to establish the right of action - duty of care

[5] The first question is whether the respondent owed him a duty of care in the law of negligence with respect to the conduct of an investigation into his behaviour and, in turn, the manner of his dismissal. The investigation and his dismissal are said to have precipitated deterioration in his mental state and the development of a marked aggravation of his depression.[1] The personal injuries he claims to have suffered are described in his notice of claim for damages dated 5 December 2017 as having been suffered as a result of his being served with an invitation to show cause why he should not be dismissed and his dismissal, from which he says he developed a psychiatric illness since diagnosed as a major depressive disorder which he attributes to the respondent's negligence.[2]

[6] The respondent's submission is made in reliance on decisions in *State of New South Wales v Paige*[3] and *Govier v The Uniting Church in Australia Property Trust (Q)*.[4] The decision in *State of New South Wales v Paige* dealt with whether a duty of care existed in an employer to provide a safe system of work encompassing the provision of a safe system of investigation and decision-making with respect to procedures for discipline and termination of employment pursuant to New South Wales legislation so as to avoid psychiatric injury. It was described as a novel duty and inconsistent with the heavy

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1 See the report of Dr Caniato dated 21 July 2017, ex RR-25 to the affidavit of Mr Ravat filed 30 July 2018 at p 98 of the annexures to that affidavit.

2 See ex RR-32 to the affidavit of Mr Ravat filed 30 July 2018 at p 129 of the annexures.

3 (2002) 60 NSWLR 371.

4 [2017] QCA 12.

regulation of unfair dismissals at both Commonwealth and State levels across Australia. Spigelman CJ for the New South Wales Court of Appeal on this issue went on to say:[5]

> "[154] The area of unfair dismissals is heavily regulated in both the State and Commonwealth contexts. It represents a particular and carefully calibrated balancing of the conflicting interests involved namely, between preserving the expectations of employees on the one hand and enabling employers to create jobs and wealth, on the other hand. The arguments and factors accepted in *Johnson v Unisys* are directly applicable to the legislation examined above and the same conclusion, namely a refusal to expand the duty of care in negligence to provide an alternative cause of action for unfair dismissals, should be the result.
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> [155] The expansion of the law of tort to matters concerning the creation and termination of a contract of employment, as distinct from performance under the contract, may distort the balance of conflicting interests found to be appropriate as a matter of contract or by intervention of statute. Where, as here, the courts are asked to create a novel duty of care, the courts should refrain from doing so where there is such a well developed alternative mechanism for adjusting the interests involved. Matters concerning the creation and termination of a contract of employment can, in my opinion, properly be left to the law of contract, subject to the extensive statutory modification that the parliaments have introduced into this specific area of contract law."

[7] That decision was applied in *Govier v The Uniting Church in Australia Property Trust (Q)*.[6] The appellant in that case did not argue that the aspect to which I have referred of the decision in *Paige* was wrong but rather sought, unsuccessfully, to distinguish it. Queensland legislation also regulates unfair dismissals extensively as is illustrated by these facts.

[8] In the circumstances, Mr Grant-Taylor QC for the applicant conceded that, if I considered the applicant's case fell within the types of cases governed by the decision in *Paige* and *Govier*, his client's application would fail. He did not submit that the decision in *Paige* was plainly wrong.[7] In my view, it appears to be correct. It also seems to me that its application by the Court of Appeal in *Govier* has the consequence that I must decide that the applicant's proposed cause of action is based on an alleged duty of care which could lead to incoherence in the law from the attempts to expand the

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5 (2002) 60 NSWLR 371, 400 at [154]-[155]; see also 405 at [182], 416 at [330] and 419 at [358].

6 [2017] QCA 12 at [66]-[78].

7 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-152 at [135]; *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 411-412 at [49]-[50].

duty of care in negligence to provide an alternative cause of action for unfair dismissal. Consequently, for that reason alone, the application should be dismissed.

Material fact of a decisive character - knowledge as to breach of duty

[9] Mr Grant-Taylor QC for the applicant submitted that, in this case, it was only on the applicant's receipt on 9 November 2017 of the respondent's NOA that he became a "person entitled to seek damages" within the meaning of s 237(1)(a)(i) of the Act. That is the "material fact" that the applicant relied on as possessing the "decisive character" necessary to satisfy s 31(2)(a) of the *Limitation of Actions Act*. He relied on the decision in *Charlton v WorkCover Queensland*[8] as being relevantly indistinguishable.

[10] There it was not until an Industrial Magistrate held that the appellant had sustained an injury that he became entitled under s 253 of the *WorkCover Act* 1996 to seek damages for an injury allegedly sustained in the course of his employment. As Williams JA said:[9]

> "In my view when one considers the provisions of s. 253 in the context of s. 30 and s. 31 of the *Limitation of Actions Act* it must be a decisive consideration that for the first time a person has become entitled to seek damages for an injury sustained in the course of employment. … [U]ntil the decision of the Industrial Magistrate the appellant had no entitlement to commence proceedings seeking damages for an injury allegedly sustained in the course of his employment. The decision of the Industrial Magistrate had the effect of clothing facts already known with a decisive character, namely the consequence that a reasonable person taking appropriate advice on those facts would conclude that it was only then appropriate to commence proceedings."

[11] The submission by the respondent's counsel to the contrary was that *Charlton v WorkCover Queensland* was distinguishable factually because McMurdo P at [2] and Williams JA at [45] each stressed that the Industrial Magistrate's decision was the first time the applicant became entitled to seek damages as the Industrial Magistrate's decision had been delivered outside the limitation period. The respondent's submission was that the applicant did not address why he did not obtain an NOA within the ordinary limitation period or a period protected by s 302(1)(b) or s 302(1)(c) of the Act. The submission was that, as the injury was allegedly precipitated by his receipt on 4 June 2014 of a "show cause" letter from his employer with his termination of employment occurring on 24 June 2014, the facts and circumstances relevant to those events were within his knowledge at the time they occurred. He was legally represented on his application for reinstatement where the factual matrix of that claim was effectively the same as his damages claim.

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8 [2007] 2 Qd R 421.

9 *Charlton v WorkCover Queensland* [2006] QCA 498 at [45]; [2007] 2 Qd R 421, 431 at [45].

[12] He was first seen by a medical practitioner on 29 July 2014 and his psychiatric symptoms are described in a variety of documents sworn by him, his wife and other potential witnesses as well as in the report of Dr Caniato referred to earlier. There was no evidence that any psychiatric condition affected his capacity to pursue an action. He had pursued the proceeding in the Queensland Industrial Relations Commission for almost two years.

[13] He had previously requested an NOA on 29 March 2017, two months before the expiration of the ordinary limitation period. He could at that time, under the then current legislation, have protected his limitation period by making the request for assessment more than six months before 4 June 2017 to be protected by s 302(1)(c) or have made the request for assessment at a time which would have permitted the respondent to provide an NOA within the ordinary limitation period, including by the applicant responding expeditiously to requests for information and witnesses to fall within s 302(1)(b).

[14] Here, the respondent submitted that a reasonable person in the position of the applicant would have concluded that he should have attempted at any time between 4 June 2014 and 4 December 2016 to enforce an entitlement to damages through the statutory provisions set out in s 302(1)(a), s 302(1)(b) and s 302(1)(c). Accordingly, therefore, receipt of the NOA from the respondent was not "decisive". His entitlement did not hinge on an appeal process beyond his control but only on him requesting an NOA in a timely way.

[15] The respondent submitted, therefore, that the case was akin to *Hintz v WorkCover Queensland*[10] where the Court of Appeal declined an extension based on the receipt of a damages certificate outside the limitation period in circumstances where gateways to seeking damages had opened earlier and the applicant had simply failed to take the relevant steps to do so.[11] It was pointed out that the applicant had been legally represented from the outset and that it could be inferred that he knew he needed an NOA all along. The fact that a gateway to a common law action was open to him within the ordinary limitation period or, if necessary, by means of s 302(1)(b) or s 302(1)(c) meant that the issue of the NOA did not have a decisive character.

[16] In my view, those submissions are also compelling as a reason why the application should be dismissed.

Discretion

[17] If it had become necessary for me to consider whether to exercise the discretion in s 31(2) of the *Limitation of Actions Act*, the respondent also submitted that, for similar reasons as those I have just expressed, the interests of justice did not require an exception to the ordinary rule that proceedings be commenced within three years. He

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[10] [2007] QCA 72.

[11] [2007] QCA 72 at [7]-[9] (per Williams JA), [23] and [26]-[34] (per Keane JA).

submitted that the applicant had not explained the delay between the cause of action arising and the request for his injury to be assessed two months before the expiration of the limitation period or the delay, if relevant, between the receipt of the decision of the Queensland Industrial Relations Commission and the request for assessment of his injury over nine months later.

[18] The respondent also pointed to other delays and issues of compliance raised by its solicitors but not responded to promptly by the applicant's solicitors. Accordingly, the submission was that the applicant had not diligently progressed his claim so that for that reason also I should not exercise my discretion in his favour. I also agree on that basis that the application should be dismissed.

Orders

[19] Accordingly the application is dismissed with costs.