SUPREME COURT OF QUEENSLAND

CITATION:	*Wirth v Mackay Hospital and Health Service & Anor* [2016] QSC 84
PARTIES:	**DR PETER DONALD WIRTH** (applicant) **v** **MACKAY HOSPITAL AND HEALTH SERVICE** (first respondent) **CLARE FRANCES DOUGLAS** (second respondent)
FILE NO/S:	SC No 6485 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application for variation of order
DELIVERED ON:	1 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2016
JUDGE:	Bond J
ORDER:	**Delivered *ex tempore* on 1 April 2016:** **The orders of the Court are that:** **1. Pursuant to s 30(4) of the *Judicial Review Act 1991* the Order of Bond J on 7 March 2016 in *Wirth v Mackay Hospital and Health Service & Anor* [2015] QSC 39 be varied as follows:** **Pursuant to s 26 of the Judicial Review Act –** **(a) the second respondent's decision on 4 December 2014 to find the applicant guilty of misconduct pursuant to s 187(1)(b) of the Public Service Act be quashed with effect from 4 December 2014; and** **(b) the second respondent's decision on 6 January 2015 to terminate the applicant's employment pursuant to s 188(1) of the Public Service Act be quashed with effect from 6 January 2015.** **2. There be no order as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW - JUDICIAL REVIEW - POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION - OTHER ORDERS - where order made

	to quash two decisions of the second respondent pursuant to s 26 of *Judicial Review Act 1991* (Qld) ("JR Act") - where, by operation of s 30(1) of the JR Act, that order operated from the day of the making of the order - where applicant sought to vary that order to operate from the day of the quashed decisions - where applicant submits that the day of the quashed decision is most appropriate in the circumstances - where respondent submits that the applicant's delay in bringing the originating application weighs against varying the order - where the respondent further submits that the applicant's benefit from that delay weighs against varying the order - whether, in the circumstances, the order should be varied
	Judicial Review Act 1991 (Qld), s 30(1), s 30(4) *Uniform Civil Procedure Rules 1999* (Qld), r 388, r 667
	Nguyen v Minister for Immigration and Multicultural Affairs (2001) 112 FCR 19, considered *Thakral Fidelity Pty Ltd v Commissioner of Stamp Duties* [2001] 1 Qd R 428, followed *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253, considered *Wirth v Mackay Hospital and Health Service* [2016] QSC 39, cited
COUNSEL:	S J Keim SC, with Dr M Spry, for the applicant C J Murdock for the first and second respondents
SOLICITORS:	Cooper Grace Ward for the applicant Clayton Utz for the first and second respondents

[1] By judgment delivered on 7 March 2016, I ordered relevantly that pursuant to s 26 of the *Judicial Review Act 1991* (Qld) ("JR Act") –

(a) the second respondent's decision on 4 December 2014 to find the applicant guilty of misconduct pursuant to s 187(1)(b) of the *Public Service Act*; and

(b) the second respondent's decision of 6 January 2015 to terminate the applicant's employment pursuant to s 188(1) of the *Public Service Act*,

be quashed.

[2] The order in that form reflected the terms of the relief which the applicant had sought in its application for statutory order of review. The basis of the order was my finding that the two decisions were decisions made in breach of the requirement that natural justice be accorded to the applicant.

[3] In light of the terms of s 30(1)(a)(i) and (ii) of the JR Act the effect of quashing the decisions without specifying a particular date meant that the quashing of the decisions operated from the date of the order, not the date of the decisions themselves. In other words, the decisions were quashed as of the date the order

was made, namely 7 March 2016, and not the dates of the decisions, namely 4 December 2014 and 6 January 2015.

[4] The applicant now applies before me pursuant to s 30(4), of the JR Act or alternatively rr 388(1)(b) and/or 667(2)(d) of the *Uniform Civil Procedure Rules 1999* (Qld) to amend the orders that I made on 7 March so that the order would specify that the decisions were quashed respectively on the dates they were made.

[5] The application is brought because the legal representatives for the applicant realised in the course of seeking back pay on behalf of their client for the period from the time his employment was terminated that the specification of dates was required. In effect, they had sought back pay backdated to the dates of the decisions and that had been refused by the first respondent in reliance on the proposition, obviously correct on the face of the orders in light of ss 30(1)(a)(i) and 30(1)(a)(ii) of the JR Act, that the quashing only took effect from the date of the order.

[6] The applicant's legal representatives realising that issue caused them to bring the application that I have identified.

[7] Section 30(1)(a) of the JR Act does permit the specification of the date in the way that the applicants seek to have the orders expressed today. The subsection specifically authorises the Court to make an order quashing a decision with effect from the day of making the order or by specifying a different date of the order having effect.

[8] In this regard, the applicant drew my attention to the decision of Sackville J in *Nguyen v Minister for Immigration and Multicultural Affairs* (2001) 112 FCR 19, at 21 to 22 ([11] to [12]), where his Honour observed:

> On general principles of administrative law a decision made in contravention of the rules of natural justice is not regarded as void ab initio, but if challenged is liable to be set aside from the date it was made. In Forbes v New South Wales Trotting Club Ltd (1979) 143 CLR 242, Aickin J (with whom Stephen J agreed) explained the position as follows (at 277):
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> > "That which is done without compliance with applicable principles of natural justice, in circumstances where the relevant authority is obliged to comply with such principles, is not to be regarded as void ab initio so that what purports to be done is totally ineffective for all purposes. Such an act is valid and operative unless and until duly challenged but upon such challenge being upheld it is void, not merely from the time of a decision to that effect by a court, but from its inception. Thus, though it is merely voidable, when it is declared to be contrary to natural justice the consequence is that it is deemed to have been void ab initio."
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> The discretion conferred by s 16(1)(a) of the ADJR Act is not to be circumscribed by any rigid rules. The passages I have cited, however, suggest that where a decision has been made in contravention of the rules of natural justice, the decision should ordinarily be set aside as from the date it was made, at least if there are no factors pointing to a different date as being appropriate. This is consistent with the view expressed by Davies J in Minister for Immigration and Ethnic Affairs v Taveli (1990) 23 FCR 162 at 169. (French and Hill JJ in that case upheld an order that a deportation decision be set aside as from the date it was made as an exercise of the trial Judge's discretion: see at 186.)

[9] I observe that the section of the ADJR Act to which reference is made is equivalent in effect to s 30(1)(a) of the JR Act.

[10] In referring to the citation from *Nguyen*, I am not to be thought as overlooking the controversy that often exists in administrative law circles between whether a decision is to be regarded as void or voidable. To my mind, that distinction is not relevant because the appropriate course is that described in the second paragraph of the quotation I have made from Sackville J's decision, commencing with the words, "The passages I have cited."

[11] I note that in *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253, the judgment of Sheppard and Wilcox JJ adverted to the distinction between what is void and what is voidable and observed (at 258):

> In the end the label does not matter. A decision made in purported exercise of a statutory discretion, but which is affected by a relevant irregularity, will normally be treated as valid until successfully impugned by an appropriate plaintiff; but once the decision is held to be bad in law it will be treated as being invalid, at least insofar as substantive rights are concerned, as from the date upon which it was made.

[12] It is against that background that the applicant invites me to vary the terms of the order I made so as to make the quashing, which I ordered, have effect as from the date of the relevant decisions, there being in the applicant's submission no factors pointing to a different date as being appropriate.

[13] The applicant points out that its originating application did not seek only relief under the JR Act. In fact, its case pursued declaratory relief pursuant to the *Constitution of Queensland 2001* (Qld) and the Court's inherent jurisdiction – the JR Act relief being sought in the alternative. The applicant submitted that the declarations of invalidity that it had sought – and in this regard reference can be made to paragraphs 1, 3, and 4 of the relief sought in the originating application – would have operated from the dates of the decisions which had been the subject of the declaration.

[14] The applicant submits that if the need to specify a date on a quashing order made under the JR Act had been adverted to at the trial and he had sought to amend the originating application to specify that he sought to have the decisions quashed as at the date they were made, the respondents could not have opposed any such amendment. The applicant bases this upon the proposition that in the context of the declaratory relief sought and the nature of the grounds for review, namely grounds founded upon breach of natural justice, such an amendment would have been regarded as within the bounds of the relief which had been sought in any event.

[15] The respondents to the application before me today – who were the respondents at the trial – do not contend that they could have opposed such an amendment if it had been sought. They submitted that they could and would have opposed the amendment on the same bases as they do today and they could have done so based upon the evidence that had already been adduced in the course of the trial. Or to put it in another way, they would not have needed to adduce new or different evidence to be able to meet the altered claim for relief. They submit, having regard to the undoubted jurisdiction that I have under s 30(4) to make variations to the orders, that there are considerations (to use the words of Sackville J in *Nguyen*) pointing to a different date as being appropriate. They contend that I should leave the orders in the position they now are, namely, taking effect as at 7 March 2016.

[16] The respondents point to the following considerations.

[17] They rely on the applicant's delay in bringing the original proceedings in the Supreme Court. They point out that he was dismissed from his employment on 6 January 2015, but did not file his initiating application until 1 July 2015, which was almost five months out of time. The submission was made that delay was a relevant factor, and should influence me in my consideration as to whether any orders should be made. I address the question of delay in my reasons for judgment in *Wirth v Mackay Hospital and Health Service* [2016] QSC 39 at [123] to [129]. But they submit – and I accept – that my rejection of their argument and my determination to exercise a discretion to extend time does mean that I ought not take into account their argument about delay in the exercise of my discretion, pursuant to s 30(4).

[18] The respondent's point, apart from delay, is that if I make the orders sought it would permit the applicant to be allowed to benefit from the delay that has happened. It would expose them, so they contend, to the applicant's ability to claim a very substantial sum of money in the form of the applicant's salary for the period from his termination on 6 January 2015 to 7 March 2016. The sum for the full 14 month period could potentially expose the first respondent to a claim from the applicant in excess of $600,000. The respondents submit that I should not take this course, because allowing the applicant to receive this sum of money would be akin to awarding compensating damages when no such claim was made in the initiating application. And, they contend, that is not the purpose or intent of administrative law remedies. The respondents submitted that it does not legally flow from the finding I made in my earlier reasons for judgment that the applicant should be treated as if he would have remained in the employ of the first respondent at all times until 7 March 2016, and be entitled to claim remuneration on that basis.

[19] It does seem to me that if I accede to the application by the applicant I would expose the respondents to a claim for compensation to which they are not presently exposed. But I think the submission that there is something wrong with that, because it would be akin to awarding compensatory damages, is misconceived. I think the proper way to think about this consideration is whether, given that the effect of my decision was that the termination decision was made unlawfully, there are any factors pointing to a conclusion that I should have the quashing of that decision take effect on the day I made the order, as opposed to the date of the decision.

[20] If I left the orders unamended I would close out the applicant from making any compensation claim. I do not see how that could possibly be thought to be an appropriate exercise of discretion. It seems to me that the justice of the case, namely a case in which it follows from my decision that a termination decision was made unlawfully, is that the applicant should not be closed out from whatever appropriate compensation claim ought follow.

[21] I reject the notion that my decision decides such a compensation claim one way or the other. Counsel for the applicant contended that if I did accede to his application the nature of the cause of action that his client might have against the first respondent would be, essentially, an action of an employee against the employer who has prevented the employee from continuing to earn his agreed remuneration.

[22] It may well be – I express no view on it – that the proper assessment of any such cause of action is that the employee is entitled to the full extent of back pay from the date of the unlawful decision to the date that I made my order. I interpolate that I understand the question of his remuneration after the day of my order is not controversial between the parties.

[23] On the other hand, it may well be that some of the considerations adverted to by the respondents in argument before me are relevant to the question of the assessment of the quantification of any such claim. As I recall it, the contract of employment permitted termination on notice. Perhaps that is relevant to assessment of the quantification. Perhaps the consideration as to whether it would necessarily have been the case that he would have continued to be employed, for all material times, is relevant. I express no view on these matters. To my mind, the decision is whether to close out the applicant from the possibility of the hypothesised claim.

[24] I form the view that the considerations adverted to by the respondents do not express any good reason why the order should not operate from the date the decisions were made. Accordingly, I find in favour of the applicant on its application to vary the order.

[25] I found my decision on an exercise of jurisdiction pursuant to s 30(4) of the JR Act. It seems to me that it is appropriate to regard that section as conferring on me a wide power, not constrained, necessarily, by the considerations that operate in relation to the provisions of the UCPR, which were the alternative basis upon which the applicant founded its claim. In light of the view I have taken about the exercise of my jurisdiction under s 30(4), I do not find it necessary to express a view as to whether I would have been minded to grant the remedy and exercise a power under the UCPR.

…

[26] I have heard from the parties about the cost order that ought be made, consequent upon the applicant's success in persuading me to make an order pursuant to s 30(4) of the JR Act. It does seem to me that it is inappropriate to make an order for costs in favour of the applicant. He comes to this Court for an indulgence resulting from originally not having specified the dates from which he wished any quashing or setting aside of the two relevant decisions to take effect. I am minded to take an approach the same as taken in the Court of Appeal decision of *Thakral Fidelity Pty Ltd v Commissioner of Stamp Duties* [2001] 1 Qd R 428.

[27] It seems to me that, in the present circumstances, had the order been sought appropriately during the trial the arguments that the respondents have advanced could have been advanced during the trial. It was legitimate to seek to persuade me in the way they did. It is just that they failed. But I do not think that they ought to be forced to pay the costs consequence of the applicant's inadvertence. I will order that there be no order as to the costs of or incidental to the application.