QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Lawler v Workers' Compensation Regulator; Ex parte Council of the City of Gold Coast* [2016] QIRC 087
PARTIES:	**Council of the City of Gold Coast** (Applicant) **Lawler, William** (Appellant) **v** **Workers' Compensation Regulator** (Respondent)
CASE NO:	WC/2016/102
PROCEEDING:	Objection to Notices of Non-Party Disclosure
DELIVERED ON:	16 August 2016
HEARING DATE:	15 August 2016
HEARD AT:	Brisbane
MEMBER:	Industrial Commissioner Neate
ORDER:	**The two Notices of Non-Party Disclosure dated 20 July 2016 directed to the CEO of the Council of the City of Gold Coast in relation to WC/2016/102 be set aside.**
CATCHWORDS:	APPEAL AGAINST DECISION - Psychiatric or psychological injury - appellant seeks non-party disclosure from employer - documents sought refer to an event after his injury and the date of his application for compensation - whether documents should be disclosed - employer contends documents not relevant to appeal - other bases for objection PRACTICE AND PROCEDURE - Notices of Non-Party Disclosure - two notices issued - objection that documents sought in one notice are not relevant to issue on appeal - objection that the notice lacks particulars of documents sought - whether documents sought are confidential - no objection made in writing to second notice - whether extension of time to lodge objection in writing should be granted - *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 64E, 64F, 64G

Delaney v Q-COMP Review Unit [2005] QIC 11; 178 QGIG 197
WorkCover Queensland v Heit [2000] QIC 22; 164 QGIG 121

APPEARANCES: Mr M. Wichlinski for the Council of the City of Gold Coast
Mr W. Lawler, Appellant
Mr P. Bush, appeals officer for the Workers Compensation Regulator

Decision

[1] The issue in the present proceeding is whether the Council of the City of Gold Coast ("the City") should produce documents identified in two Notices of Non-Party Disclosure in regard to a claim for workers' compensation made by William Lawler.

Background

[2] During the period when the circumstances giving rise to his application for compensation occurred, Mr Lawler was employed by the City as the Executive Coordinator, Environment and Climate Change. He claims to have suffered a work related injury as a result of bullying and harassment by his line manager, Kim Mahoney.

[3] In January 2016 he lodged an application for compensation with CityCover for a condition he described as "psychological injury." He nominated that his injury first occurred in January 2014 and was "ongoing" at the date of lodgement. Mr Lawler sought a review by the Workers' Compensation Regulator of the failure of CityCover to make a decision on the application

[4] It appears from the reasons for the Regulator's Senior Review Officer's decision ("the review decision") that Mr Lawler was diagnosed by Dr Teck Wong on 28 July 2015 as having generalised anxiety with depressive symptoms. The Senior Review Officer appears to have accepted that Mr Lawler first sustained an injury of a psychological condition in relation to issues arising out of his employment on that date. Accordingly, events which occurred after that date did not fall for consideration in the review decision.

[5] In summary, the Senior Review Officer determined that Mr Lawler sustained a personal injury of a psychological nature, the injury arose out of his employment, his employment was the major significant contributing factor to the injury, and the injury arose out of reasonable management action taken in a reasonable way by his

employer in connection with his employment. Consequently, the Senior Review Officer concluded that the provisions of s 32(5) of the *Workers' Compensation and Rehabilitation Act 2003* ("the Act") exclude the psychological condition sustained by Mr Lawler from the definition of "injury" within s 32(1) of the Act.

[6] On 17 June 2016, Mr Lawler lodged with the Industrial Registrar his Notice of Appeal under the Act. Mr Lawler appeals against the review decision dated 25 May 2016 to reject his application for compensation in accordance with s 32 of the Act.

The Notice of Non-Party Disclosure

[7] By Notice of Non-Party Disclosure dated 20 July 2016 ("the First Notice"), the CEO of the City of Gold Coast ("the City") was required to produce the following documents dated July 2016:

(a) complaint made by Mr Lau Chean regarding Ms Mahoney threatening physical violence against Mr Jack Bryce

(b) statement of Mr Lau Chean

(c) statement of Mr Jack Bryce

(d) statement of others

(e) email correspondence from or to Ms Dyan Currie relating to the physical violence threatened by Ms Mahoney.

[8] The First Notice identifies the matter about which the documents are relevant as an incident in June or early July 2016 in which, it is alleged, Ms Mahoney aggressively threatened Mr Bryce with physical violence after having denigrated him in a common work area in front of other employees. According to Mr Lawler, Mr Chean lodged a complaint to Ms Currie and the matter was investigated internally by the City. Witnesses, including Mr Chean and Mr Bryce, provided statements about the incident.

[9] By another Notice of Non-Party Disclosure dated 20 July 2016 ("the Second Notice"), the CEO of the City was required to produce the following documents dated July 2016:

(a) Investigation report into Ms Mahoney threatening physical violence against another employee Mr Jack Bryce in late June/early July 2016

(b) any correspondence or direction (written or verbal) from management including Ms Currie, relating to the resignation of Ms Mahoney.

The City's objection

[10] In an email dated 28 July 2016 to the Industrial Registrar, the City noted that Mr Lawler served on it "a" Notice of Non-Party Disclosure on 21 July 2016. The City objected to the production of "the requested documentation based on the reasoning

outlined in the attached correspondence." That letter, dated 26 July 2016 and addressed to Mr Lawler, referred to the Notice of Non-Party Disclosure received from him on 21 July 2016 and listed the documentation referred to in the First Notice. The City objected to the production of that documentation pursuant to Rule 64E of the *Industrial Relations (Tribunals) Rules 2011*.

[11] There was no reference to the Second Notice in any email or letter from the City addressed to Mr Lawler or the Industrial Registrar.

[12] Rule 64E provides that the non-party may object to the production of some or all of the documents mentioned in the notice within seven days after its service or, with the leave of the Commission, a later time. The objection must be in writing and clearly state the reasons for the objection. Those reasons may include:

(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.

[13] The four bases for the City's objection the production of the documents are:

(a) the requested documentation is not relevant to the proceedings;

(b) the requested documentation is not sufficiently particularised;

(c) the requested documentation is confidential in nature;

(d) the effect of the production of the requested documents could be detrimental to employees of the City.

[14] There is no dispute that the objection to the First Notice was served on Mr Lawler within seven days after the First Notice was served on the City. By operation of Rule 64F, that service operated as a stay on the First Notice (Rule 64F).

[15] At the hearing of the City's objection to the First Notice it became apparent that, although the City had received the Second Notice (and apparently acknowledged receipt by electronic message to Mr Lawler), the City had not objected in writing to the Second Notice. The period for objection specified in Rule 64E had expired.

[16] In the course of the hearing, the City's representative, Mr Wichlinski, sought an extension of time in which to object, and made substantially the same objections in relation to the documents referred to in the Second Notice. Mr Lawler opposed the grant of such an extension.

Dealing with the City's objection

[17] 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.

[18] At the hearing in relation to the objection, Mr Lawler appeared on his own behalf and Mr Wichlinski appeared for the City. Each made oral submissions. The Regulator's representative, Mr Bush, made no submissions in relation to any of the matters raised at the hearing.

[19] Having heard oral argument from Mr Lawler and Mr Wichlinski, it is appropriate to consider each of the grounds of the City's objection.

Whether the requested documentation is relevant to the proceedings

[20] The City notes that the alleged incident involving Ms Mahoney occurred after Mr Lawler lodged his application for workers' compensation. Mr Lawler was not present at the incident, he was not connected to the person affected by the incident, and the incident did not involve him as the applicant to the proceedings. The City does not accept that an alleged incident involving Ms Mahoney and another employee, which post-dates Mr Lawler's application for workers' compensation, is relevant to the current proceedings.

[21] Mr Lawler accepts that the incident occurred after he lodged his application for workers' compensation and that it did not involve him. However, as he explained in each Notice of Non-Party Disclosure, Mr Lawler contends that the behaviour by Ms Mahoney on the nominated occasion in late June/early July 2016 is "directly relevant to the subject" of his workers' compensation appeal (WC/102/2016) and to another matter before the Commission (D/2015/93). He states that this "new information goes to the consistent global behaviours of Ms Mahoney and the effectiveness of the Council's response to my grievance to provide Ms Mahoney with leadership training."

[22] Mr Lawler states that as "most of the bullying and harassment that I received was behind closed doors, this event was public and substantiates my claims regarding the nature of Ms Mahoney's consistent and pervasive aggressive behaviours."

[23] Finally, he submits that because the alleged incident occurred after he made his workers' compensation application but before the Commission has determined his application, information about the incident is relevant to his appeal.

Whether the requested documentation is sufficiently particularised

[24] The City contends that the required documentation lacks particularity and is too broad. It cites as an example the request for the "Statement of Others." At the hearing, Mr Wichlinski accepted that references to statements of named persons were sufficiently particularised. However, he suggested that the City was unaware

whether some of the categories of documents, such as "any correspondence or direction (written or verbal) from management including Ms Currie, relating to the resignation of Ms Mahoney," exists. He went on to characterise the exercise overall as a "fishing expedition" by Mr Lawler that affects others involved in an incident that has no bearing on his appeal.

[25] Mr Lawler appeared to concede that "Statement of Others" is broad. However, he asserted, on the basis of conversations, that there were up to four other people who witnessed the alleged event and who he understood made statements. He does not know their names. Accordingly, he seemed to suggest that there would not be a practical burden on the City in identifying such statements. He was also unable to say whether there was an "Investigation report" into the allegation against Ms Mahoney, but suggested that if there was such a report (whatever its form) and it was disclosed to him, he might not need the evidence of others (e.g. the witness statements listed in the First Notice).

Whether the requested documentation is confidential and nature

[26] The City contends that the requested documentation is confidential in nature and involves private witness evidence provided by employees regarding an alleged incident in the workplace. The witnesses were not advised such information would be disclosed as part of a separate matter involving an employee who was not involved in the incident in any way.

[27] Mr Lawler suggested that if the material was released it would remain confidential. He would be happy for names to be redacted on the basis that he is not interested in the names of the witnesses but is interested in the pattern of behaviour they describe. Alternatively, he suggested, the material could be released on a confidential basis to the Commissioner hearing the appeal.

[28] It is clear that:

(a) if Mr Lawler sought to rely on that information, he would need to tender it in evidence to the Commission;

(b) the Regulator would have to be given an opportunity to cross-examine a witness or witnesses in relation to that material; and

(c) if the Commission sought to rely on that material when deciding the appeal, the Commission would need to make findings of fact and give written reasons for its decision.[1]

On that basis, Mr Lawler suggested that the documents be disclosed to him in confidence but that the issue of what use could be made of them in the hearing of his appeal should be left to another day.

Whether the effect of the production of the requested documents could be detrimental to employees of the City

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[1] *Workers' Compensation and Rehabilitation Act 2003* s 559.

[29] The City contends that the disclosure of the requested documentation would affect working relationships between employees of the City as all witness statements are confidential information. However, it appears that the City was referring only (or at least primarily) to the relationship between Mr Lawler and Ms Mahoney.

[30] Mr Lawler submits that, because Ms Mahoney resigned soon after the incident, the production of the documents could not be detrimental to others in the workplace.

Consideration and conclusion

[31] I have set out the arguments in relation to each of the objections made by the City. However, in my view, the critical issue is whether some or all of the documents sought by Mr Lawler could have any bearing on the outcome of his appeal.

[32] The preparations for the hearing of this appeal have not been completed. In particular, the Appellant has not yet been required to provide the Respondent and the Commission with a Statement of Facts and Contentions which identifies the events and actions that he contends caused his work-related injury. At this stage, it appears that the Appellant is assembling evidence to support an argument that there was a course of conduct or pattern of behaviour engaged in by his line manager which gave rise to his injury, and which did not constitute reasonable management action taken in a reasonable way.

[33] If the appeal goes to a hearing, Mr Lawler will bear the onus of proving on the balance of probabilities that his injury arose out of, or in the course of, his employment and that his employment was the major significant contributing factor to his injury. To succeed in that appeal, Mr Lawler will need to prove the events or interactions which he has yet to specify in his Statement of Facts and Contentions.

[34] As noted earlier, Mr Lawler seems to proceed on the basis that the period in relation to which evidence might be adduced continues until the Commission makes a decision in relation to his claim for compensation. It is clear that evidence about the cause of his injury can include events that preceded it and the workplace environment in which the injury occurred as it was at that date or during the relevant period. However, evidence of events that occurred subsequently, but before the hearing and determination of the appeal, is not likely to be relevant to whether and how an injury occurred. Hence, the temporal scope of the evidence that he might call is not as great as Mr Lawler suggests.

[35] At this stage it appears that, if Mr Lawler can establish that his injury is work-related, there will be an issue about whether his injury is excluded from the definition of "injury" in s 32(1) of the Act because his injury arose out of, or in the course of, reasonable management action taken in a reasonable way (s 32(5)). Actions taken by management and the way in which those actions were taken before Mr Lawler decompensated will be relevant to the outcome of the appeal.

[36] Although an appellant will usually seek to prove each event or interaction individually, there are cases where it might be appropriate for the Commission to take a more global approach when assessing the merits of the appeal. For example, in cases where the events and courses of conduct were not truly discreet but there were repetitive blemishes joined by subject matter, time and personality in a

discordant workplace, the appellant might entitled to a much more "global" evaluation of the actions in which management had engaged.[2] It appears from his oral submissions in relation to the objection, that Mr Lawler will urge the Commission to take such a global approach to the alleged behaviour of his line manager toward him. In his submission, the incident in June or July 2016 (if proved) would inform such a global evaluation.

[37] It seems from Mr Lawler's submission that, so far as his appeal is concerned, the primary significance of the alleged incident in 2016 is that it occurred in the presence of five or six witnesses, rather than privately behind closed doors. It is, he contends, exactly the type of aggressive behaviour by Ms Mahoney that he experienced. He acknowledges that the behaviour of which he complains is difficult to establish. In that sense it might be thought that the alleged public display of aggressive behaviour provides more ready evidence of the workplace conditions in which, Mr Lawler says, he had been operating in the year or more before his injury was diagnosed. It might also help overcome perceived weaknesses in his case that were identified in the reasons for the review decision.

[38] As Mr Lawler is aware, the hearing of his appeal by the Commission would be in the form of a hearing *de novo*. In other words, the Commission would not be concerned to consider the reasons given for the review decision but would decide the appeal only on the basis of evidence before the Commission. However, those reasons are relevant for the purpose of dealing with the objections to the Notices of Non-Party Disclosure.

[39] It is clear from the review decision that:

(a) Mr Lawler has identified 17 examples of the type of behaviour and incidents which he alleges occurred since January 2014;

(b) Mr Lawler has diary notes in relation to specific incidents on nominated dates;[3]

(c) he raised his concerns informally with Matthew Hulse, Manager Development Assessment and Acting Director Planning and Environment on a number of occasions to seek support and advice;

(d) Mr Lawler alleged that he was the subject of punitive action and was victimised as a result of raising the grievance;

(e) there is medical evidence from Dr Wong (general practitioner), Dr Saibal Guha (psychiatrist), and Dr Martin Nothling (psychiatrist) about his injury and its cause.

[40] It is also apparent from the reasons for the review decision that:

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[2] See *Delaney v Q-COMP Review Unit* [2005] QIC 11; 178 QGIG 197 (2 March 2005), see also *WorkCover Queensland v Heit* [2000] QIC 22; 164 QGIG 121 (24 May 2000)

[3] At the hearing, Mr Lawler referred to 32 diary entries.

(a) Mr Lawler and Ms Mahoney have different accounts or different assessments of aspects of their interactions on specific occasions;

(b) at least some of their interactions were in the presence of others (and, I infer, some of those others were among the 11 witnesses who were part of the comprehensive investigation commenced in response to the grievance lodged by Mr Lawler on 30 July 2015).

[41] I mention the investigation and the conclusions reached in the report on the investigation (aspects of which Mr Lawler disputes) only for the purpose of indicating that there seems to be a range of evidence potentially available for the hearing of the appeal from which the Commission could ascertain (either by reference to individual events or by making a more global evaluation) whether Ms Mahoney acted in the ways alleged by Mr Lawler and whether her actions constituted reasonable management action taken in a reasonable way.

[42] To the extent that Mr Lawler adduces such evidence, he might be able to prove the basis on which his appeal should succeed both because his injury was work-related and because s 32(5) would not operate to exclude his injury from the definition of "injury" in s 32(1) of the Act.

[43] This is not a case where there is no other evidence of what he contends is a pattern of behaviour and where Mr Lawler could only succeed if evidence of behaviour after the relevant period or dates was admitted by the Commission. Indeed, it appears that there is a body of potentially relevant evidence which he could call, including evidence of Ms Mahoney's behaviour in the presence of others. As noted earlier, although Mr Lawler states that "most" of the bullying and harassment that he received was behind closed doors, there is apparently evidence that at least some of the interactions between him and Ms Mahoney were in the presence of others who might be called to give evidence.

[44] Mr Lawler is not seeking evidence of a pattern of conduct to show that an isolated or one-off event should be characterised as unreasonable management action. Rather, he is seeking evidence of a public display of aggressive behaviour in order to substantiate or bolster his claims regarding the nature of Ms Mahoney's behaviours toward him.

[45] Although the material Mr Lawler seeks to be disclosed might be logically probative or relevant to whether s 32(5) of the Act applies in relation to his claim for compensation, its weight is potentially reduced because the alleged incident occurred about one year after his injury was diagnosed and because there is apparently a body of evidence about the behaviour complained of in the period between January 2014 and July 2015.

[46] In that context, I am not satisfied that the evidence about alleged actions taken by Ms Mahoney approximately one year after Mr Lawler's injury was diagnosed, and in relation to people other than Mr Lawler, would be substantially probative in determining the outcome of the appeal. Certainly the evidence could have no bearing on whether he sustained an injury in July 2015, approximately one year earlier.

[47] If the documents were disclosed to Mr Lawler and he sought to lead evidence from witnesses to the incident, that might prolong the hearing without greatly contributing to the resolution of the issues. In other words, any attempts to lead such evidence (and possibly objections to it) might overcomplicate the matter and cause further delay.

[48] I am not satisfied that the potential cost, inconvenience and strain on people still employed by the City who could be asked to give evidence only in relation to that event would be justified given the limited relevance (if any) of that evidence to the appeal.

[49] For those reasons (and without the need to deal with the other bases of the Council's objections), I am satisfied that the City should not be compelled to disclose to Mr Lawler such of the documents identified in the First Notice or the Second Notice as exist.

[50] As noted earlier, the City did not refer to the Second Notice in any email or letter addressed to Mr Lawler or the Industrial Registrar. It appears that such an omission was an oversight or administrative error on behalf of the City. Absent any order of the Commission, that oversight would not excuse the City from the obligation to disclose the documents identified in the Second Notice, assuming they exist.

[51] At the hearing of the City's objection to the First Notice, Mr Wichlinski applied for leave of the Commission for an extension of time in which to object to the production of some or all of the documents mentioned in the Second Notice. Rule 64E empowers the Commission to grant such leave. If leave is granted, Rule 64E provides that the objection must be in writing and clearly state the reasons for the objection.

[52] Mr Lawler opposed the grant of leave.

[53] It is clear from the preceding reasons that:

(a) the Second Notice refers to documents pertaining to the same alleged incident as identified in the First Notice;

(b) the City outlined the basis of its objection to the Second Notice at the hearing of its objection to the First Notice; and

(c) I have decided that the objection to the Second Notice has been made out.

[54] To ensure that there is no ongoing breach by the City, I grant leave to the City to object to the Second Notice beyond the period prescribed in Rule 64E(1). Given that I have dealt with the substantive objection in these reasons for decision, I waive the requirement that the City's objection be in writing and state the reasons for the objection.[4]

Order

[4] See *Industrial Relations Act 1999* ss 274(2), 320(3), (6).

[55] For the reasons given above, and pursuant to Rule 64G(2)(c), I order that the two Notices of Non-Party Disclosure dated 20 July 2016 directed to the CEO of the Council of the City of Gold Coast in relation to WC/2016/102 be set aside.