

# SUPREME COURT OF QUEENSLAND

CITATION: *Brown & Ors v McArthur & Walters* [2002] QSC 236

PARTIES: **ROBIN BROWN**  
(applicant)  
v  
**JOHN MCARTHUR**  
(first respondent)  
and  
**KAREN WALTERS** (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)  
(second respondent)

heard together with

**MARY EDGAR**  
(applicant)  
v  
**JOHN MCARTHUR**  
(first respondent)  
and  
**KAREN WALTERS** (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)  
(second respondent)

heard together with

**MELODY KROK**  
(applicant)  
v  
**JOHN MCARTHUR**  
(first respondent)  
and  
**KAREN WALTERS** (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)  
(second respondent)

heard together with

**MAILY PICKERING**  
(applicant)  
v  
**JOHN MCARTHUR**  
(first respondent)  
and  
**KAREN WALTERS** (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)  
(second respondent)

heard together with

**ROBIN PURVIS**

(applicant)

v

**JOHN MCARTHUR**

(first respondent)

and

**KAREN WALTERS (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)**

(second respondent)

Heard together with

**NARELLE READ**

(applicant)

v

**JOHN MCARTHUR**

(first respondent)

and

**KAREN WALTERS (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)**

(second respondent)

heard together with

**SHEENAH TURNBULL**

(applicant)

v

**JOHN MCARTHUR**

(first respondent)

and

**KAREN WALTERS (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)**

(second respondent)

heard together with

**KATHY UZSOKI**

(applicant)

v

**JOHN MCARTHUR**

(first respondent)

and

**KAREN WALTERS (sued in her capacity as the Anti-Discrimination Commissioner, Queensland)**

(second respondent)

FILE NO/S:

SC No 7257 of 2002

SC No 7258 of 2002

SC No 7259 of 2002

SC No 7260 of 2002

SC No 7261 of 2002

SC No 7262 of 2002

SC No 7263 of 2002

SC No 7264 of 2002

DIVISION: Trial Division

PROCEEDING: Appeal from decision of the Anti-Discrimination Commission

ORIGINATING COURT: Anti-Discrimination Commission

DELIVERED ON: 22 August 2002

DELIVERED AT: Supreme Court at Brisbane

HEARING DATE: 20 August 2002

JUDGE: de Jersey CJ

ORDER: **1. In each case: the application is dismissed.**  
**2. there will be no order as to costs in relation to the first respondent.**

CATCHWORDS: ADMINISTRATIVE LAW – APPEALS FROM ADMINISTRATIVE AUTHORITIES – STATUTORY APPEALS FROM ADMINISTRATIVE AUTHORITIES TO THE COURTS – where appeal from a decision of the Anti-Discrimination Commissioner not to allow complaints against the first respondent where the complaints were all out of time

DISCRIMINATION LAW – QUEENSLAND – where alleged sexual harassment by the first respondent against eight women while undergoing massage therapy – where *Anti-Discrimination Act* limits the time to bring a complaint to one year after the act of discrimination subject to the discretion of the Commissioner if the complainant shows “good cause” – where applicants’ complaints are up to four years after the act of discrimination – where the Anti-Discrimination Commissioner refused the late complaint – where applicants appealed the Anti-Discrimination Commissioner’s decision to disallow the complaints – whether the complainants had “good cause” for the favourable exercise of the discretion – whether a consideration of the strength or weakness of the complainants’ cases had occurred in assessing “good cause” – whether there was a reasonable explanation for the delay by the complainants – where the Commissioner failed to refer to the circumstance that each complainant alleged she was one of a group of victims

*Anti-Discrimination Act* 1991 (Qld) s 138  
*Judicial Review Act* 1991 (Qld)

COUNSEL: J A Logan SC and J Merrell for the applicants  
MM Jarrett for the first respondent  
B M O’Shea for the second respondent

SOLICITORS:           Reidy & Tonkin for the applicants  
                               Clayton Utz for the first respondent  
                               Crown Solicitor for the second respondent

- [1] **de JERSEY CJ:** In May 2001 the applicant Ms Brown, and seven other women, lodged, with the Anti-Discrimination Commission (constituted under the *Anti-Discrimination Act 1991*), complaints alleging sexual harassment suffered while undergoing massage therapy provided by the first respondent Mr McArthur.
- [2] Section 138(2) of the Act provides that a person is entitled to make a complaint within one year of the alleged contravention of the Act, but that the Commissioner may accept a complaint after one year if the complainant shows “good cause”.
- [3] The applicant Ms Brown alleged conduct which occurred in July, August and September 1996, so that her complaint was substantially out of time. The complaints of all other complainants were also out of time.
- [4] On 12 July 2002 the second respondent, the Anti-Discrimination Commissioner, informed each applicant by letter of her decision not to accept that applicant’s complaint.
- [5] Each applicant now seeks to challenge, by application for statutory order of review under the *Judicial Review Act 1991*, the lawfulness of the second respondent’s decision not to exercise the s 138(2) discretion in favour of accepting the late complaint.
- [6] The grounds of review are from case to case substantially the same. The circumstances of the applicant Ms Brown raise each of the grounds found in the other applications. It was therefore convenient to hear the applications together and focus on hers.
- [7] The applicant points substantially to three suggested errors in the Commissioner’s approach.
1. The Commissioner concluded that “the length of the delay in bringing the complaint will significantly prejudice the ability of Mr McArthur to respond”. Yet the Commissioner said that the applicant “had established a strong argument for the delay on two points, the delay in conscious understanding of her experience, and her lack of awareness of the potential for a complaint”. The Commissioner accepted that the applicant had “been able to explain her delay”, yet considered that in view of its extent, prejudice to the respondent warranted not accepting the complaint out of time, albeit she rejected a contention the complaint was frivolous, misconceived or lacking in substance.

Mr Logan SC, who appeared for the applicants, submitted that the Commissioner erred in not acknowledging the responsibility of the first respondent, as perpetrator of the harassment, for the delay so far as it was attributable to the respondent’s “dissociation” – as explained in a report from a Dr Quadrio.

The Commissioner should be regarded as having accepted the applicant's explanation for the delay, while having also considered that the lapse of time was just too great for one to be confident that the respondent would now be able to recall the particular alleged offence with sufficient precision, warranting the view that the complaint, otherwise out of time, should not proceed: and that that was so regardless of a view that he may have contributed to some of that delay. That course was open to her.

The Commissioner's conclusion was:

"I have weighed up Ms Brown's explanation of the delay in making her complaint, the prejudice to her if I do not exercise my discretion to accept the complaint and the prejudice to the respondent if I do exercise my discretion to accept the complaint out of time.

In the matter of *Brisbane South Regional Authority v Taylor* (1996) 186CLR541, McHugh and Dawson JJ found that if the granting of an extension would result in "significant prejudice to the respondent then actual injustice to the respondent would occur," Toohey and Gummoo JJ noting in that in those circumstances a fair hearing would not be possible.

Notwithstanding that Ms Brown has been able to explain her delay in making a complaint, I have formed the view that the length of the delay in bringing the complaint will significantly prejudice the ability of Mr McArthur to respond to the incidents described in it. I have therefore decided not to exercise my discretion under section 138(2) of the Act. That is I have not accepted Ms Brown's complaint."

Mr Logan criticized the Commissioner's reference to "weighing up" various features, referring to *Brisbane South Regional Authority*, supra, pp 549-550. I consider the criticism unwarranted: the Commissioner is to be taken to have found, in terms of s 138(2), that the complainant had not shown "good cause" for acceptance of the complaint out of time.

2. The Commissioner was said to have adverted to an irrelevant consideration, in mentioning the applicant's proceeding for damages in the District Court. While the relief sought before the Commission was different, it was relief sought against the respondent in respect of these events. Her capacity to seek relief against the respondent in respect of the same alleged misconduct within the court, albeit relief of a different kind, was not irrelevant, and the Commissioner did not err in adverting to it.
3. The Commissioner was also criticized for failing, in dealing with the respective applications, to refer to the circumstance that each complainant alleged she was one of a group of victims. Mr Logan referred to the statement of reasons in the *Anti-Discrimination Act*, referring, in cl 7 for

example, to “special measures...for the promotion of equality of opportunity for everyone by protecting...them from sexual harassment”. See also s 117.

But it was the individual application of the Act to the respective complainants which fell for the Commissioner’s consideration. Mr Logan submitted the Commissioner erred in law by failing to take account of “the wider public interest of the protection of everyone from sexual harassment”, where “the complaints, if true, disclosed a pattern of serious, serial, predatory sexual harassment...”. I do not consider however that the Commissioner erred in apparently not regarding the collective situation as a factor justifying a more generous approach to the question of delay and consequential prejudice. The Commissioner rightly focused on the complaint before her, that concerning Ms Brown.

- [8] Notwithstanding Mr Logan’s helpful submissions, I am not satisfied that the Commissioner failed to take account of relevant matters, or to have taken account of irrelevant material, such that her determination is in any of the cases vulnerable under the *Judicial Review Act*.
- [9] In each case the application is dismissed.
- [10] As to the first respondent’s position in relation to costs, he was a reluctant respondent who sought unsuccessfully to be dismissed from the proceedings. I ruled that he should not be dismissed on the basis that he was a potentially interested party. But he thereafter played no role in the proceedings. Although he sought to be protected in relation to costs should the applications fail, I consider in these circumstances that no order should be made as to his costs.
- [11] The Commissioner, I should record, abided the order of the court.