SUPREME COURT OF QUEENSLAND

CITATION:	*Buderim Ginger Ltd v Booth* [2002] QCA 177
PARTIES:	**BUDERIM GINGER LTD** ACN 010 978 800 (Applicant/Respondent) **v** **SUSAN BOOTH, ACTING ANTI-DISCRIMINATION COMMISSIONER, QUEENSLAND** (Respondent/Appellant)
FILE NO/S:	Appeal No 9435 of 2001 SC No 3077 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2002
JUDGES:	de Jersey CJ, McPherson JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. That the appeal be allowed** **2. That the orders made on 27 September 2001 by the learned primary Judge be set aside** **3. That the respondent pay the appellant's costs of the application and the appeal to be assessed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – ERROR OF LAW – where employee made complaint of discrimination on the ground of impairment – where Anti-Discrimination Commissioner exercised discretion to accept complaint outside one year limit – whether there was evidence from which the Commissioner could be reasonably satisfied there was good cause to accept complaint ADMINISTRATIVE LAW – PARTICULAR TRIBUNALS OR BODIES – ANTI-DISCRIMINATION AND EQUAL

OPPORTUNITY TRIBUNALS

DISCRIMINATION LAW – STATE PROVISIONS – QUEENSLAND – whether "good cause" in s138(2) *Anti-Discrimination Act* 1991 requires explanation for delay in bringing complaint

Anti-Discrimination Act 1991 (Qld), s 2, s 4, s 6(2), s 7(1)(h), s 11, s 15(1)(a), s 15(1)(f), s 136(b), s 138, s 139
Judicial Review Act 1991(Qld), s 20(2)(h), s 24

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, referred to
Comcare v A'Hearn (1993) 45 FCR 441, applied
Cooper v Hopgood & Ganim [1999] 2 Qd R 113, referred to
Dempsey v Dorber [1990] 1 Qd R 418, applied
Department of Transport v Chris Smaller (Transport) Ltd [1989] 1 AC 1197, considered
Gleeson v Brick [1969] Qd R 361, referred to
McAuliffe v Puplic (1996) EOC 92-800, referred to
Hoffman v The Queensland Local Government Superannuation Board [1994] 1 Qd R 369, referred to
Witten v Lombard Australia Ltd (1963) 88 WN (Pt 1) NSW, applied

COUNSEL: P A Keane QC, with D Rangiah, for the appellant
D Jackson QC, with S Keim, for the respondent
SOLICITORS: Blake Dawson Waldron for the respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Atkinson J, in which her Honour comprehensively sets out the circumstances giving rise to the appeal.

[2] The narrow question for the learned primary Judge was whether there was, before the Commissioner, any evidence – even a scintilla – from which the Commissioner could reasonably have been satisfied that the complainant had shown "good cause" for acceptance of the complaint after the prescribed 12 month period (s 24 *Judicial Review Act* 1991). In her reasons, Atkinson J has referred to some of the matters which may fall for consideration in determining whether "good cause" has been shown, of which the reason why the complaint was not made within time, the extent of the delay in its being brought forward, and whether accepting the complaint late would occasion prejudice to the respondent, will often feature prominently. (It is not necessary in this case to determine the question whether any preliminary assessment of the substance of the complaint may properly be undertaken: cf. *McAuliffe v Puplic* (1996) EOC 92-800.)

[3] The essence of the learned primary Judge's reasoning emerges from the following paragraph of his reasons for judgment:

> "Before the discretion conferred by s 138(2) of the Act can be exercised there must be good cause why a late complaint of *discrimination* should be accepted. It is no doubt right that Mr Sealy

> persistently and bitterly complained about the applicant's refusal to pay his long service leave "entitlements". There was, however, no suggestion of unlawful discrimination until Ms Johnston made it. There is nothing in the material to show that he was seeking redress for these acts of discrimination in the twelve months after 29 October 1998. The "concerns" which he sought to have "dealt with through other avenues", relied on by the respondent, were not concerns of discrimination, certainly not discrimination on the basis of race or trade union activity. Nor can it be said that Mr Sealy "sought to investigate how to resolve his matter" if one understands his matter to be allegations of discrimination contrary to the Act. The matter he sought to have resolved was the non payment of long service leave entitlements. The applicant is right that there is no material to show that Mr Sealy sought advice about discrimination and received inappropriate advice, nor does the material show that his attempts to obtain long service leave payments and/or workers' compensation or damages were a misguided attempt to obtain redress for unlawful discrimination. Mr Sealy offers no explanation at all why he did not complain of discrimination before October 2000."

[4] In brief, the learned Judge took the view that the complainant's failure, for two years after his resignation, to complain of discrimination resting in his being required to work night shifts though – to the knowledge of the respondent – because of his medical condition he would be unable to do so, meant that "good cause" could not have been shown. It is true that the relevant complaint concerned the respondent's refusal to pay to the complainant long service leave payments to which he would have become entitled had he remained in the respondent's employment for another four months. But the very reason for that early resignation – on the complainant's case – was the respondent's unreasonable requirement that the complainant work night shifts, the matter which the complainant now asserts amounted to indirect indiscrimination (s 11 *Anti-Discrimination Act* 1991).

[5] That was the way the complainant was presenting his position to the respondent prior to his resignation, through his psychiatrist's letter of 29 October 1998 which said:

> "He has made a reasonable adjustment to his present job on day shifts but would find it an intolerable strain if he had to do night shift. Can consideration be given to accommodating his needs?"

and likewise to WorkCover Queensland, as appears from his application dated 10 November 1999:

> "I was instructed to work night shift when I had previously advised my employer that I could not cope with working night shift. I had also presented a letter from my doctor requesting that consideration be given to me not working night shift. As soon as night shift commenced, I experienced symptoms of post-traumatic stress disorder."

[6] While the claim which the complainant relevantly advanced related directly to unpaid long service leave payments, the circumstances which based that claim were at the forefront of the complainant's approaches and enquiries, and it was those circumstances which Ms Johnston eventually suggested may have involved unlawful discrimination. In my respectful view, the particular circumstance that the

complainant did not, for two years, advance, in terms, that specific claim of discrimination, did not in these circumstances mean that "good cause" could not have been shown.

[7] In my view there was evidence from which the Commissioner could reasonably have been satisfied that the complainant had shown "good cause" for acceptance of the complaint after the prescribed 12 month period. The Commissioner expressed her conclusion in these terms:

> "Mr Sealy has provided extensive documentation demonstrating that he sought to have his concerns dealt with through other avenues but was not informed of the possibility of taking up the matter with the Commission until he sought advice from Ms Zrinka Johnston … I do not accept that Mr Sealy "chose not to investigate how to remedy" … his complaint. It appears that he has sought to investigate how to resolve his matter but not necessarily in the right direction. In my view Mr Sealy has provided a reasonable explanation for the delay, particularly in light of the complainant's medical condition and the further claim of delay in exhausting other avenues of redress."

Those matters, together with the absence of prejudice to the respondent should the complaint be accepted, amounted to evidence from which the Commissioner could reasonably have been satisfied that "good cause" was shown.

[8] I would order:

(a) that the appeal be allowed;
(b) that the orders made on 27 September 2001 by the learned primary Judge be set aside; and
(c) that the respondent pay the appellant's costs of the application and the appeal to be assessed.

[9] **McPHERSON JA**: I agree with the reasons given by the Chief Justice and Atkinson J for allowing this appeal on the terms proposed.

[10] **ATKINSON J**: On 23 October 2000, Michael Sealy (the "complainant") lodged a complaint with the Anti-Discrimination Commission of Queensland (the "Commission"). The complaint alleged discrimination by the respondent, Buderim Ginger Ltd ("Buderim Ginger") on the basis of impairment, trade union activity and race. As his complaint was lodged outside the statutory time limit of one year for making complaints of an alleged contravention of the *Anti-Discrimination Act*, the Acting Anti-Discrimination Commissioner (the 'Commissioner") was obliged to exercise her discretion whether or not to accept the complaint.

[11] Section 138 of the *Anti-Discrimination Act* 1991 provides that, "the Commissioner has a discretion to accept a complaint after one year has expired if the complainant shows good cause." On 6 March 2001, the Commissioner exercised her discretion to accept the complaint of discrimination on the basis of impairment, having been satisfied that the complainant had shown good cause. The allegations of discrimination on the basis of trade union activity and race were not accepted by the Commissioner as they did not satisfy the requirement in s 136(b) of the *Anti-Discrimination Act* that they be set out in reasonably sufficient detail to indicate an alleged contravention of the *Anti-Discrimination Act*.

[12] Buderim Ginger sought judicial review of this decision. At the hearing of that application, it relied solely on the ground found in s 20(2)(h) of the *Judicial Review Act* 1991, "that there was no evidence or other material to justify the making of the decision." This ground is amplified and explained in s 24 of the *Judicial Review Act* 1991 which provides:

> "The ground mentioned in s 20(2)(h) … is not to be taken to be made out–
>
> (a) unless–
>
> (i) the person who made, or proposed to make, the decision was required by law to reach the decision only if a particular matter was or is established; and,
>
> (ii) there was no evidence or other material (including facts of which the person was or is entitled to take notice) from which the person could or can reasonably be satisfied that the matter was or is established …"

In this case, the decision maker was required by law to reach the decision to exercise her discretion to extend the time only if she was satisfied that the complainant had shown good cause. In such a case the ground relied upon in the application for judicial review would not be made out unless there was no evidence or other material from which the Commissioner could reasonably be satisfied that good cause was made out.

[13] On 11 September 2001, the learned judge who heard the judicial review application set aside the decision of the Commissioner holding that "on no reasonable view of the evidence has good cause been shown to enliven the discretion to accept the complaint out of time." To determine whether or not that conclusion was open to his Honour on an application for judicial review it is necessary to consider the question that was before him for decision.

[14] The question on judicial review where the only ground relied upon is s 20(2)(h) of the *Judicial Review Act*, is whether there was any evidence or other material from which the Commissioner could be satisfied that there was good cause to exercise her discretion to accept the complaint even though more than a year had expired since the alleged contravention of the *Anti-Discrimination Act*.

[15] The occasion for the exercise of the discretion only arises if there was an alleged contravention of the *Anti-Discrimination Act*. The facts and circumstances which are said to give rise to the alleged discrimination are that Mr Sealy says that in about October 1998, he was informed by his employer, Buderim Ginger, that he would have to work night shifts instead of day shifts. Mr Sealy suffers from a psychiatric disorder, namely post-traumatic stress disorder, as a result of his military service in Vietnam. Mr Sealy's psychiatrist, Dr Anderson, wrote to Buderim Ginger on 29 October 1998 indicating that, because of his psychiatric condition, Mr Sealy would find it an intolerable strain to work night shifts.[1] He was nevertheless required to work night shift by Buderim Ginger. Mr Sealy then went on sick leave from 11 November 1998 and was hospitalised on 16 November 1998 for treatment for his post-traumatic stress disorder. On the advice of Dr Anderson, Mr Sealy

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[1] In a report dated 26 June 2000, Dr Anderson amplified this by saying that Mr Sealy had indicated that night work brought back bad memories and flashbacks of night patrols in Vietnam making him extremely anxious.

resigned from his employment as of 29 December 1998. At that time he had worked for Buderim Ginger for nine years and eight months. On his resignation, he lost not only his job but the opportunity to receive the long service leave payment to which he would have become entitled had he worked there for another four months.

[16] Section 6(2) of the *Anti-Discrimination Act* provides that discrimination is prohibited on a ground set out in Pt 2 of a type set out in Pt 3, and in an area of activity set out in Pt 4 of the Act. In this case, the alleged discrimination is on the ground of impairment found in s 7(1)(h) of the *Anti-Discrimination Act*.[2] The impairment alleged is that found in subsection (d) of the definition of impairment in s 4 of the *Anti-Discrimination Act* being, "a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour." The type of discrimination alleged by Mr Sealy is indirect discrimination as defined in s 11 of the *Anti-Discrimination Act*[3]. The area of activity in which the discrimination is said to have occurred is found in s 15(1)(a) and (f)[4] of the *Anti-Discrimination Act*, i.e. in any variation of the terms of work or by treating a worker unfavourably in any way in connection with the work.

[17] Was there any evidence on which the Commissioner could be satisfied that there was good cause to exercise her discretion to accept a complaint of such alleged discrimination notwithstanding the delay?

[18] The Commissioner considered the reasons why and justification for the complainant's delay and any prejudice which might be occasioned to the respondent by the delay. She referred to the many steps Mr Sealy had taken to seek redress until he was informed that the respondent's actions might represent unlawful discrimination against him. He had written to Buderim Ginger on 29 December 1998 seeking long service leave payments. His request was rejected on 13 January 1999. A week later, Mr Sealy wrote to the union of which he was a member, the Australian Manufacturing Workers' Union (the "AMWU"), seeking their assistance to recover long service leave payments. The AMWU wrote to Buderim Ginger on 8 February 1999 requesting those payments. That request was rejected seven months later on 13 September 1999. Mr Sealy then sought advice from the AMWU as to his rights. On 20 September 1999, the AMWU informed Mr Sealy that they had sought legal advice and there was no way for him to successfully claim long service leave because he did not have 10 years service.

[19] Mr Sealy sought advice from solicitors who lodged a claim for WorkCover on 23 December 1999. This claim explains how his injury happened as follows:

> "I was instructed to work night shift when I had previously advised my employer that I could not cope with working night shift. I had also presented a letter from my doctor requesting that consideration be given to me not working night shift. As soon as night shift commenced, I experienced symptoms of post-traumatic stress disorder."

[20] The claim was rejected by WorkCover on 29 June and 29 August 2000 on the basis that his psychiatric condition was related to his war service. His solicitors were

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2 Section 7 is in Pt 2 of the *Anti-Discrimination Act*.
3 Section 11 is in Pt 3 of the *Anti-Discrimination Act*.
4 Section 15 is in Pt 4 of the *Anti-Discrimination Act*.

aware of the material which would constitute an alleged contravention of the *Anti-Discrimination Act* but did not give him any advice to that effect. Rather they advised him that he was unable to seek redress under the *WorkCover Act* or independently of the *WorkCover Act*.

[21] Mr Sealy then saw members of parliament who made representations to Buderim Ginger on his behalf which were unsuccessful. On the advice of a counsellor from the Vietnam Veterans' Counselling Service, Mr Sealy then saw Councillor Zrinka Johnston of the Maroochy Shire Council who advised him by letter on 16 October 2000 that he may be able to complain to the Commission about a contravention of the *Anti-Discrimination Act* in that he was treated less favourably in his employment because of his illness. Mr Sealy then promptly lodged a complaint with the Commission.

[22] Although it is not essential to show that there is a reason for and justification for the delay in order to show good cause[5], such a consideration is always relevant to such a decision[6]. In forming an opinion that the complainant has shown good cause, the Commissioner is not fettered by rigid rules but must take into account all of the relevant circumstances of the particular case[7] such as the length of the delay[8]; whether the delay is attributable to the acts or omissions of the complainant or his or her legal representatives[9], the respondent, or both[10]; the circumstances of the complainant[11]; whether there has been a satisfactory explanation for the delay[12] and whether or not the delay will cause prejudice to the respondent[13].

[23] Before the discretion to accept the complaint can be exercised, as I have observed, the Commissioner must firstly be satisfied, as she was, that it is a complaint of an alleged contravention of the *Anti-Discrimination Act*. The Commissioner need not look further at the merits of the complaint[14] in the consideration of whether "good cause" has been shown under s 138. The Commissioner has a separate duty set out in s 139 of the Act to reject a complaint when of the reasonable opinion that the complaint is:

> "(a) frivolous or vexatious; or
> (b) misconceived or lacking in substance."

[24] The Commissioner must then be satisfied that the complainant has shown good cause. The Commissioner considered that Mr Sealy had provided a reasonable

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5 *Comcare v A'Hearn* (1993) 45 FCR 441 at 443-444; *Hoffmann v The Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372-373*; cf Hunter Valley Dev Pty Ltd v Cohen* (1984) 3 FCR 344 at 348.

6 *Dempsey v Dorber* [1990] 1 Qd R 418 at 420.

7 *Witten v Lombard Australia Ltd* (1963) 88 WN (Pt 1) NSW 405 at 412; *Stollznow v Calvert* [1980] 2 NSWLR 749; *Norbis v Norbis* (1986) 161 CLR 513 at 538; *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 at 118-119, 124; *Tyler v Custom Credit Corp Ltd* [2000] QCA 178 at [2].

8 *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197 at 1207-1208 per Lord Griffiths; *Tyler v Custom Credit Corp Ltd* (supra) at [2].

9 *Comcare v A'Hearn* (supra) at 443; *Cooper v Hopgood & Ganim* (supra) at 120, 121;.

10 *Gleeson v Brick* [1969] Qd R 361 at 369; *Lewandowski v Lovell* (1994) 11 WAR 124; *Hoy v Honan* CA No 4058 of 1996, 19 August 1997 at 5; *Hunter Valley Dev Pty Ltd v Cohen* (supra) at 351.

11 *Hoffmann v The Queensland Local Government Superannuation Board* (supra) at 373; *Hoy v Honan* CA No 4058 of 1996, 19 August 1997 at 3, 7.

12 *Dempsey v Dorber* [1990] 1 Qd R 418 at 420; *Hunter Valley Dev Pty Ltd v Cohen* (supra) at 349.

13 *Dempsey v Dorber* (supra) at 420; *Cooper v Hopgood & Ganim* (supra) at 118; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 554-555 per McHugh J.

14 *McAuliffe v Puplick* (supra) ¶92-800.

explanation for the delay in making a complaint, particularly in view of his medical condition and his attempts to otherwise gain redress. She considered the question of prejudice and determined that, in view of the fact that the respondent had been receiving correspondence from the complainant, Mr Sealy, or on his behalf from his psychiatrist, Dr Anderson, his union, his solicitors, and various elected representatives as well as correspondence from WorkCover until the time of his complaint to the Commission, there was extensive documentation and memories would not have to be refreshed. The respondent did not allege on the hearing of the judicial review application that it would suffer any relevant prejudice.

[25] It was not suggested that the Commissioner failed to take into account any relevant considerations. The Commissioner made relevant findings of fact which were open on the material before her and which could not be reconsidered by the judge reviewing her decision on the "no evidence" ground. In such a case it was not open to the judge on review to hold, as he did, contrary to the findings made by the Commissioner, that "Mr Sealy offers no explanation at all why he did not complain of discrimination before October 2000."

[26] In light of the material before the Commissioner, it could not be said that there was no evidence or other material from which the Commissioner could reasonably have been satisfied that the complainant had shown good cause. The question before the learned trial judge was not whether there were reasonable grounds for his Honour to be satisfied that the complainant had shown good cause, but whether there was any evidence before the Commissioner from which she could reasonably have drawn a conclusion that the complainant had shown good cause. The judge inadvertently put himself in the shoes of the decision-maker and therefore trespassed into the merits of the decision when he made the finding referred to earlier, that "on no reasonable view of the evidence has good cause been shown to enliven the discretion to accept the complaint out of time." That was not the question before him for consideration. As there was evidence before the Commissioner from which she could reasonably have drawn the conclusion that Mr Sealy had shown good cause, the application for judicial review was bound to fail. I agree with the orders proposed by the Chief Justice.