

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Costelloe v Workers' Compensation Regulator; Ex parte WorkCover Queensland and Origin Energy Pty Ltd* [2016] QIRC 122

PARTIES: **WorkCover Queensland**
(Applicant)

Origin Energy Pty Ltd
(Applicant)

Costelloe, Joseph
(Appellant)

v

Workers' Compensation Regulator
(Respondent)

CASE NO: WC/2016/38

PROCEEDING: Objection to Notices of Non-Party Disclosure

DELIVERED ON: 18 November 2016

HEARING DATE: 16 November 2016

HEARD AT: Brisbane

MEMBER: Industrial Commissioner Black

ORDER: **Order to set aside Notice in part (WorkCover);
Order to set aside Notice in part and interim
orders made (Origin Energy).**

CATCHWORDS: APPEAL AGAINST DECISION - Psychiatric or psychological injury - appellant seeks non-party disclosure from employer and WorkCover- whether documents should be disclosed.

PRACTICE AND PROCEDURE - Notices of Non-Party Disclosure – objections – consideration of relevance, oppressiveness, confidentiality - other bases for objection - *Industrial Relations (Tribunals) Rules 2011*

CASES: *Workers' Compensation and Rehabilitation Act 2003*
s 32
Industrial Relations Act 1999 ss 274, 320

Industrial Relations (Tribunals) Rules 2011 rr 64B, 64C, 64E, 64F, 64G

APPEARANCES: Ms B Hughes, Solicitor, Kaden Boriss for WorkCover Queensland;
Mr E Mentiplay, Solicitor, Johnson Winter & Slattery Lawyers, for Origin Energy Pty Ltd;
Mr J Costelloe, Appellant;
Ms R Jamieson, Appeals Officer for the Workers' Compensation Regulator.

Decision

- [1] Objections have been lodged to notices issued by Mr Costelloe seeking non-party document production from WorkCover Queensland and Origin Energy Pty Ltd. The notices relate to an appeal brought by Mr Costelloe against a decision of the Workers Compensation Regulator to reject his application for compensation arising from a psychological injury he sustained in 2015 during his employment with Origin Energy Pty Ltd.
- [2] The objections made were subject to a hearing before the Commission on 16 November 2016.
- [3] Mr Costelloe's case is framed by a statement of facts and contentions which he filed on 14 November 2016. Mr Costelloe claims that his psychological injury was attributable to management failures associated with events in the workplace occurring between November 2014 and April 2015. Mr Costelloe commenced work with Origin Energy on 15 September 2014 in the capacity of senior draftsman. He said that in November 2014 his direct report (Ms Tams) was reassigned and that as a consequence he was asked to take on many of her duties. He also maintained that he was appointed to replace Ms Tams in the role of Lead Draftsman, however Origin Energy denies that any such appointment was made.
- [4] Mr Costelloe said that he was ill-prepared and ill-equipped to take on the new and additional duties and responsibilities and that throughout January and February 2015 he had many conversations with his manager, Mr Claughton, about difficulties in the workplace, an unmanageable work load, and his inability to cope.
- [5] Mr Costelloe claims that his circumstances worsened when decisions were made to further reduce staffing in his drafting team culminating in the departure of his assistant, Mr Matthies, on 6 March 2015. By this point in time the drafting team had been reduced from three to one. Mr Costelloe acknowledges that concurrent with the plan to cut staffing, management announced that a range of drafting functions would be contracted out. However he maintained that work was not contracted out until May 2015 and, in the interim, the cumulative impact of workplace stressors and the failure of management to provide appropriate support, resulted in his decompensation.
- [6] As currently informed, it appears that the determination of Mr Costelloe's appeal will include the following key determinations:

- (a) Findings about the facts and circumstances associated with the re-assignment of Ms Tams and the impact of her re-assignment on Mr Costelloe's role, duties and responsibilities;
- (b) Findings about the interactions between Mr Costelloe and Mr Claughton relating to his ability or capacity to absorb duties and responsibilities passed on from Ms Tams;
- (c) Findings about interactions between Mr Costelloe and Mr Claughton about his capacity, and his drafting team's capacity, to undertake the work allocated;
- (d) Findings about interactions between Mr Costelloe and Mr Claughton about complaints made by Mr Costelloe about his work load and related issues;
- (e) Findings about the reasonableness or otherwise of Mr Costelloe's workload;
- (f) Findings related to Mr Costelloe's complaint to HR on 2 March 2015;
- (g) Findings about the management response to claims made by Mr Costelloe relating to changes in his scope of work, his workload, and his ability to cope with workplace demands;
- (h) Findings related to Mr Fleming's and Mr Asheidu's involvement in management decisions affecting Mr Costelloe's role, duties, responsibilities and his capacity to manage the tasks assigned to him.

Industrial Relations (Tribunals) Rules 2011

- [7] Rule 64B provides that a party to a proceeding may, by notice of non-party production, require the production of documents "directly relevant to a matter in issue in the proceeding", while Rule 64C provides that a notice must "state the matter in issue in the proceedings about which the document sought is directly relevant". Rule 64E provides that objections to production may be made for reasons which may include the following:
- (a) the lack of relevance to the proceeding of the documents mentioned in the notice;
 - (b) the lack of particularity with which the documents are described;
 - (c) the confidential nature of the documents or their contents;
 - (d) the effect production would have on any person.
- [8] Rule 64G provides that the Commission may make any order it considers appropriate including, but not limited to, an order:
- (a) lifting the stay; or
 - (b) varying the notice; or

- (c) setting aside the notice.

Notice of Non-Party Disclosure - WorkCover

- [9] By Notice of Non-Party Disclosure dated 19 October 2016, WorkCover was required to produce the following documents:
- (a) List of all Workers' Compensation claims for workers/contractors and ex-workers/ex-contractors when employed by/for Origin Energy;
 - (b) Statements/submissions from Origin Energy in every matter, regardless if it is supporting or rejecting the claim;
 - (c) Details of each of the decisions regard the above cases. Including whether WCQLD accepted or denied the worker's compensation claim and the stated reasons for the decision;
 - (d) All correspondence, notes, records of phone calls of all staff regarding any matter with regard to the Appellant's claim S14RG228413.
- [10] While WorkCover did not object to the production of documents relevant to item (d) above, it objected to the disclosure of documents mentioned in items (a), (b) and (c) above.
- [11] In respect to the disputed items, Mr Costelloe sought, in effect, to access every file that WorkCover held relating to claims made by employees of, or contractors to, Origin Energy, since 2008. He appeared motivated to complete a form of audit on the claims management activities of both WorkCover and Origin Energy associated with their handling of workers' compensation claims over the last eight years. As I understood Mr Costelloe's reasons, he was hoping to discern a pattern of behaviour or decision making which might contribute positively to an ultimate finding that management action taken by Origin Energy in respect of him was unreasonable.
- [12] In pressing his notice for disclosure Mr Costelloe embarks on a fishing expedition of considerable proportions. He seeks an oppressive number of documents within which it is likely, on the most generous of assessments, very few would have any relevance to his appeal. While Mr Costello may be curious about whether other Origin Energy employees have made workers' compensation claims, how those claims have been processed and the outcome of the claims, the inevitable truth is that his appeal will turn on its own particular facts and circumstances and, more particularly, whether specified management actions taken by two or three individuals between September 2014 and March 2015 could be considered unreasonable.
- [13] Pursuant to Rule 64G(2)(c) of the *Industrial Relations (Tribunals) Rules 2011*, I order that the Notice of Non-Party Disclosure dated 19 October 2016 directed to WorkCover Queensland in relation to WC/2016/38 be set aside except in respect to item 4 in the Notice.

Notice of Non-Party Disclosure – Origin Energy

- [14] By Notice of Non-Party Disclosure dated 19 October 2016, Mr Costelloe sought that Origin Energy disclose a substantial amount or number of documents. Additionally, for the purposes of a subpoena, he sought the address, email and phone numbers of 29 current or former staff of Origin Energy.
- [15] A matter in contention in the hearing arose from the failure of Mr Costelloe's Notice of Non-Party disclosure to adequately describe the matter in issue in the proceedings to which the document sought to be discovered was directly relevant (refer Rule 64C). The difficulty of Origin Energy in positively responding to the Notice of Non-Party Disclosure in these circumstances is self-evident.
- [16] These proceedings are further complicated by the fact that Mr Costelloe's Notice of Non-Party disclosure was filed before he had completed his statement of facts and contentions. Further, his statement of facts and contentions was filed after the filing of Origin Energy's notice of objection and before the hearing of the objections.
- [17] In the circumstances I have elected to proceed with a consideration of Origin Energy's objections on the basis that my determinations about relevance would be made having to regard to what I understood to be Mr Costelloe's case by reference to his statement of facts and contentions. In so proceeding however I acknowledge that Origin Energy's objections have been formulated without reference to Mr Costelloe's statement of facts and contentions. In the circumstances, any orders for discovery which issue as a result of this decision will issue on an interim basis. The approach will allow Origin Energy the opportunity to make submissions on the terms of the interim orders in circumstances where they are fully apprised of the contents of Mr Costelloe's statement of facts and contentions, and the contents of the regulator's statement of facts and contentions (which have not yet been filed).
- [18] During the hearing, I accepted Origin Energy's submission that personal contact details for current employees were not required and that attendance notices could be served on these persons via their employer's address. Orders therefore will not be made in respect of the contact details for Rowan Jaschke, Kylie Blackett-Smith or Mayank Pardiwala in particular, or for any current Origin Energy employees. In terms of former Origin Energy employees I am satisfied that Mr Costelloe should be provided with contact details in the form of either a postal address or an email address for Anastasia Moir (or Gilmour); James Nunn; Ian Glasson; Rene Carcoma; Leon O'Brien; and Grant Radcliffe.
- [19] Other than the disclosure of personal contact details of current and former employees, Mr Costello's Notice asked Origin Energy to supply the following documents or materials:

No	Date	Description
1	Sept' 14 to Apr' 15	Policies governing internal employee recruitment, selection, secondment etc to other/higher roles (possibly numbered ORG-HRMS-POL-005 Version 3.1 or version immediately previous to '4' & all revisions/versions of policies/procedures governing code of conduct (including

		“Our compass) and employee complaints valid Sept’ 14 to Apr’ 15
2	Sept’ 14 to Apr’ 15	All Drawing Office Permanent staff weekly timesheets
3	Sept’ 14 to Apr’ 15	All emails to/from Drawing Office Group mailbox
4	Sept’ 14 to Apr’ 15	All emails sent/received to/from (including those ‘cc’) Joe Costelloe
5	Sept’ 14 to Apr’ 15	All correspondence sent/received to/from (including those ‘cc’) Ben Cloughton and higher managers, HR/PeopleConnect/etc regarding all matters leading up to decision to interview Joe Costelloe for Senior ICCE draftsperson role through to change of role Nov/Dec’ 14 to resignation in Dec’ 15
6	Sept’ 14 to Apr’ 15	Log on/Log off times for profile/PC used by Joe Costelloe
7	Oct/Nov 2014	Details/workbooks/content/intent of 2 day safety training course ‘Employees to play active role in safety’ attended by Joe Costelloe conducted at Park Regis Hotel at North Quay and contact details of both course facilitators
8	Oct/Nov 2014	Details/content/intent of compulsory 2-3hr training course conducted by Krystle Tams at Origin Head Office on Coronation Drive October/November 2014
9	Aug/Sept 2014	Reference check questions and answers plus any other correspondence from/to nominated referees for Joe Costelloe (Kris Klupfel) & (Trevor Hughes)
10	Up to April 2015	Personal work files/records for Joseph Costelloe / Kyrstle Tams / Kylie Blackett-Smith / Eddie Matthie (In relation to positions when commencing employment and all correspondence/documentation of any changes to duties/roles/responsibilities/reporting lines
11	Up to April 2015	All revisions of Position Description for every role that every Drawing Office team member (employed at start of 2015) from pre-employment advertisement until April 2015
12	Up to July 2015	Editable-filters, electronic (live) files of Drawing Office database/spreadsheet of Work requests at the start of every month from ie. Sept’ 14, Oct’ 14, Nov’ 14, Dec’ 14, Jan’ 15, Feb’ 15, Mar’ 15, Apr’ 15, May’ 15, June’ 15, July’ 15
13	As at Dec 1 2015	External Drafting charge out rates to all external contractors for all classifications of draftpersons of all disciplines
14	Jan’ 14 to June’ 15	Record of all ICCE Tag/Equipment number requests completed forms
15	Jan’ 14 to June’ 15	Record of all ICCE ORF request completed/signed forms

Consideration and conclusion

[20] Having considered the submissions of Mr Costello and Origin Energy and having reviewed all relevant material, I am not satisfied that orders should be made for the

production of documents identified in the Notice as items 2, 6, 9, 11, 12, 13, 14, and 15, and to the extent that the Notice of Non-Party Disclosure seeks the production of documents in these areas, the Notice is set aside. In so deciding I accept that there is some merit in Origin Energy's submission alleging non-compliance with Rule 64C; that, on balance, the material sought is either not relevant to the issues in contention, or that other avenues are reasonably open to Mr Costello to establish the propositions that he wishes to make; that disclosure might impose an unreasonable administrative burden on Origin Energy; and that disclosure might allow access to matters which are confidential or commercial in confidence.

- [21] In terms of items 1, 3, 4, 5, 7, 8, and 10, after consideration of the submissions of the parties and all the relevant material including Origin Energy's notice of objection and Mr Costelloe's statement of facts and contentions, I propose to issue the following interim orders. The orders will not be finalised until such time as Origin Energy has had the opportunity of considering both Mr Costelloe's statement of facts and contention and the regulator's statement of facts and contention. Further directions will issue prescribing that the regulators statement of facts and contentions are to be filed by 2 December 2016. Origin Energy is required to file written submissions in relation to the interim orders no later than close of business on Friday 9 December 2016.

Orders

- [22] Origin Energy Pty Ltd disclose to Mr Costelloe:
- (a) Any policy or procedure current at November 2014 which is relevant to the undertaking of higher duties by a senior draftsman;
 - (b) Code of Conduct Policy
 - (c) Documents including emails, diary entries, notes, meeting minutes and memoranda evidencing any communication between Mr Costelloe and Mr Cloughton, or between Mr Cloughton and Mr Fleming and/or Mr Asheidu, about any management consideration given to the consequences for the drafting team of the reassignment of Ms Tams, including whether Mr Costelloe should act in the lead role or be considered for permanent appointment to the lead role;
 - (d) Documents including emails, diary entries, notes, meeting minutes and memoranda evidencing any communication between Mr Costelloe and Mr Cloughton which surfaced any concern by Mr Costelloe said that he was ill-prepared or ill-equipped to take on new or additional duties and responsibilities as a result of Ms Tams re-assignment;
 - (e) Documents including emails, diary entries, notes and memoranda evidencing any communication between Mr Costelloe and Mr Cloughton which canvassed difficulties that Mr Costelloe was experiencing relating to work load, the allocation of work to his drafting team, or surfacing his inability, or the inability of his team, to cope with their respective workloads;

- (f) Documents including emails, diary entries, notes, meeting minutes and memoranda evidencing any communication between Origin Energy management and Mr Costelloe, including Mr Costello's drafting team, providing information about a restructure, staff cuts, or outsourcing of work impacting on Mr Costelloe or the drafting team;
- (g) Training hand-outs, if any, provided to participants, including Mr Costelloe, at a two day safety course conducted at the Park Regis Hotel, North Quay in October or November 2014;
- (h) Training hand-outs, if any, provided by Ms Tams to participants, including Mr Costelloe, at a compulsory training session conducted by Ms Tams at Origin Energy's Head Office, Coronation Drive, in October or November 2014;
- (i) A copy of documents included in Mr Costelloe's personnel file which are relevant to any of the matters specified above including any emails, diary entries, file notes, meeting minutes and memoranda relating to Ms Tams reassignment and to concerns or complaints made by Mr Costelloe about his non-appointment to the lead draftsman role, or about his workload, or his team's workload, or any inability to cope with the work allocated to him or his team;
- (j) A copy of Mr Costelloe's complaint to HR on 2 March 2015 and a copy of emails, diary entries, file notes, meeting minutes and memoranda evidencing any communication between HR and other management about the appropriate response to the complaint;
- (k) Documents including emails, diary entries, notes, meeting minutes and memoranda relating to meetings, conversations or phone calls between Mr Costelloe and Mr Claughton on 12 March 2015, 16 March 2015, 20 March 2015, and 24 March 2015;
- (l) Documents including emails, diary entries, notes, meeting minutes and memoranda relating to a meeting between Mr Costelloe and Mr Asheidu on 23 March 2015;
- (m) Records or minutes of drafting team meetings convened by Mr Claughton in January and February 2015 in which Mr Costelloe participated;
- (n) Documents relating to Mr Costelloe's performance review on 27 February 2015.

[23] A date by which disclosure is to be effected will issue after receipt of any written submission filed by Origin Energy Pty Ltd on or before 9 December 2016.