

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Scott v Steritech Pty Ltd* [2020] QIRC 070

PARTIES: **Scott, Michael**
(Applicant)

v

Steritech Pty Ltd
(Respondent)

CASE NO: WC/2019/190

PROCEEDING: Application to lift a stay on a Form 29 Notice of Non-Party Disclosure

DELIVERED ON: 11 May 2020

HEARING DATES: 1 May 2020

MEMBER: McLennan IC

HEARD AT: Brisbane

ORDERS:

- 1. The stay on the Notice to Produce served on Steritech Pty Ltd on 26 March 2020 is lifted, with respect to the categories of documents referred to at numbers 1, 3, 5 - 8 at page 3 of the itemised 'Schedule of documents'.**
- 2. The Notice to Produce served on Steritech Pty Ltd on 26 March 2020 is varied, with respect to the categories of documents referred to at numbers 2 and 4 at page 3 of the itemised 'Schedule of documents'. Such that it reads:**
 - 2. All documents evidencing or recording communications of analysis undertaken by Glenn Robertson of staffing resources, salaries and staffing structures for the Narangba plant from 1 March 2018 until 7 August 2018, with**

the personal details of other employees redacted.

4. All documents evidencing or recording communications between Glenn Robertson, Murray Lynch, Tony Collins, Paul Newman, John Irwin and Kym Morrison for the Budget Review Process for 2018 of Mr Robertson's examination of the staff review (resources, structure, salaries) for the Narangba plant, with the personal details of other employees redacted.

3. Each party is to bear their own costs.

CATCHWORDS:

INDUSTRIAL LAW – APPLICATION TO LIFT A STAY ON A FORM 29 NOTICE OF NON-PARTY DISCLOSURE – objections to produce documents – where privilege and confidentiality at issue – where direct relevance is considered – where application is varied.

LEGISLATION:

Industrial Relations (Tribunals) Rules 2011 r 64B, r 64E, r 64G

APPEARANCES:

Mr M. Black, Counsel instructed by Mr H. Trotman, Solicitor of Queensland Workplace Law for Mr M. Scott, Applicant.

Ms K. Morrison and Mr G. Robertson for Steritech Pty Ltd, Respondent.

Ms B. Callaghan, Counsel directly instructed by Ms O. Steele for the Workers' Compensation Regulator, interested party.

Reasons for Decision

[1] On 26 March 2020, Mr Michael Scott's legal representative filed a Form 29 Notice of Non-Party Disclosure with the Industrial Registry.

- [2] The Form 29 Notice sought to compel his former employer, Steritech Pty Ltd, to produce various documents that Mr Scott requires for the future substantive Hearing of his Workers' Compensation Appeal.
- [3] The Workers' Compensation Regulator ('the Regulator') is Respondent in that matter. They attended this Hearing as an 'interested party'.
- [4] Mr Scott contends that the documents held by Steritech Pty Ltd ('the company') are relevant to the question of whether the company's decision to make his position redundant constituted reasonable management action taken in a reasonable way. That question will be significant in determining his Workers' Compensation Appeal.

The *Tribunals* Rules

- [5] By way of application under r 64G of the *Industrial Relations (Tribunals) Rules 2011* ('the *Tribunals* Rules'), Mr Scott has sought to have that Form 29 Notice enforced. Under that rule, the tribunal's options are to order that the Notice be:
- Enforced (by way of lifting the stay on the notice); or
 - Varied, or
 - Set aside.
- [6] A Hearing was conducted on 1 May 2020. The purpose of the Hearing was to decide the enforcement Application filed on behalf of Mr Scott, regarding a Notice of Non-Party Disclosure directed at the company.
- [7] Rule 64B(1) of the *Tribunals* Rules says:

Notice requiring non-party production

- (1) A party to a proceeding may, by notice of non-party production, require a person who is not a party to the proceeding (the non-party) to produce to the party, within 14 days after service of the notice on the non-party, a document –
- (a) directly relevant to a matter in issue in the proceeding; and
 - (b) in the possession or under the control of the non-party; and
 - (c) that is a document the non-party could be required to produce at the hearing for the proceeding.
- [8] The key point of the Tribunal Rule above is that a party to a proceeding may compel a third party to produce a relevant document in the possession or under the control of the non-party.
- [9] In the Hearing of this matter, Mr Scott's legal representative addressed the issue of 'relevance' with respect to the application for the company to produce the documents sought. This is summarised at paragraphs [2] and [4] above.

[10] The Tribunals Rules envisage that a non-party may object to the production of documents.

[11] Rule 64E(3)(d) of the *Industrial Relations (Tribunals) Rules 2011* says:

Objection to production

- (3) The objection must –
- (d) clearly state the reasons for the objection.

[12] Rule 64E(4) further states that:

Objection to production

- (4) The reasons may include, but are not limited to, the following –
 - (a) if the objector is the non-party – the expense and inconvenience likely to be incurred by the non-party in complying with the notice;
 - (b) the lack of relevance to the proceeding of the documents mentioned in the notice;
 - (c) the lack of particularity with which the documents are described;
 - (d) a claim of privilege;
 - (e) the confidential nature of the documents or their contents;
 - (f) the effect production would have on any person;
 - (g) if the objector was not served with the notice – the fact that the objector should have been served.

[13] The company objected to providing the documents sought in an email from Ms Kym Morrison (HR Manager, Steritech Pty Ltd) dated 7 April 2020.

Objections

[14] In an email from Ms Kym Morrison (HR Manager, Steritech Pty Ltd) dated 7 April 2020, the company objected to producing the documents on the grounds that:

- Nominated party / persons not specified or named in the title;
- Information requested is privileged;
- Confidential nature of the documents and their contents;
- Limited resources currently available;
- The expense and inconvenience in complying with the notice.

[15] Mr Scott's legal representative had responded to each of the company's stated objections in correspondence to Ms Morrison dated 14 April 2020 ('the reply correspondence').

Oral Submissions

[16] At the Hearing of this matter, the parties made oral submissions regarding the various objections to the production of documents raised and responded to, along with the relevance of these documents to the substantive appeal matter.

[17] The Form 29 Notice of Non-Party Disclosure particularises the eight categories of documents the Applicant requires under the heading ‘Schedule of documents: The following documents must be produced’.

[18] In oral submissions, Ms Morrison elaborated on the company’s objections expressed in its email correspondence.

[19] Each of the company’s objections have been considered and determined as follows.

Nominated party / persons not specified or named in the title

[20] With respect to this stated objection, Ms Morrison advised that not all of the documents sought to be produced were under her possession or control - but may instead be held by others in the company.

[21] Whilst this objection was addressed in Mr Scott’s legal representative’s reply correspondence to her, it was restated that the ‘nominated party’ was correctly identified as ‘Steritech Pty Ltd’ and that “The identity of the individuals relevant to the documents are clearly and relevantly particularised in each paragraph of the notice.”

[22] It was explained that the Form 29 Notice of Non-Party Disclosure had been sent to Ms Morrison in her capacity as HR Manager for the company, rather than as an individual.

[23] The explanation outlined in oral submissions at the Hearing resulted in there being no continued residual objection to disclosure on that point.

Information requested is privileged

[24] The company objected to producing the documents on grounds that they were ‘privileged’ information.

[25] When pressed on the nature of the privilege claimed for each category of documents sought, it became apparent that an assertion of privilege was not the real issue but rather it was an expression of held concerns about ‘confidentiality’.

[26] As such, that ground of objection is also dispensed with and a fuller consideration of ‘confidentiality’ is provided below.

Confidential nature of the documents and their contents

[27] In expounding upon this particular objection, Ms Morrison expressed concerns that some of the information contained within some documents contained the personal details of some employees. Issues such as ‘who can access’ such employee data and ‘where can it go’ appeared core to her stated objections.

[28] Ms Morrison also indicated that certain documents sought contained commercially and (potentially) industrially sensitive data, relevant to the company’s state branches.

- [29] Whilst this objection was addressed in the reply correspondence to the company, it was again emphasised that where documents are obtained through a Notice of Non-Party Disclosure, they are "...subject to an implied undertaking that they will not use those documents for any purpose other than the subject litigation." Mr Scott's legal representatives confirmed that these conditions have been conveyed to him. It was further asserted that "...the public interest in the efficient and expeditious resolution" of the matter effectively trumps the company's confidentiality claims.
- [30] In terms of the relevance of documents sought, Mr Scott's legal representatives confirmed that he did not require disclosure of sections revealing personal information about other employees.
- [31] These insights revealed an opportunity to make a determination to vary the scope of documents to be produced, with respect to two of the categories described in the Notice of Non-Party Disclosure.

Limited resources currently available

- [32] In elaborating on this objection, Ms Morrison stated that her weekly working hours had been decreased due to a health issue. She asserted that the impact of the company's reduced resources, in regard to her available time, should be taken into account when determining whether the documents sought need be produced.
- [33] The consideration of this particular objection is made in the context of the time that has now elapsed since the company was effectively 'on notice' that the documents were required to be produced and the present.
- [34] In the reply correspondence to Ms Morrison, Mr Scott's legal representative offered that the company suggest an alternate timetable for the delivery of documents sought (later than the 14 days that would otherwise be required to comply with the Notice), to avoid the time and cost of this Hearing. That opportunity has now eluded the company.
- [35] The time delay in the production of documents so sought - between the date the Notice of Non-Party Disclosure was issued (26 March 2020) and the Hearing of the matter – has provided the company with ample space to attend to the search and production of the relevant documents without further delay.

The expense and inconvenience in complying with the notice

- [36] Finally, Ms Morrison asserted the company's objections to the production of documents included the expense and general inconvenience of doing so.
- [37] In the reply correspondence to Ms Morrison, Mr Scott's legal representative alerted the company early to the likely inadequacy of these reasons. In doing so, he pointed to the *Tribunals* Rules r 64I which provides for Mr Scott to pay the 'reasonable expenses' of producing the required documents as incurred by the company.
- [38] Taken as a whole, the various objections to producing the required documents outlined by the company were neither so significant nor so onerous as to outweigh Mr Scott's

right to discover them as relevant materials to inform the preparation of his case for his appeal matter.

[39] The Regulator did not seek to be heard on the non-party disclosure issue at hand.

Remedy sought by Applicant

[40] As per the Form 4 Application in existing proceedings (filed in the Industrial Registry on 14 April 2020) the outcome sought by Mr Scott is that:

- the Form 29 Notice is enforced;
- the Respondent to disclose documents within 14 days of the Commission decision; and
- the Respondent pay the Applicant's costs of and incidental to this Application.

Conclusion

[41] I am satisfied that the documents requested by Mr Scott in the 'Form 29 Notice of non-party disclosure' complies with the criteria expressed in 64B (1) of the *Tribunals* Rules. That is, that the documents requested by the Applicant in this matter are both directly relevant and in the possession or under the control of the company.

[42] With respect to 'relevance', a foundational question to be determined in the substantive Hearing of Mr Scott's appeal is whether or not the company's decision to make his position redundant was reasonable management action taken in a reasonable way.

[43] The issue at hand in this particular proceeding is whether the eight categories of documents described in the Notice of Non-Party Disclosure are directly relevant to this question.

[44] In *Mullins v Workers' Compensation Regulator; Ex parte Drake International Pty Ltd (No. 2)* [2020] QIRC 003, Commissioner Black considered the application in these terms:

In *Goldsmith v Sandilands*, the High Court said that "evidence is relevant if it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding."

In *Xstrata Queensland Ltd v Santos Ltd & Ors*, McMurdo J was asked to consider the distinction between the test of relevance under the general law and the requirement of the Uniform Civil Procedure Rules 1999 (Qld) (UCRP) which is that only directly relevant documents must be disclosed. In this respect, McMurdo J said that "a document is directly relevant in this sense only if it tends to prove or disprove an allegation in issue in the proceedings."

[45] Each of the company's stated objections to producing documents are addressed in paragraphs [14] to [38] above.

- [46] However, the company's core concerns appear to distil to the issue of 'confidentiality', rather than the expression of 'privilege' in the strictest sense.
- [47] In *DP World Brisbane Pty Ltd v Rogers & Anor* [2014] ICQ 010, President Martin J explained the applicable principles where 'confidentiality' is claimed:

The mere claim that a document to be produced is confidential is not a valid objection to its production. Much of what is disclosed to another party in court or tribunal proceedings of one kind or another may well be confidential. It has been held that where this is the case, "the risk to the confidentiality of information must be tolerated in the interest of the administration of justice." Where specific issues of privacy or a heightened concern for commercial confidentiality, for example, arise, arrangements may be made to ensure that the disclosure of material and information that is made does not go beyond what is strictly necessary in the circumstances. What has been said with regard to confidential information might equally be said to apply in the case of personal information that might in other circumstances be protected by privacy legislation. Accordingly, the mere fact that information to be produced might include "private" information, however defined, is an insufficient ground in law to justify the setting aside of a Notice or to issue a Notice.

- [48] President Martin J further said that:

It is well established that parties to whom documents are discovered may not use the discovered documents or the information that they contain for a purpose other than the conduct of the proceedings in question. To do so would amount to conduct in contempt of the relevant court or tribunal, and this principle has been held to extend to material produced on subpoena. Accordingly, this concern does not justify the exercise of the Commission's discretion.

- [49] In summary, whilst confidentiality concerns may be genuinely held by the company, they are not elevated above Mr Scott's rights to obtain the documents he requires to prepare his case for future Hearing on the substantive appeal matter.
- [50] This is particularly true where the company's concerns can be dealt with to some extent by Orders that vary the scope of documents to be produced in two categories of documents sought, together with a Commission Direction under s 580 of the *Industrial Relations Act 2016* Qld ('the IR Act') to protect confidentiality.
- [51] The effect of this Decision is that Steritech Pty Ltd must disclose the required documents within 14 days, per r 64B of the *Tribunals* Rules.
- [52] Bearing in mind that the default position under the *Tribunals* Rule 64G(3) is that each party to an application such as this bears their own costs, and given the brevity of this matter, I am not minded to award costs in this instance. Each party is to bear their own costs of this application.
- [53] I order accordingly.

Orders

- 1. The stay on the Notice to Produce served on Steritech Pty Ltd on 26 March 2020 is lifted, with respect to the categories of documents referred to at numbers 1, 3, 5 - 8 at page 3 of the itemised 'Schedule of documents'.**

2. **The Notice to Produce served on Steritech Pty Ltd on 26 March 2020 is varied, with respect to the categories of documents referred to at numbers 2 and 4 at page 3 of the itemised ‘Schedule of documents’. Such that it reads:**
 2. **All documents evidencing or recording communications of analysis undertaken by Glenn Robertson of staffing resources, salaries and staffing structures for the Narangba plant from 1 March 2018 until 7 August 2018, with the personal details of other employees redacted.**
 4. **All documents evidencing or recording communications between Glenn Robertson, Murray Lynch, Tony Collins, Paul Newman, John Irwin and Kym Morrison for the Budget Review Process for 2018 of Mr Robertson’s examination of the staff review (resources, structure, salaries) for the Narangba plant, with the personal details of other employees redacted.**
3. **Each party is to bear their own costs.**