

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Robyn Bond v State of Queensland (Department of Justice and Attorney-General) & Ors* [2020] QIRC 063

PARTIES: **Robyn Bond**
(Applicant)

v

State of Queensland (Department of Justice and Attorney-General)
(First Respondent)

Christine Thomas
(Second Respondent)

Sean Harvey
(Third Respondent)

Kerrith McDermott
(Fourth Respondent)

CASE NO: AD/2019/27

PROCEEDING: Application in proceedings

DELIVERED ON: 30 April 2020

MEMBER: Industrial Commissioner Dwyer

HEARD AT: On the papers

ORDERS: **1. The Notice to admit facts filed 14 February 2020 is set aside.**

CATCHWORDS: INDUSTRIAL LAW – DISCRIMINATION – VICTIMISATION - INTERLOCATORY APPLICATION – Notice to admit facts –

Purpose of Notice to admit facts – matters in dispute - relevance of facts sought to be admitted – legal professional privilege.

LEGISLATION:

Industrial Relations Act 2016, s 536

Industrial Relations (Tribunals) Rules 2011, r 6, r 41, r 49

CASES:

Cape York Land Council Aboriginal Corporation v Joseph Gersten [2004] ICQ 58

Cormie v Orchard [2001] QSC 21

Pollock v Thiess Pty Ltd & Ors [2014] QSC 22

Rigato Farms Pty Ltd v Ridolfi [2000] QCA 292

Reasons for Decision

Nature of application

- [1] On 14 February 2020 Ms Bond filed a Notice to admit facts ("the notice") pursuant to r 49 of the *Industrial Relations (Tribunals) Rules 2011* ("the rules"). Rule 49 relevantly provides:¹

49 Notice to admit facts or documents

(1) A party to a proceeding (the "first party") may, by notice in the approved form served on another party, ask the other party to admit, for the proceeding only, the facts or documents stated in the notice.

(2) If the other party does not, within 14 days after receiving a notice under sub rule (1), serve a notice on the first party disputing the facts or the authenticity of the documents, the other party is taken to admit, for the proceeding only, the stated facts or the authenticity of the stated documents.

(3) The other party may, with the leave of the court, commission or registrar, withdraw an admission taken to have been made under sub rule (2).

¹ Rule 49 is in substantially the same terms as r 189 of the *Uniform Civil Procedure Rules*.

- [2] The notice contains a request at Attachment A that reads:

Please admit that Crown Law lawyers drafted the following documents that were disclosed to the Applicant on 12 February 2020.

- [3] Attachment A then goes on to list 13 documents that were disclosed by the Respondents to Ms Bond ("the documents"). None of the documents are before the Commission.
- [4] The statement of facts and contentions ("SOFC") filed by Ms Bond reveals the substantive matter to be one with a lengthy and complex history. There are a multitude of complaints against a number of persons. The events said to give rise to the multiple alleged contraventions date back to at least 2014 and culminate with Ms Bond's termination of employment in February 2017.
- [5] It is apparent from the description of the documents in attachment A to the notice that they were created in the context of a series of events which are said to form the basis of the action brought by Ms Bond against the Respondents.
- [6] There does not appear to be any dispute between the parties as to the relevance of the documents per se. The issues that are central to the dispute in this application are Ms Bond's request for an admission from the Respondent as to the identity of the author(s) of the documents, whether the identity of the author(s) is relevant, and whether the Respondents have grounds to resist the notice.
- [7] The Respondents indicated an objection to the requirement to comply with the notice and the matter was subsequently listed for mention on 27 February 2020 to hear the parties on the process to address the issues in dispute.

Mention on 27 February 2020

- [8] At the mention on 27 February 2020, the representative for Ms Bond was asked by the Commission to explain why the facts sought to be admitted in the notice could not simply be addressed during cross examination at hearing. The following exchange took place:²

COMMISSIONER: ...Can't you do that in cross-examination?

MR BOND: Well, I can do it in cross-examination, but if I'm prohibited from finding out who it was who wrote it – I mean, if she says, "Okay, I adopt that document" but if the – **if that document was written by the lawyers who have been litigating against Mrs Bond for five years, it would seem – and – and Crown Law had been this person's personal lawyer in – from what I can tell – up to 14 cases in different jurisdictions, then that would lend itself to**

² Transcript dated 27 February 2020 from pages 1-8 to 1-10.

an inference that she wasn't an independent decision-maker. She was, in fact, instructed by lawyers who had a vested interest in – in – –

COMMISSIONER: She acted on advice from lawyers in making the decision, is what you're describing.

MR BOND: No, I'm not – I'm look – not looking for privileged information. The documents aren't – certainly aren't privileged. I mean, they were disclosed. If there was privilege in them at any point then once they were disclosed any privilege would have been waived. So I'm not looking for any advice that – that they had – may have given Ms McDermott, **I'm just looking for the fact that they had written the document and she signed off on it. Her own lawyer gave her – gave her documents to sign which would lead to an inference that she didn't make the decision at all.**

....

COMMISSIONER: - - - if it's revealed that the lawyer authored that document. But they're not putting it forward as advice, they're putting it forward as a letter written under the hand of that person which brings me back to my original point. She's adopted the letter. She's signed it so, presumably having read it, she agrees with the content. If you think it – that the situation is otherwise, then you can do that in cross-examination, can't you?

MR BOND: I could do it in cross-examination, but I don't think it goes far enough. I mean, if you look at even some of the other documents, such as – there's a – there's a document that they provided that was heavily redacted, Mrs Bond filed a public interest disclosure, and a – **supposedly an investigation was done and then her report was drafted, provided to the decision-maker. And it appears from the documents that I've received that it was Crown Law who drafted the actual investigation report. The investigation was of Crown Law's client, Christine Thomas, in this case. And so, if they are drafting a report that exonerates their own client, certainly that's relevant to Mrs Bond's case.**

....

MR BOND: ... **I'm simply trying to show that one of – one of the allegations is that the decision-maker in the public interest disclosure didn't provide – or the State didn't provide natural justice because it was – it was made by a biased decision-maker.**

....

COMMISSIONER: They've got to make a decision. They sought advice on the decision. The advice has come in the form of, "Here's the letter and you should send". They've read it and gone, "I completely agree with everything in that letter. I'm prepared to put my name to it and make that my decision".

MR BOND: Yeah.

COMMISSIONER: It's their decision then, isn't it?

MR BOND: Yeah. **But if they sought the advice of the lawyer for the person who was accused and acted on that advice, that seems relevant to the question of whether or not there was natural justice in the decision itself.**

(Underlining and emphasis added)

- [9] The rules impose an onus on the Respondent to make a response to the notice within 14 days or the 'facts' sought in the notice to admit become deemed admissions. The rules only contemplate an admission or a denial. The Respondents, for reasons set out below, submitted that the notice ought to be set aside.
- [10] In the circumstances the parties were directed to provide written submissions on the question of whether the notice ought to be set aside. The parties agreed to stay the obligation of the Respondent to respond to the notice until 14 days after delivery of this decision.

Respondent's submissions

- [11] In written submissions filed on 6 March 2020 the Respondent relies on two grounds in seeking to have the notice set aside namely:
- i. Relevance; and
 - ii. Legal professional privilege (LPP).
- [12] With respect to relevance, the respondent submits that admissions sought under a notice to admit facts must be relevant to the issues between the parties, as defined by the pleadings or contentions filed in the proceedings.
- [13] The Respondents, in reference to the SOFC filed by Ms Bond submit that there is no controversy as to who the decision maker was in each of the instances of alleged contravention. Having regard to the case pleaded by Ms Bond, they submit the author(s) of the letters and other documents contained in the notice is irrelevant.
- [14] The Respondents further contend that the notice seeks to delve into matters that are protected by LPP. While, on their face, the documents are not evidently communications from lawyers advising the Respondents, the identification of the parts or all of the documents that may have been drafted by lawyers is likely to reveal the advice provided.

Applicant's submissions

- [15] Ms Bond filed written submissions on 13 March 2020. Ms Bond's submissions respond directly to the grounds cited by the Respondents.
- [16] With respect to relevance Ms Bond submits that the identity of the decision maker(s) is "*very much*" in dispute. Ms Bond submits that she intends to establish that e.g. the third

Respondent (Ms McDermott) did not independently decide to initiate a show cause process against Ms Bond or to terminate her employment.

[17] For this reason, it is submitted by Ms Bond that the identity of the author of each of the thirteen documents is relevant.

[18] Ms Bond's submission then, by way of hypothetical cross examination scenarios, seeks to demonstrate this point further.

[19] On the question of LPP, Ms Bond submits that it is unclear what confidential communications the Respondents claim are protected. Further, Ms Bond submits that she is not seeking access to confidential communications, merely the identity of the author of the nominated documents.

Consideration

Purpose of a Notice to admit facts

[20] In considering the application I am conscious of Rule 6 of the rules which provides:

6 Purpose of rules

The purpose of these rules is to provide for the just and expeditious disposition of the business of the court, the commission, a magistrate and the registrar at a minimum of expense.

[21] Rule 49 is in substantially the same terms as r 189 of the *Uniform Civil Procedure Rules* ('UCPR') though the word 'specified' in sub-rule (1) of r 189 is substituted with the word 'stated' in Rule 49.

[22] It is broadly accepted in matters involving notice to admit facts under the UCPR that the purpose of admissions is to ensure that a court is called upon to determine questions genuinely in dispute.³

[23] Further, some precision is required in the notice to specify a 'fact'.⁴ While this principle emerges from a reference to 'specified' in r 189, I do not consider the use of the word 'stated' produces a different reading of r 49.

[24] For the reasons set out below, I consider the notice to be defective.

Matters in dispute

[25] Ms Bond's SOFC is an extensive and complex document. It traverses a great many events dating back to 2014, and it makes a great many allegations.

³ *Rigato Farms Pty Ltd v Ridolfi* [2000] QCA 292.

⁴ *Pollock v Thiess Pty Ltd & Ors* [2014] QSC 22; see also *Cormie v Orchard* [2001] QSC 21.

- [26] The exchange that occurred with Mr Bond and the Commission at the mention on 27 February 2020 reveals (albeit unclearly), for the first time, a new case theory (or theories) by Ms Bond i.e. that (as yet unidentified) lawyers from Crown Law, acting (at best) with a conflict of interest or (at worst) acting with wilful malice, have directly controlled or influenced the processes to which Ms Bond was subjected and now complains of.
- [27] Nowhere in the fifteen pages of the SOFC filed by Ms Bond is there an enunciation, either clear or at all, that those individuals and Respondents who made decisions which Ms Bond alleges aggrieve her, were acting at the behest of (as yet unidentified) 'lawyers' from Crown Law. Nowhere in the outline of evidence filed by Ms Bond is there any suggestion of these allegations being made.
- [28] In short, the identity of the author of the correspondence and other documents referred to in the notice has never been and is not an issue in dispute between the parties.
- [29] Ms Bond seeks to refute this suggestion in her written submissions by pointing to certain language used in the SOFC. I reject her submission. The references to e.g. '*The State acting through Kerrith McDermott*' that are replete through the SOFC do not descend to any level of particularity that might allow them to objectively be understood to plead the case now being presented.
- [30] In the circumstances it cannot be said, by reference to the SOFC filed by either party, that the independence of the relevant decision makers is an issue in dispute between the parties.
- [31] In the circumstances, the facts sought do not go in any relevant way to the matters in dispute. The notice is not serving to narrow the issues in dispute. On the contrary, it is opening up a new area of dispute not previously identified or pleaded. The notice is more akin to an interrogatory.
- [32] In my view it cannot be said that the notice is being used to ensure that the Commission is called upon to determine questions genuinely in dispute⁵ and it ought to be set aside.
- [33] For completeness, subject to leave being granted to amend the SOFC, it is not beyond contemplation that such allegation(s) might become a matter genuinely in dispute between the parties. In the event that they do, Ms Bond will have the opportunity to cross examine witnesses and advance her arguments at the hearing. In these circumstances there is no prejudice to Ms Bond in setting aside the notice.

Lack of precision

⁵ *Rigato Farms Pty Ltd v Ridolfi* [2000] QCA 292.

- [34] In addition to the reasons set out above, I consider that the question asked in the notice is overly simplistic, incomplete, and misconceived. It has the potential to produce an unclear, incomplete or even inadvertently misleading response.
- [35] Firstly, the answer to the very singular question contained in the notice is not necessarily binary. There are thirteen separate documents. Having regard to their description e.g. show cause letters, I confidently assume they are of varying complexity. Further, given the nature of such documents and the usual approach taken in bureaucracies, multiple contributors could be anticipated with respect to a number of the documents.
- [36] Ms Bond asserts the purpose of the notice is to establish that certain persons identified as decision makers are, in fact, not the authors of the documents. In doing so, Ms Bond then (presumably) intends to impute proscribed motives by others for the actions taken against her, namely 'Crown Law lawyers'. The problem with the notice is that it presumes the answer, and therefore gives rise to a potentially misleading response.
- [37] Any or all of the documents may have been prepared by or contributed to by someone other than the purported author. Further, *parts* of any or all of them may have been prepared by or contributed to by someone other than the purported author. And further still, any, all or parts of the documents may have been authored by someone other than the identified decision maker or 'Crown law lawyers'.
- [38] The question, as posed in the notice, does not lend itself to a simple admission or denial and, in some circumstances, a denial of the question would not achieve the stated purpose of the enquiry. For example, if the purpose of the question is to establish the fact that the decisions or actions of certain individuals were influenced or usurped by someone other than the purported decision maker, then a question about 'lawyers' from 'Crown Law' could confidently be denied if e.g. the document(s) in question was drafted by Counsel from the private Bar briefed by Crown Law, or a non-lawyer employed by Crown Law, or some other bureaucrat elsewhere in the public sector.
- [39] In addition to my concerns about the structure of the question in the notice, I am also concerned that the answers would be unhelpfully complex and not fully informative.
- [40] Answers to a notice to admit facts should serve to inform the Commission. The answers need to be sufficiently informative that they can be relied upon. An answer to a poorly constructed or incomplete question will be of little or no utility and may well lead the Commission into error.

[41] Having regard to r 6 of the rules, the notice in this instance is expressed with insufficient precision and is potentially burdensome on the Respondents such that, in my view, it has the potential to interfere with the just and expeditious disposition of this matter. In the circumstances, and in addition to my reasons above, I consider the notice to be defective.

Relevance

[42] I am not convinced on the material currently before the Commission that the information sought is relevant. As noted above at paragraphs [25] – [33], nothing contained in the SOFC filed by Ms Bond amounts to an allegation that the decision makers acted upon instructions of 'lawyers' from Crown Law.

[43] The identity of the authors and the case theory now disclosed has never been previously raised, and it certainly does not form part of the pleaded case.

[44] I am therefore not satisfied that the question (or its answer) is relevant.

Legal Professional Privilege

[45] I do not have any of the documents contained in attachment A to the notice before me. That said, having regard to their descriptions, I anticipate that some of them will be both formal and complex. The processes imposed on Ms Bond e.g. the show cause process are matters that are commonly contained in the factual matrix of matters before the Commission. I confidently anticipate that legal assistance and advice will have been relied on for the preparation of some of the documents.

[46] To give proper consideration to the question of which (if any) of the documents might be subject to LPP I would need to have the benefit of seeing the documents and hearing arguments from the parties.

[47] While I cannot reach any final conclusion on the objections on the basis of LPP, I would be prepared to hear further argument on the matter if necessary.

[48] For completeness I am of the view that legal advice that *may* be subject to LPP includes assistance from lawyers with drafting of correspondence. I consider that this is especially so where the correspondence is formal or complex, and where the drafting assistance is intertwined within correspondence authored by others and ultimately issued under the hand of another e.g. one of the respondents.⁶

⁶ See *Cape York Land Council Aboriginal Corporation v Joseph Gersten* [2004] ICQ 58.

Conclusion and further observation

- [49] Rule 49 does not contain provision for exceptions or grounds for dismissal of a notice. Rule 41 however provides that the Commission may make an order that *relates* to requiring a party to respond to a notice to admit facts.
- [50] I consider that the term 'relates' contemplates a broad range of orders, including an order that a party is not required to respond to a notice to admit facts, or that such notice be set aside.
- [51] Further, or alternatively, I have broad powers in interlocutory matters under s 536 of the *Industrial Relations Act 2016* to make orders with respect to admissions.⁷ Such powers would include the power to set the notice aside.
- [52] For all of the foregoing reasons I propose to set notice aside. It follows that the Respondents have no obligation to comply with r 49.
- [53] As an aside, I am compelled to make a further observation about this matter.
- [54] As best as I can understand it from Mr Bond's explanation on 27 February 2020 it seems the purpose of the notice is to assist an argument Ms Bond *now* intends to make. The argument, as explained by Mr Bond, is that 'lawyers' from Crown Law who were also involved in multiple other litigation against her and Mr Bond had a "*vested interest*" i.e. impartial or personal motivation in the outcome of the processes Ms Bond was exposed to and which now aggrieve her.⁸ At the very least, it seems the argument is that (unidentified) 'lawyers' have acted in circumstances where they ought not to have due to a conflict of interest.
- [55] I can see no other reason why the question would so pointedly seek an admission as to the role of 'lawyers' in the drafting. Mr Bond's assertion of their "*vested interest*" would appear to confirm this.
- [56] Such an allegation, if pressed at this stage in proceedings, is fraught with problems.
- [57] Firstly, it is a proposition that if allowed to advance, demands particularity with respect to the 'lawyers' alleged to be acting in this way i.e. their names. Crown Law employs a great many lawyers. Such a scandalous allegation could not be allowed to stand on the

⁷ Section 536(f).

⁸ Transcript dated 27 February 20 at page 1-8, line 19 – Note – Mr Bond does not finish the sentence where he refers to 'vested interest' but, having regard to the language immediately before the term is used, and the other parts of the transcript between 1-8 and 1-10, it is clear that this is one theory Ms Bond proposes to advance.

record, even briefly, lest it impugn the professional reputation of persons entirely uninvolved with Mr and Ms Bonds broader litigious activities.

- [58] Secondly, if such an argument is allowed to advance, the assertion carries imputations of impropriety on the part of legal professionals. The Respondent would likely seek leave to include those lawyers as witnesses to refute such assertions, and I can readily anticipate leave being granted for that purpose given the late emergence of this argument. This *may* delay the matter proceeding on the scheduled dates in June 2020.
- [59] Finally, Mr Bond has been granted leave to represent Ms Bond. Mr Bond has some form of legal qualification but is not a Legal Practitioner in the formal sense as I understand it. Nevertheless, Mr Bond ought to be cognisant of rules governing the professional conduct of persons practicing as solicitors and barristers in Queensland, particularly in respect to making allegations without reasonable grounds.⁹
- [60] While Mr Bond's conduct is not subject to regulation by any professional body, he is not free to make serious allegations without objective evidence giving rise to reasonable grounds for such allegations. The details of the argument foreshadowed in the Mention of 27 February 2020 remain unclear, and they are not yet properly before the Commission. That said, what is foreshadowed so far is potentially serious.
- [61] If, in the course of the proceedings, serious assertions are made against legal representatives, and further, if it becomes apparent that those assertions are without reasonable grounds, I would have to give consideration to whether Mr Bond should retain his grant of leave to appear as representative for Ms Bond.
- [62] However, until or unless Ms Bond or Mr Bond seek to press these assertions, I am insufficiently possessed of facts that would allow me to reach a concluded view about them and what consequences might or should flow from that.
- [63] For completeness, I note that my observations immediately above are not intended to reflect adversely on Mr Bond's conduct of the matter to date.
- [64] It will be a matter for Ms Bond as to how she and her representative conduct her matter from here. I merely make this observation to allow the parties to consider their respective positions on the assertions made by Mr Bond on 27 February 2020, and to avoid the risk of the parties possibly encountering unforeseen difficulties or delays before or at the hearing.

Orders

- [65] I make the following order:

⁹ See for example r 32 of the *Australian Solicitors Conduct Rules 2012* or r 60 and 64 of the *Barristers' Conduct Rules (Qld)*.

- 1. The Notice to admit facts filed by Ms Bond on 14 February 2020 is set aside.**

[66] I so Order.