QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Peng v Bak10Cut Pty Ltd AND Anor* [2020] QIRC 115
PARTIES:	**Peng, Yu-Rong** (Complainant) v **BAK10CUT Pty Ltd** (First Respondent) AND **Yuan, Wenxin** (Second Respondent)
CASE NO:	AD/2019/107
PROCEEDING:	Application in existing proceedings for disclosure and attendance upon a medical expert.
DELIVERED ON:	7 August 2020
HEARING DATES:	7 August 2020
MEMBER:	McLennan IC
HEARD AT:	Brisbane
ORDERS:	**1. The Respondents' Application in existing proceedings commenced orally at the mention of this matter on 24 July 2020 is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW – ANTI-DISCRIMINATION – Application in existing proceedings – whether a Complainant can be compelled to attend upon a medical examination – whether documents are directly relevant to credit – whether documents only

related to credibility must be disclosed - objections to produce documents

LEGISLATION:

Anti-Discrimination Act 1991 (Qld) s 209

Evidence Act 2007 (Qld) s 20

Industrial Relations (Tribunals) Rules 2011 (Qld) r 46

Industrial Relations Act 2016 (Qld) s 451, 541, 447

Personal Injuries Proceedings Act 2002 (Qld) s 25, s 6

Public Service Act 2008 (Qld) ch 5 pt 7

Workers' Compensation and Rehabilitation Act 2003 (Qld) s 556

CASES:

Coco v The Queen (1994) 179 CLR 427

Cuttiford v Queensland Police Service [2011] QIRC 6

George Ballantine & Son Ltd and others v F E R Dixon & Son Ltd and others [1974] 2 All ER 503

Grant v BHP Coal Pty Ltd (No 2) [2015] FCA 1374

Kelsey v Logan City Council & Ors (No 6) [2018] QIRC 115

Starr v National Coal Board (1977) 1 All ER 243

Weston and Parer v State of Queensland (Department of Justice and Attorney-General) (No. 4) [2016] QIRC 75

White v Ducks in a Row Pty Ltd [2016] QDC 212

APPEARANCES: Mr H. Jordaan of GTC Lawyers for the Respondents.

Mr R Hii of Counsel, instructed by Mr T Murray of Caxton Legal Centre Inc., for the Complainant.

Reasons for Decision

[2] The substantive proceeding is a complaint of discrimination brought by Ms Yu-Rong Peng ('the Complainant') against BAK10CUT Pty Ltd and Mr Wenxin Yuan ('the Respondents'). This matter was mentioned before me on 24 July 2020. During that mention, the Respondents orally applied for two procedural outcomes.[1] It is that Application in existing proceedings which this decision addresses. Directions were issued for the parties to file and exchange written submissions as to:

1. Whether the Complainant can, and should, be compelled to attend upon an appointment with a Doctor nominated by the Respondents for the purposes of allowing that Doctor to develop a report to be used as evidence in these proceedings.

2. A list of documents (or categories of documents) sought to be disclosed from the Complainant regarding her visa, and whether the Complainant should then be required to disclose those documents.

[3] Those issues are the subject of this decision. For the reasons that follow, my findings are that:

1. This Commission is not empowered to compel the Complainant to attend upon a Doctor in the manner sought.

2. The documents sought are not relevant to the proceeding or a matter in issue in the proceeding. They relate solely to the Complainant's credibility, which is an insufficient basis for their disclosure to be ordered.

The Respondents' Submissions

Submissions regarding compelling the Complainant's attendance upon a Doctor

[4] The Respondents' submissions regarding compelling the Complainant to attend upon a Doctor of their choosing can be summarised as follows:

[1] Though for simplicity I have continued to refer to the parties in their roles in the substantive proceedings, namely Complainant and Respondent.

- The Complainant seeks damages arising from the alleged discrimination, which in part flow from an alleged psychological injury.

- The Complainant has sought her own medical reports as evidence, but is unwilling to attend upon a Doctor nominated by the Respondents.

- The Complainant "should be compelled to undergo an independent medical examination for the purposes of allowing that Doctor to develop a commentary of the (Complainant's) report".

- The *Industrial Relations Act 2016* (Qld) at s 451(2)(a) "provides that the Commission may give directions about the hearing of a matter. The section therefore provides authority for the Commission to make the direction required."

- The *Personal Injuries Proceedings Act 2002* (Qld) ('PIPA') at s 25 applies to these proceedings "as it is expressed in very wide terms that are not only limited to conventional personal injury claims although s 6(5)(a) of (that Act) says that it does not affect the recover of damages is these proceedings."

- That provision of PIPA allows the Respondents to compel examination of the Complainant on particular terms.

- That report "will assist the Commission in determining the facts in issue, namely: whether the (Complainant) did in fact sustain a psychological injury and if so, the exact nature and effect of the psychopathological symptoms.

- "If the (Complainant) is not compelled to attend an appointment with a Doctor nominated by the Respondents for the purposes of developing a report, the Respondents will be seriously disadvantaged as experts notoriously favour the party instructing them. It stands to reason that it will enable such a Psychiatrist to prepare a much more thorough report if he/she has the opportunity to interview the (Complainant)."

- "It is the Respondent's case that the (Complainant) did not sustain any psychological injury caused by the Respondents as the alleged sexual assaults were in fact consensual. Alternatively, if she did sustain such injuries, it was not caused by him and the severity of it is an issue."

- "It is also interesting to note that s 556 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) provides the relevant appeal body with the power to order a claimant to submit to a personal examination."

[5] The Respondents also effectively submit that:

- *Cuttiford v Queensland Police Service* [2011] QIRC 6 is a relevant example of a person being referred for an independent medical examination; and

- *White v Ducks in a Row Pty Ltd* [2016] QDC 212 is relevant as it involves considering whether it would be "unreasonable or unnecessarily repetitious" under PIPA to send a person to a further medical examination.

Submissions regarding disclosure

[6] The Respondents' submissions regarding disclosure can be summarised as follows:

- The Respondents seek that the Complainant "disclose documents regarding her current migration status that references the present proceedings or the previous ones in the Human Rights Commission."

- On 20 May 2020, GTC Lawyers on behalf of the Respondents wrote to the Complainant's solicitors "requesting further disclosure regarding the (Complainant's) immigration status outlining that this may have direct relevance to her credibility and her motive for initiating or maintaining the complaint in the first place."

- The category of documents requested is very narrow, and there will be no prejudice to the Complainant in her being required to produce them.

- In the inverse, if the documents are not produced, "it may have provided an important opportunity for the Commission to be informed of all aspects of the matter, that may be relevant".

- "Generally, documents that only go to credibility are not disclosed but in these circumstances, it is relevant to assist in reaching a determination of two conflicting versions".

The Complainant's Submissions

[7] The Complainant resisted both the attendance upon a Doctor and the further disclosure sought by the Respondent.

Submissions regarding compelling the Complainant's attendance upon a Doctor

[8] The Complainant's submissions regarding being compelled to attend upon a Doctor can be summarised as follows:

- There is no specific power under the IR Act to compel the Complainant to grant the order sought by the Respondents.

- PIPA and the WCR Act have no relevance to these proceedings.

- Neither *Cuttiford v Queensland Police Service* [2011] QIRC 6 nor *White v Ducks in a Row Pty Ltd* [2016] QDC 212 provide any basis for the order sought, and have effectively no relevance in these proceedings.

- The assertion that "experts notoriously favour the party instruction them" is scandalous, made without basis, and plainly wrong.

- The further report sought would not offer the assistance actually sought by the Respondents, because it would maintain the same factual basis as the first report.

Submissions regarding disclosure

[9] The Complainant's submissions regarding further disclosure of the visa documents can be summarised as follows:

- The documents sought by the Respondents are of no relevance to these proceedings.

- The request for disclosure is a fishing expedition, exemplified by the fact that the Respondents' submissions provide that the information sought "may be" relevant to "all aspects" of the matter, and that there is a mere "possibility" that the documents may be relevant.

- The disclosure sought would be oppressive, as in the current formulation the Respondents' request would cover the Complainant's visa documents with the embassy in Taiwan, and all correspondence she has ever had with any immigration authorities even though it may have no bearing on her present immigration status in Australia.

- The Complainant has already advised the Respondents that she is in Australia on a student visa.

Analysis

Compelling the Complainant's attendance upon a Doctor

[10] The Respondents submit that this Commission is empowered to compel the Complainant to attend upon a Doctor of their nomination for a medical examination by way of s 451(2)(a) of the IR Act. That section provides (emphasis added):

> **451 General powers**
>
> (1) The commission has the power to do all things necessary or convenient to be done for the performance of its functions.
>
> (2) Without limiting subsection (1), the commission in proceedings may—
> (a) **give directions about the hearing of a matter**; or
> (b) make a decision it considers appropriate, irrespective of the relief sought by a party; or
> (c) make an order it considers appropriate.

[11] *Prima facie,* to grant the order sought on that basis would be an astonishing exercise of that power. Compelling a person to attend upon a medical examination has a nebulous connection to "*directions about the hearing of a matter*". Such a direction would not be about the hearing of the matter, but rather would be about the substance of the proceeding in considering a potential award of damages, or perhaps about the gathering of evidence. Directions about the hearing of a matter would include issues such as the date, location or duration of a hearing. The Respondents have not provided, nor have I located, an example of any similar direction to attend a medical examination being made on the basis of s 451(2)(a) that might support their interpretation.

[12] The Respondents refer to *Cuttiford v Queensland Police Service* [2011] QIRC 6, but that case has little or no relevance to these proceedings. It concerned a reinstatement application where the Queensland Police Service directed their then-employee, Ms Cuttiford, to attend upon an independent medical examination pursuant to clause 7.2.4(b) of the *Police Service Award – State 2003*. It is uncontentious that employers may direct employees to attend independent medical examinations in certain circumstances.[2] That case is entirely unhelpful in determining whether this Commission is empowered by s 451(2)(a) or otherwise to direct a person for a medical examination in the manner sought by the Respondents.

[13] The Respondents also refer to PIPA as a basis upon which the Complainant could be directed to attend upon a medical examination as sought by the Respondents. However, that Act states:

> **6 Application of Act**
>
> (1) This Act applies in relation to all personal injury arising out of an incident whether happening before, on or after 18 June 2002.
>
> …
>
> **(5) Further, this Act does not affect the seeking, or the recovery or award, of damages or financial assistance in relation to personal injury under any of the following—**
>
> **(a) the *Anti-Discrimination Act 1991*, section 209(1)(b);**

[2] See, eg, *Public Service Act 2008* (Qld) ch 5 pt 7.

[14] The *Anti-Discrimination Act 1991* (Qld)[3] at s 209(1)(b) provides that the Commission may make an award of damages in response to a finding of discrimination.

[15] This is a proceeding commenced under the AD Act. The Complainant has indicated that they intend to adduce medical evidence to support their contention that the Complainant has suffered damages as a result of psychological harm arising from alleged discrimination. The only foreseeable relevance of that medical evidence arising from the Complainant's Statement of Facts and Contentions will be in the calculation of damages.

[16] The Respondents submit that the additional medical report sought will be relevant to determining "whether the (Complainant) did in fact sustain psychological injury and if so, the exact nature and effect of the psychopathological symptoms" and "if (the Complainant did sustain such injuries, it was not caused by (the Respondents) and the severity of it is an issue". That information is only relevant in these proceedings in the potential calculation of damages.

[17] Further, the Respondents have not provided, nor have I located, any examples where PIPA has been applied in such a manner to a proceeding under the AD Act. *White v Ducks in a Row Pty Ltd* [2016] QDC 212, referred to by the Respondent, has no relevance to determining whether PIPA applies to these proceedings under the AD Act, or whether this Commission is empowered to provide the orders sought. PIPA does not apply to these proceedings in the manner sought by the Respondents.

[18] The Respondents also submit that "It is also interesting to note that s 556 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld)[4] provides the relevant appeal body with the power to order a claimant to submit to a personal examination". The Respondents do not explain how that section could possibly connect to the orders they seek. In dealing with that submission, it is sufficient to reiterate that this proceeding was commenced under the AD Act. The WCR Act at s 556 has no relevance to these proceedings, except perhaps to illustrate that when such a significant power is provided to the Commission, it is clearly set out in the relevant legislation and does not arise from an ancillary procedural power such as s 451 of the IR Act.

[19] It is worth noting what the Respondents are actually seeking: that I compel a person to attend upon a Doctor to be examined against their will. In *Grant v BHP Coal Pty Ltd (No 2)* [2015] FCA 1374, Justice Collier considered the foundational concept of directions to attend medical examinations, and summarised the relevant caselaw as follows (emphasis added):

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[3] 'AD Act'.
[4] 'WCR Act'.

> As a general proposition a person is not obliged to submit to a medical examination without his or her consent (*Fernando*, *Hallstrom*, *Furesh*). A forced examination of a person without the consent of the person is assault.
>
> Legislation can require a person to submit to a medical examination without his or her consent, however such legislation must be clear and unambiguous (*Fernando*, *McNamara*).
>
> A contractual right can be given to an employer to direct or order an employee to attend a medical examination (*Fernando*).
>
> Courts have power to protect the integrity of their own processes and safeguard the administration of justice. In this respect, the Courts can make orders such as staying proceedings if a plaintiff refuses to undergo a medical examination (*Starr*). However this does not equate to a positive power in the Court to order a person to undergo a medical examination against their will.

[20] Further to the first and second paragraph of her Honour's summary, I would also note what was said by the High Court in *Coco v The Queen*:[5]

> The insistence of express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 12 per Mason CJ.

[21] The fourth paragraph of her Honour's summary is of little assistance to the Respondents either. *Starr v National Coal Board* (1977) 1 All ER 243, to which her Honour refers, was an English Court of Appeal case where the plaintiff in personal injury proceedings was an employee of the defendant. The plaintiff was obliged to attend upon a further medical examination at the direction of his employer, but declined because the doctor proffered by the employer was said to be a hostile examiner of plaintiffs. The court there held that the plaintiff was obliged to attend upon that Doctor, and the proceedings would be stayed until he did so. Nothing in those proceedings empowers me to grant the orders sought by the Respondents.

[22] I am keenly aware that the IR Act requires I avoid unnecessary technicalities and facilitate the fair and practical conduct of proceedings under this Act.[6] Yet that is not a grant of power to make any order I deem fit. The Respondents submitted that the power to order the Complainant to attend upon a medical examination is contained in s 451(2)(a). I do not agree. That section is a general procedural power, and is decidedly not clear and unambiguous in empowering me to order the Complainant to attend a medical examination. Beyond that submission of the Respondents, I have also considered whether there is a relevant and sufficiently specific grant of power under the AD Act, the IR Act, the Rules, the *Evidence Act 2007* (Qld) and the common law. None

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[5] *Coco v The Queen* (1994) 179 CLR 427, 438-439.
[6] *Industrial Relations Act 2016* (Qld) s 447(2)(b).

of those provide any assistance to the Respondents in their pursuit of such an order. Further to the above, the WCR Act and PIPA are also of no assistance to the Respondents.

[23] The Respondents have not directed me to, and I have not found, any sufficient grant of power to make the order they seek, namely sending the Complainant to a medical examination. As such, I will not make such an order.

Further Disclosure

[24] The parties were directed to provide disclosure in a Directions Order issued 17 December 2019 by Commissioner Power. They have an ongoing duty of disclosure in the terms of r 46 of the *Industrial Relations (Tribunals) Rules 2011* (Qld):

> **46 Duty of disclosure**
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> (1) If a directions order requiring disclosure of documents is made, a party must disclose any document that—
> (a) is relevant to the proceeding or a matter in issue in the proceeding; and
> (b) is in, or comes into, the possession of the party.
>
> (2) A party must act under subrule (1) until the proceeding is concluded or the matter in issue is admitted, withdrawn, struck out or otherwise disposed of.
>
> (3) Subrule (1) does not apply to a document in relation to which there is a valid claim to privilege from disclosure.

[25] The Respondents are seeking further disclosure from the Complainant, in the form of visa and immigration documents. The threshold issue is whether the documents sought are relevant to the proceeding or a matter in issue in the proceeding.

[26] At the mention, the Complainant referred the Commission to *Weston*.[7] In that matter, Commissioner Fisher provided a useful summary of the principles relevant to determining an application for additional disclosure such as this (citations removed):[8]

- A decision of the Commission to order disclosure is a quintessential exercise of discretion.
- To be discoverable a document must relate to the question or issues to be decided by the proceedings.
- A document is relevant if it contains information which enables the party calling for production of the document to advance its own case or damage the case of their adversary or it is a document which may fairly lead to a train of enquiry which may have either of those consequences.
- A party will not be required to produce documents where to do so would be oppressive.

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[7] *Weston and Parer v State of Queensland (Department of Justice and Attorney-General) (No. 4)* [2016] QIRC 75.
[8] Ibid [4] cited with approval in *Kelsey v Logan City Council & Ors (No 6)* [2018] QIRC 115, [16].

- A request for disclosure must not be in the nature of a fishing expedition in the sense that it is an endeavour not to obtain evidence to support a case but to discover whether there is a case at all.

- Orders for disclosure should not be made for the purpose of enabling a party to attack credibility.

[27] The Respondents in the present matter submitted that:

> On 20 May 2020, GTC Lawyers sent a letter to the (Complainant's) solicitors requesting further disclosure regarding the (Complainant's) immigration status outlining that this may have direct relevance to her credibility and her motive for initiating or maintaining the complaint in the first place.
> …
>
> Generally, documents that only go to credibility are not disclosed but in these circumstances, it is relevant to assist in reaching a determination of two conflicting versions.

[28] The Respondents cite *Ballantine*[9] as authority for that proposition, though without any pinpoint reference.

[29] In *Ballantine*, the English Court of Chancery considered discovery directed solely to credit. George Ballantine & Son Ltd was a producer of Scotch whisky, while the Defendants were alleged to have been passing off goods by purchasing Ballantine whisky, mixing it with local alcohol, and then supplying that new mixed whisky under the label of Ballentine to importers throughout the Mediterranean.

[30] The Plaintiffs in that matter sought disclosure from the Defendants about other passing off ventures the Defendants had been involved with, on the basis that "the intentions and conduct, honourable or otherwise, of the Defendants in relation to all their other business was relevant to the intentions and honesty of the conduct of their business (as it related to the Ballantine's whisky)."[10]

[31] In that matter, Justice Walton found that:[11]

> From that case I think one extracts two principles: (i) that discovery which relates solely to credit is not allowed; and (ii) that discovery is confined to matters which are in question in the action.
> …
> It appears to me, however, that if the present application for discovery is not a pure fishing expedition—as was asserted by counsel for the defendants but denied by counsel for the plaintiffs—then it is really one which is directed exclusively to credit, since it is simply and solely directed towards putting the plaintiffs in a position to say: 'You did a wicked act in Ecuador (or wherever), ergo you are a person who would do a dirty deed in the five countries with which the action is specifically concerned.' In other words, give a dog a bad name and hang him.
> …
> The application should be dismissed since it was directed exclusively to credit in that it was simply and solely directed towards putting the plaintiffs in a position to assert that, since the defendants had been guilty of dishonest trading in one country, they were the sort of people who would trade dishonestly in the five countries in question.

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[9] *George Ballantine & Son Ltd and others v F E R Dixon & Son Ltd and others* [1974] 2 All ER 503.
[10] Ibid 503.
[11] Ibid 509.

[32] The Respondents have not directed me to, nor have I found, anything within that case which supports the position that evidence related solely to credit becomes admissible where there are two conflicting versions to distinguish between. On the contrary, Justice Walton was quite clear in finding that discovery which relates solely to credit is not allowed.

[33] That is also the approach which has been taken in recent matters in this jurisdiction. Commissioner Fisher summarised the principle from *Ballantine* in this way:[12]

> Orders for disclosure should not be made for the purpose of enabling a party to attack credibility.

[34] The vast majority of proceedings contain some factual disputes. If the mere presence of two conflicting versions was a sufficient basis to order disclosure of material that relates solely to credit, that would entirely undermine the principle that discovery which relates solely to credit is impermissible. The process proposed by the Respondents is not the process which has been followed in this Commission, nor is it the process I am minded to adopt.

[35] Here, the Respondents are effectively seeking the visa materials so as to place themselves in the position to assert that, since the Complainant's visa is or was contingent upon these proceedings, she must not be a witness of credit. That is not a sufficient reason to warrant an order for further disclosure. It follows that I am not minded to order disclosure of the visa material sought by the Respondents from the Complainant.

[36] As an aside, even if it were true that the Complainant's visa has been extended on the basis that these proceedings exist, that would not automatically materially impair my confidence in the reliability of the witness's evidence. The mere fact that a person is engaged in a civil proceeding and has had their visa extended in order to conduct that proceeding is generally unremarkable. It follows that such a line of questioning may well be disallowed.[13] Even so, I am not minded to make any definitive findings in that regard at this stage.

Conclusion

[37] The Respondents requested two outcomes from their Application in existing proceedings at the mention of this matter on 24 July 2020. First, that the Complainant be compelled to attend upon a medical examination for the purpose of creating a rebuttal medical report. Second, that the Complainant disclose documents related to her

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[12] *Weston and Parer v State of Queensland (Department of Justice and Attorney-General) (No. 4)* [2016] QIRC 75, [4] cited with approval in *Kelsey v Logan City Council & Ors (No 6)* [2018] QIRC 115, [16].
[13] *Evidence Act 1977* (Qld) s 20.

visa, as it may be the case that the Complainant's visa is contingent upon or related to these proceedings.

[38] I am not satisfied that this Commission is empowered to order a Complainant in a proceeding under the AD Act to attend upon a medical examination.

[39] Nor am I satisfied that the further disclosure sought involves documents that are relevant to a matter in issue in the proceeding. They relate solely to credibility, which is not a sufficient basis to order disclosure.

[40] I order accordingly.

Orders

1. **The Respondents' Application in existing proceedings commenced orally at the mention of this matter on 24 July 2020 is dismissed.**