

SUPREME COURT OF QUEENSLAND

CITATION: *Birkett v State of Queensland* [2014] QSC 35

PARTIES: **REBECCA JANE BIRKETT**
(Plaintiff)
v
STATE OF QUEENSLAND
(Defendant)

FILE NO/S: BS 12223 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 28 February 2014

DELIVERED AT: Brisbane

HEARING DATE: 28 February 2014

JUDGE: Philip McMurdo J

ORDER:

- 1. The Plaintiff should have leave to file and serve an Amended Statement of Claim by 7 March 2014 in accordance with the reasons for judgment;**
- 2. The date for the filing and service of any Amended Defence be extended to 28 March 2014;**
- 3. The date for any Reply to that Amended Defence be extended to 4 April 2014;**
- 4. Order 17 of the orders made on 5 December 2013 be vacated; and**
- 5. No order for costs on the two applications filed on 28 and 25 February 2014.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the plaintiff amended its statement of claim - whether the amended statement of claim raises a new cause of action which is time barred – whether the new cause of action arises out of the same or substantially the same facts as the cause of action for which relief is already claimed.

Civil Proceedings Act 2001 (Qld), s 16.

Uniform Civil Procedure Rules 1999 (Qld), r 376.

COUNSEL: T Matthews QC for the plaintiff
GW Diehm QC with him A Luchich for the defendant

SOLICITORS: Schultz Toomey O'Brien Lawyers for the plaintiff
Dibbs Barker for the defendant

HIS HONOUR: On 5 December 2013, orders were made by Atkinson J on the case flow list for the further progress of this case. The first of them was for the plaintiff to file and serve any amended statement of claim by 17 December 2013. That did not occur. The plaintiff did, however, file an amended statement of claim on 19
5 December 2013. No point is taken by the defendant about that lateness and if that were the only question, it could be easily overcome by the required extension.

The real issue or issues are the result of the terms of that amended pleading. The defendant argues that it raises a new or some new causes of action which are time-
10 barred and which should not be allowed to be pleaded in all the circumstances at this late stage. The plaintiff submits that there is no new cause of action raised by the amendments or that, alternatively, the amendments should be permitted because there is no prejudice – or no relevant prejudice to the defendant and the new causes of action, if any, arise out of the same or substantially the same facts as those upon
15 which causes of action already pleaded are based.

The relevant events occurred no later than September 2008 when the plaintiff was dismissed from the employ of what was then called the WorkCover Employing
20 Office. In broad terms, her case, at least until the amendments, has been that she suffered psychiatric injury arising from the termination of her employment without notice in September 2008. She sues the State of Queensland pursuant to the Crown Proceedings Act (1980). The legal bases for her case have been pleaded as a breach of the contract of employment, a breach of the employer’s duty of care and a breach of its statutory duty or duties.
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The present proceeding was commenced in 2012, which was outside any relevant period of limitation, but which the defendant has accepted should be treated as brought within time because of the circumstances that, by a mistake, the plaintiff brought an earlier proceeding not against the State of Queensland, but against the
30 entity which had employed her. That complication has the result of apparently displacing the potential operation of rule 376 of the Uniform Civil Procedure Rules because it cannot be said that the relevant period of limitation – or a relevant period of limitation was “current at the date the proceeding was started”. Rather, it appears that that period, which was one of three years, had by then expired.
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Nevertheless, there is power to permit these amendments, which is within section 16 of the Civil Proceedings Act (2011). Rule 376 appears to qualify the circumstances in which amendments may be permitted under section 16, as subsection 16(3) anticipates. But the absence of the engagement of rule 376 does not detract from the
40 power under section 16 to permit the amendments. It is common ground that at least in the circumstances of this case, the discretion to be exercised under section 16 is to be qualified and guided by the terms of rule 376 as if it did apply.

The question then arises as to whether the amendments would include any new cause
45 of action. The answer to that question cannot be shortly stated, but it does seem to me that there would be at least some further causes of action which would be added by these amendments. The present pleading, that is, before consideration of

these amendments, is one which ultimately complains of the termination of the plaintiff's employment, albeit in circumstances some of which pre-dated that event. The amendments would add not only an allegation of a new contractual term, being a term to be performed during the course of the employment and not limited to
5 performance at the point of termination, but also several instances of an alleged breach of such a term during the duration of the employment. Once it is seen that there are distinct events of breach, at least breach of contract, which are to be part of the plaintiff's case, it follows that there would be further causes of action which would be raised by these amendments.

10 It was submitted that the evidence of the facts now to be pleaded by the amendments would be admissible on the pleading as it stood prior to the amendments. That may be correct. To instance that, there are events pleaded by paragraph 10A of this amended pleading which, at least potentially, have a relevance to the case before the
15 amendment because they would be relevant circumstances in assessing the content of the employer's duty of care at the point at which it terminated the plaintiff's employment. But the amendments would seek to rely upon those facts not simply in support of the existing cause or causes of action, but as distinct wrongs, including breaches of the contract of employment.

20 The question is whether the new cause or causes of action arise out of the same facts or substantially the same facts as the cause or causes of action for which relief has already been claimed. At this point there is some difference between the categories of amendments. As I see it, there is a difference between those raised by paragraph
25 10A and 10B and other amendments. To explain that, paragraph 10A clearly raises complaints of breach of contract, as I said, which predate the termination of the employment contract. Those facts are not facts upon which the present causes of action are based. Evidence of those facts, as I have said, might be admissible in the proof of those causes of action, but that is not to say that they are facts out of which
30 the existing causes of action arise.

The matters, however, to be pleaded by amendments to paragraph 17(b) are in a different category. As I see the intended purport of paragraph 17(b) as it would be
35 amended, it is to plead further circumstances of the occasion of the termination of the employment contract which go to the wrongfulness of that conduct. In effect, the amended paragraph 17(b) would allege that it was a breach of contract or a breach of duty by the employer to terminate, without notice the plaintiff's employment and without, putting it broadly, having given her prior warning of the matters which had motivated the employer to take that step.

40 It is a case which would not require the plaintiff to prove that there were particular facts or circumstances which did so motivate the employer. Rather, it would require the plaintiff to prove, if there was an issue about this, the absence of any notice or warning that the employer was in possession of information and forming a view
45 which was likely to lead to the step which it took in termination her employment.

Therefore, the essence of the case, even amended by paragraph 17(b), would remain one which complains of the termination itself and in turn the

psychiatric injury as a result of that termination. As I see it, such a case is one which arises out of substantially the same facts as the causes of action already pleaded. The same cannot be said, as I've endeavoured to explain, about the allegations in paragraph 10A and, to the extent that anything is raised by it, paragraph 10B.

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There is then the question which, if this were a case under rule 376, would be that raised by rule 376(4)(a), namely, whether it is appropriate to give leave to allow these amendments. In my view, it is appropriate to allow the amendments apart from those in paragraphs 10A and 10B. In other words, had I been of the view that the matters raised in 10A and 10B did include a new cause of action arising out of substantially the same facts, it would be my view that those amendments should not be allowed, because it would not be appropriate having regard to the following considerations.

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The first is that, obviously, the particular events pleaded in 10A occurred many years ago; they all occurred in the first eight months of 2008. It is said that no particular prejudice has been complained of by the defendant, but in this context it is incumbent upon the plaintiff to establish the absence of prejudice in the circumstance where new facts are to be pleaded relating to events of so long ago such that some prejudice is to be expected. The plaintiff has far from established that there could be no prejudice from allowing the plaintiff to rely upon the matters in paragraph 10A as founding distinct causes of action.

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Otherwise, it is appropriate to allow the amendments. For the defendant it was submitted that there is no proper explanation of why they were not pleaded earlier, from late last year. It was pointed out that the plaintiff is herself a qualified lawyer and, although she did not have her own solicitor until fairly recently, she had the assistance of counsel. But there is an affidavit from her solicitor which explains that these amendments were inspired by a decision of the Full Court of the Federal Court in Commonwealth Bank of Australia v Barker [2013] FCAFC 83. It does seem likely that this judgment would have encouraged the plaintiff to add an allegation which is pleaded within paragraph 4(e) of this amended pleading: that the defendant would not act in a manner likely to destroy or seriously damage the relationship of mutual trust and confidence between the plaintiff and the defendant. In turn, it can be seen that the other amendments are ones which have effectively resulted from a decision to plead that term.

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The conclusion I have reached, therefore, is that the amendments made by the amended statement of claim filed on 19 December 2013 should be allowed, with two qualifications. The first is that paragraphs 10A and 10B should be disallowed. The second probably requires some further explanation and relates to paragraph 17(b). It was fairly submitted for the defendant that, on one view of some of the subparagraphs of paragraph 17(b), they might involve a case of a claim for damages for a breach of contract preceding the termination of the employment and irrespective of the correctness of that termination.

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As I have endeavoured to explain, as I see it, the intended purport of paragraph 17(b) as amended is to plead a set of circumstances existing at the point of termination of

the contract, albeit the result of things which had not been done by the defendant preceding that event and things which were themselves a breach of contract. In other words, the matters in 17(b), although being alleged breaches of contract, had a consequence only in the context of a wrongful termination of the employment and, of themselves, were not causative of any distinct loss.

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I think it is preferable that the amendments in paragraph 17(b) be further amended to make that somewhat clearer.