QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Paxton v Children's Health Queensland, Hospital and Health Service* (No 2) [2020] QIRC 023
PARTIES:	**Paxton, Brian** (Applicant) **v** **Children's Health Queensland, Hospital and Health Service** (Respondent)
CASE NO:	B/2019/50
PROCEEDING:	Application in existing proceedings by Applicant
DELIVERED ON:	11 February 2020
HEARING DATES:	30 January 2020
MEMBER:	Thompson IC
ORDERS:	**Application refused.**
	INDUSTRIAL LAW - APPLICATION FOR INJUNCTION - APPLICATION IN EXISTING PROCEEDINGS BY APPLICANT - where applicant seeking to apply a pseudonym for his name to the released decision - where applicant seeking all references and material relating to allegations of sexual harassment be removed from the released decision - where principle of open justice - whether applicant established requisite standard of proof.
LEGISLATION:	*Industrial Relations Act 2016*, s 451, s 580 *Public Disclosure Act 2010* (Qld), s 55 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 66

CASES: *J v L & A Services Pty Ltd* (No 2) [1993] QCA 12
Health Ombudsman v Shemer (*No 2*) [2019] QCAT 54
J v L & A Services Pty Ltd (*No 2*) [1995] 2 Qd R 10
John Fairfax Group Pty Ltd v Local Court of New South Wales [1991] 26 NSWLR 131
Police v Baden-Clay [2013] QMC 6
John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCA 324

APPEARANCES: Ms T. Bidgood and Ms K. Stewart, Susan Moriarty & Associates for the Applicant.
Mr M. McKechnie, Counsel instructed by Ms H. Smith, Minter Ellison for the Respondent.

Decision

Background

[1] An application in existing proceedings was lodged with the Industrial Registrar on 29 January 2020 by Brian Paxton (Paxton) in which he applied for the following orders pursuant to s 451 of the *Industrial Relations Act 2016* (IR Act) and s 55(1) of the *Public Interest Disclosure Act 2010* (Qld) (PID Act):

1. Pursuant to s 580(5)(a) of the IR Act and s 55(1)(a) of the PID Act that the decision of Commissioner Thompson dated 15 January 2020 (Brian Paxton v Children's Health Queensland Hospital and Health Service [2020] QIRC 008) (the Decision) be amended to:

    i. apply a pseudonym for the Applicant; and
    ii. all references and material relating to any allegations of 'sexual harassment', including those relating to the first show cause process, be removed from the decision.

2. Pursuant to s 580(5)(b) of the IR Act and s 55(1)(b) of the PID Act, that all relevant material and records tendered in evidence relating to any allegations of 'sexual harassment' be withheld from search or release absolutely.

Submissions

Applicant

[2] In the proceedings relevant to this application, the Commission issued six orders, with Orders 1 and 4 of relevance for the purposes of the relief sought by the applicant:

> 1. The disciplinary action commenced on 12 March 2019 against Paxton is to cease forthwith and be recommenced afresh pursuant to subsequent orders made by the Commission specifying the conduct to be observed by the CHQHHS initially and then the delegate appointed in connection with the process.
>
> 4. Upon appointment, the delegate should be provided with all relevant material relating to the disciplinary action excluding the previously issued Show Cause Notices. Further, upon completion of the formal investigation, a copy of any report emanating from that procedure is to be provided to the delegate without delay.

3. The applicant also sought that any reference to the first show cause process, relevant material and record of evidence that went to any allegations of "sexual harassment" from the first show cause notice process be removed from the released decision. It was not in the public interest to disclose such record of material, evidence or reference to allegations of "sexual harassment" because:

- there had been no allegation by the respondent of corrupt conduct or misfeasance to Paxton's knowledge prior to the current proceedings or in either show cause notices; and
- the allegations remained untested.

Jurisdiction

4. Under s 580(5)(a) of the IR Act, the Commission may direct:

> (a) a report, or part of a report, of proceedings in an industrial cause not be published.

5. Further, under s 580(7)(a) of the IR Act, the direction may be given if the commission considers:

> (a) disclosure of the matter would not be in the public interest.

6. Section 55(1) of the PID Act states:

> (1) For an application for an injunction under this part that is before it, the industrial commission or Supreme Court may direct that -
>
> (a) a report of the whole or part of the proceeding for the application must not be published; or
> (b) evidence given, or anything filed, tendered or exhibited in the application must be withheld from release or search, or released or searched only on a stated condition.

7. Under s 55(2) of the PID Act:

> (2) The direction may be given if the industrial commission or Supreme Court considers that -

(a) disclosure of the report, evidence or thing would not be in the public interest.

8. Section 451(1) and (2) of the IR Act states:

> 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) make an order it considers appropriate.

Current application

9. In respect of the decision and orders, the Commission in the case of Paxton is requested to provide a pseudonym and/or provide that relevant material and records of evidence that go to any allegation of "sexual harassment" be removed from the decision.

10. Paxton was a vulnerable person in the substantive proceedings and if a pseudonym was not provided for him it would prejudice him and go beyond collateral disadvantage, in that he had allegations made against him that weren't even investigated and any allegation of sexual harassment that was published would remain even if they weren't met.

Respondent

11. The respondent submitted that different considerations would apply to the Commission's determination of this application than to a separate application made by the respondent, particularly in circumstances where it was unclear if Paxton was asserting that he also made a public interest disclosure and therefore entitled to protections under s 65 of the PID Act.

12. In any event, the respondent had no objection to orders being made in similar terms as those sought by the respondent with respect to the claimant on the basis of Paxton being owed a duty of care from his employer in terms of matters relating to his employment.

Conclusion

13. The application for determination by the Commission was filed on 29 January 2020, some 14 days beyond the date the substantive decision was released to the parties and nine days after that decision was published on the Supreme Court Library website.

14. The substantive application was the subject of a mention before the Commission on 23 August 2019 and subsequently heard before the Commission as constituted on 27 November 2019.

15. Prior to the hearing date of 27 November 2019, a pre-hearing submission was filed on behalf of Paxton on 7 November 2019 and following the evidentiary stage of the proceedings, further written submissions were filed on behalf of Paxton on 4 December 2019.

16. Neither, in the course of the proceedings or in any of the previously referred to submissions were the issues of pseudonym or suppression raised by Paxton, nor was there any formal request in regard to withholding from search or release all relevant material and records tendered in evidence relating to any allegations of "sexual harassment".

17. This occurred against a background where pre-hearing submissions were filed with the Industrial Registrar on 7 November 2019 and in respect of "sexual harassment" Paxton stated at paragraphs 32 and 33:

> 32. The mischief in the lack of particularisation is evinced in the index case where, notwithstanding the absence of any reference to sexual harassment or harassment in the Notice, the Respondent asserts to the Commission this disciplinary process is characterised by sexual harassment. In submissions to the Commission, the Respondent stated:
>
> > MR ZIELINSKI: Thank you, Commissioner. This - Ms Moriarty was referring to this being a special category of case. In our submission, it's a relatively straightforward one. The crux of the matter is whether or not Mr Paxton engaged in conduct which can be characterised as harassing or sexually harassing.
>
> 33. Without this disclosure from the Respondent's representative, there is nothing in the Notice which would have made the Applicant aware of matters relating to sexual harassment. Nor, for example, would it have been considered reasonably appropriate to address the Respondent's sexual harassment policy, as it was not referenced in any of the disciplinary documentation.

18. Certainly, it would not be unreasonable to conclude that at this stage of the process Paxton was at least alive to there being some potential of "sexual harassment" being mentioned in the proceedings, yet he chose not to exercise an option of at least raising possible concerns about a released decision by the Commission being publicly available.

In any event, it was a matter of record that in the released decision the Commission in addressing the issue of "sexual harassment" did so in the following terms:

> [130] Neither the file note nor the one page document recorded any information that might reasonably indicate behaviour that would fit into the "sexual harassment" mould referred to by Tait in the letter of suspension.

Further, in respect of "sexual harassment" in the second show cause notice there was an absence of any reference to:

- sexual harassment;
- aspects of the allegations that may have constituted "sexual harassment"; and/or
- how the terms of "sexual harassment" were defined.

Pseudonym

19. The application sought that all references to Paxton by name in the decision released on 15 January 2020 be removed and replaced with a pseudonym. In oral submissions in this application, it was advanced that Paxton was a vulnerable person who would suffer a prejudice if a pseudonym was not granted in the substantive decision which ought to be tested against the following authorities.

20. In the matter of *J v L & A Services Pty Ltd*[1], Fitzgerald P and Lee JA stated:

> ... . The use of pseudonym initials, beyond cases clearly allowed and in courts having the power to order them, is a significant departure from the norm. It would be undesirable that powerful individuals, substantial corporations or particular witnesses promised anonymity by the authorities, could secure such orders without authority of law and then only for very substantial reasons. Cf David Hunt J. in Savvas at 339. In my opinion neither of these preconditions was present here. There was no authority of law. Nor were there substantial reasons. On the contrary, the law of the State as declared by this Court in the Police Tribunal Case and affirmed in Mayas forbad such an order. ... .
>
> Mahoney JA said at p. 23:
>
> "The power to make orders for concealment of the identity of persons has been exercised by superior courts in various circumstances. Reference was made to the general power which the superior courts have in this regard in John Fairfax and Sons Ltd. v. Police Tribunal of New South Wales (1986) 5 NSWLR 465 by McHugh JA, with whose judgment Glass JA agreed: at p.476-9; and by me: at 471-4. The power to make a pseudonym or analogous order has been exercised in relation to the identity of an informer: see generally Cain v. Glass (No.2) (1985) 3 NSWLR 230 at 246 et seq; in relation to blackmail: R v. Socialist Worker Printers and Publishers Ltd.: Ex parte Attorney-General (1975) QB 637; . . ."

21. Their Honours went on to espouse the test articulated by McHugh JA in John Fairfax and Sons Ltd v Police Tribunal of New South Wales in considering the powers of a statutory tribunal:

> Subsequently, his Honour said that the principle of open justice required that "an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it": at 476-7. Reference was also made to the implication of powers in this way in Attorney-General for New South Wales v. Mayas Pty. Ltd. (1988) 14 NSWLR 342.
>
> Therefore, in considering whether the power to make a pseudonym order of the present kind in an extortion case is, in the sense to which Dawson J. and McHugh JA have referred, a power impliedly granted to the Local Court, it is necessary to consider whether the making of a

[1] *J v L & A Services Pty Ltd* (No 2) [1993] QCA 12.

> pseudonym order can in principle be "really necessary to secure the proper administration of justice in the proceedings" before a Local Court . . ..

22. The application for the use of a pseudonym in this case had little or no prospect of success on the basis of the Commission adopting the reasoning of the Court of Appeal, where it referenced no authority of law or the existence of substantial reasoning to support the application, which was the case in these circumstances. Further, in consideration of whether the making of a pseudonym order can be made or otherwise, the principle that it is "really necessary to secure the proper administration of justice in a proceedings" had not been enlivened in these proceedings.

Open Justice

23. The intent of the application was in effect an entreaty to suppress from publication references to Paxton being named and the removal of all references to material relating to "sexual harassment" in the already released decision.

24. In *Health Ombudsman v Shemer (No 2)*[2], Allen J stated the exercise of discretion pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) relies on the principle of open justice:

> "Although there is a public interest in avoiding or minimising disadvantages to private citizens from public activities, paramount public interest in the open administration of justice, freedom of speech, a free media and an open society require the court proceedings to be open to the public and able to be reported and discussed publicly."[3]
>
> "… information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or other 'collateral disadvantage'…"[4]
>
> "… an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light.
>
> Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders and their various alternative forms."[5]

25. In *Police v Baden-Clay,*[6] Butler J, Chief Magistrate stated in respect of the open justice principle:

> The principle of open justice is fundamental to our legal system.[7] The common law has established limited exceptions to the obligation of courts to sit in public and the freedom to report proceedings but the list of exceptions is limited. Parliament can, of course, legislate for

---

[2] *Health Ombudsman v Shemer (No 2)* [2019] QCAT 54, [6].
[3] Ibid, quoting *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, 44.
[4] Ibid, 45.
[5] *Health Ombudsman v Shemer (No 2)* [2019] QCAT 54, quoting *John Fairfax Group Pty Ltd v Local Court of New South Wales* [1991] 26 NSWLR 131, 142-143.
[6] *Police v Baden-Clay* [2013] QMC 6, [11].
[7] Ibid, quoting *John Fairfax Publications Pty Ltd v District Court of New South Wales* [2004] NSWCA 324, [17].

> further exceptions. However, in view of the importance of the principle of open justice any statutory provision should be construed strictly in accordance with its declared purpose.[8]

26. In the course of this application, Paxton failed to demonstrate grounds, based on the requisite standard of proof, that would warrant the departure by the Commission from the well-established practice of providing a non-suppressed decision in circumstances such as this.

Public Interest Disclosure

27. The application sought relief relying upon s 55(1)(b) of the PID Act:

> **55 Restrictions about application**
>
> (1) For an application for an injunction under this part that is before it, the industrial commission or Supreme Court may direct that -
>
> . . .
>
> (b) evidence given, or anything filed, tendered or exhibited in the application must be withheld from release or search, or released or searched only on a stated condition.

28. Whilst this particular provision identifies the process relied upon in the granting of relief for suppression of material, there was no supporting material in either the substantive proceedings or this application, regarding Paxton having made a public interest disclosure. In fact, on the information available to the Commission, it was abundantly clear that Paxton was the subject of a complaint regarding his conduct and the issue of public interest disclosure at no time saw the light of day in terms of Paxton.

Findings

29. On consideration of the material and submissions before the proceedings, I find that the applicant for reasons embodied in this decision failed to establish grounds that would on the requisite standard of proof allow the application to succeed.

30. The application is refused.

---

[8] "…, a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle."; *Hogan v Hinch* [2011] HCA 4, [27] per French CJ.