

**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION: *Jackson v Job Futures Ltd & Anor* [2021]  
QIRC 203

PARTIES: **Jackson, Kristen**  
(Complainant)

v

**Job Futures Ltd**  
(First Respondent)

&

**Ralston, Emma**  
(Second Respondent)

CASE NO: AD/2020/101

PROCEEDING: Anti-Discrimination

DELIVERED ON: 7 June 2021

MEMBER: McLennan IC

HEARD AT: On the papers

ORDER: **That the proceeding is dismissed.**

CATCHWORDS: ANTI-DISCRIMINATION – where Complainant failed to provide requested information – where Complainant failed to comply with directions orders – consideration of r 45 of the *Industrial Relations (Tribunals) Rules 2011* (Qld) – where proceeding is dismissed

LEGISLATION: *Industrial Relations (Tribunals) Rules 2011*

(Qld) r 6, r 45

CASES:

*Cady v Capital SMART Repairs Australia Pty Ltd & Anor* [2019] QIRC 144

*Cooper v Hopgood & Ganim* [1998] QCA 114

*House v R* (1936) 55 CLR 499

*Lenijamar Pty Ltd and Ors v AGC (Advances) Ltd* [1990] 98 ALR 200

*Quinlan v Rothwell & Anor* [2001] QCA 176

*Seymour v Workers' Compensation Regulator* [2017] QIRC 061

*Treanor v State of Queensland* [2019] QIRC 146

*Workers' Compensation Regulator v Bero* [2019] QIRC 36

*Workers' Compensation Regulator v Varga* [2019] QIRC 028

### **Reasons for Decision**

- [1] Ms Kristen Jackson filed a Form 85 - Referral of a matter in the Industrial Registry on 9 November 2020 (the Complaint).
- [2] The Complaint relates to Ms Jackson's claim that during her employment by the First Respondent she was subjected to direct discrimination on the basis of an impairment.
- [3] At the commencement of this proceeding, Ms Jackson was represented by Supportah Ops Pty Ltd trading as Human Rights Claims.
- [4] The matter did not resolve at the first conference on 8 March 2021. A Further Directions Order was issued on that date, requiring the parties to undertake several steps prior to returning for a second conference. Relevantly, the first direction stipulated:

That the Complainant file in the Industrial Registry and serve on the Respondents a statement of

facts and contentions (no more than 10 pages, type-written, line and a half spaced, 12-point font size and with numbered paragraphs), by 4.00 pm on 29 March 2021.

- [5] On 27 April 2021, Ovartis Lawyers contacted the Industrial Registry on behalf of the Respondents and advised:

Further to the directions issued in this matter, we note that we have not been served with the statement of facts and contentions due on 29 March 2021.

- [6] Subsequently on 27 April 2021, Supportah Ops Pty Ltd filed a Form 35 - Notice of withdrawal of appointment of lawyer or agent with the Industrial Registry.

- [7] On 28 April 2021, the Industrial Registry issued an email to the parties that stated the following (emphasis added):

Commissioner McLennan will grant leave for Mr Van Oeveren to withdraw from acting once the Commissioner is assured that we have a current address for service and contact details for the Applicant. Please confirm the Applicant's email address, postal address, and phone number.

Until the Commissioner grants that leave, kindly ensure that you forward any correspondence or Directions to the Applicant.

Further to Ms Town's correspondence dated 27 April 2021, on 8 March 2021 the Applicant was Directed (see attached) to file materials in the Industrial Registry by 29 March 2021. It does not appear that has been completed. **As a matter of urgency, please advise as to the status of this matter, the reason why the Applicant has been late in complying with those Directions, and the Applicant's expectation of when the outstanding Direction will be complied with.**

- [8] On 5 May 2021, the Industrial Registry followed up on the 28 April 2021 correspondence by issuing an email that stated:

We note that a week has passed since the below correspondence was issued. No response has been received.

If a response to the below is not provided by the Complainant or her representatives by 4:00pm on 6 May 2021, Commissioner McLennan will consider vacating the Directions Order and upcoming listing before placing this matter into abeyance.

- [9] Subsequently on 5 May 2021, the Complainant's representatives responded by providing Ms Jackson's telephone number, postal address and two email addresses. In light of this information being provided, on 6 May 2021, I granted leave for Supportah Ops Pty Ltd to withdraw from acting as Ms Jackson's agent.

- [10] On 11 May 2021, the Industrial Registry issued an email to Ms Jackson (via two email addresses provided by her previous agents) and the Respondents that stated the following (emphasis added):

Ms Jackson, pursuant to the attached Further Directions Order, you were required to file a Statement of Facts and Contentions by 29 March 2021. You did not file that material.

On 28 April 2021, correspondence was sent to both yourself and your agent advising that you were non-compliant and giving you an opportunity to explain the situation. On 5 May 2021, correspondence was sent to you requesting a response by no later than 6 May 2021 and advising that Commissioner McLennan would consider the status of your matter if a response was not received by that time. You have not responded.

Do you have an intention to proceed with this matter and respond to the abovementioned correspondence? If not, please file a Form 27 Request to discontinue proceedings that can be accessed here: Forms | Queensland Industrial Relations (qirc.qld.gov.au) by no later than 4pm on 13 May 2021.

**In the event that you elect not to file a Form 27 by 4pm on 13 May 2021 or act promptly to explain and rectify your current non-compliance with the Further Directions Order issued, Commissioner McLennan will consider dismissing your application pursuant to r 45 of the Industrial Relations (Tribunals) Rules 2011 (Qld).** A Further Directions Order would be issued requiring the parties' submissions on that point.

- [11] Ms Jackson did not make contact with the Industrial Registry as requested. So, on 18 May 2021, a Further Directions Order was issued to the parties. Relevantly, the first direction stipulated:

That, **by 4:00pm on 25 May 2021**, the Applicant file in the Industrial Registry and serve on the Respondent, any submissions as to whether or not the Application filed on 19 November 2020 should be dismissed under r 45 of the *Industrial Relations (Tribunals) Rules 2011 (Qld)*.

- [12] Ms Jackson did not comply with the 18 May 2021 Directions Order. Even now, the substantive requirements of the 8 March 2021 Directions Order and subsequent email correspondence requesting explanation for delay remain unfulfilled. At no stage has Ms Jackson made contact with the Industrial Registry.
- [13] For the reasons that follow, I have determined that Ms Jackson's continued and unexplained non-compliance with the Directions Orders warrants the dismissal of her Complaint.

### **Submissions**

- [14] In the 18 May 2021 Further Directions Order, both parties were directed to file written submissions with respect to "whether or not the Application filed 19 November 2020 should be dismissed under r 45 of the *Industrial Relations (Tribunals) Rules 2011 (Qld)*."
- [15] Neither party filed written submissions. Notably however, the Respondents were directed to file "submissions in reply" to Ms Jackson's submissions. As Ms Jackson did not file any submissions, understandably the Respondents could not file submissions in response.

## Rule 45

[16] In the 18 May 2021 Directions Order, the parties were directed to make submissions with respect to r 45 of the *Industrial Relations (Tribunals) Rules 2011* (Qld) (Tribunal Rules). Rule 45 of the Tribunal Rules provides as follows (emphasis added):

### 45 Failure to attend or to comply with directions order

- (1) This rule applies if -
  - (a) a party to a proceeding receives notice of a directions order made by the court, commission or registrar stating a time, date and place for a hearing or conference for the proceeding; and
  - (b) the party fails to attend the conference.
  
- (2) This rule also applies if -
  - (a) a party to a proceeding **receives notice of a directions order** made by the court, commission or registrar; and
  - (b) the party **fails to comply with the order**.
  
- (3) The court, commission or registrar may -
  - (a) **dismiss the proceeding**; or
  - (b) make a further directions order; or
  - (c) make another order dealing with the proceeding that the court, commission or registrar consider appropriate, including, for example, a final order; or
  - (d) make orders under paragraphs (b) and (c).

[17] The power under r 45(3)(a) of the Tribunal Rules involves an exercise of discretion. Foremost, discretionary powers must be "exercised judicially, according to rules of reason and justice, and not arbitrarily or capriciously or according to private opinion."<sup>1</sup> In exercising that discretion, I am informed by several factors, which are set out below. Ultimately, however, I must consider the particular circumstances of this case.<sup>2</sup>

[18] In *Lenijamar Pty Ltd and Ors v AGC (Advances) Ltd*,<sup>3</sup> their Honours Wilcox and Gummow JJ considered a provision under the Federal Court Rules which is materially similar to r 45 of the Tribunal Rules. In that case, their Honours identified two broad types of failure to comply with directions which would warrant the dismissal of a matter (emphasis added):

As it is impossible to foresee all of the circumstances under which the rule might be sought to be used, it is undesirable to make any exhaustive statement of the circumstances under which the

<sup>1</sup> *House v R* (1936) 55 CLR 499, 503.

<sup>2</sup> *Cooper v Hopgood & Ganim* [1998] QCA 114, 6; citing *Witten v Lombard Australia Ltd* (1968) 88 W.N. (Pt. 1) N.S.W. 405.

<sup>3</sup> [1990] 98 ALR 200.

power granted by the rule will appropriately be exercised. We will not attempt to do so. But two situations are obvious candidates for the exercise of the power: cases in which the history of non-compliance by an applicant is such as to indicate an inability or unwillingness to co-operate with the Court and the other party or parties in having the matter ready for trial within an acceptable period and **cases - whatever the applicant's state of mind or resources - in which the non-compliance is continuing and occasioning unnecessary delay, expense or other prejudice to the respondent.** Although the history of the matter will always be relevant, it is more likely to be decisive in the first of these two situations. Even though the most recent non-compliance may be minor, **the cumulative effect of an applicant's defaults may be such as to satisfy the Judge that the applicant is either subjectively unwilling to co-operate or, for some reason, is unable to do so. Such a conclusion would not readily be reached; but, where it was, fairness to the respondent would normally require the summary dismissal of the proceeding.**

In the second of the two situations we postulate, a significant continuing default, it does not really matter whether there have been earlier omissions to comply with the Court's directions. **Ex hypothesi the default is continuing and is imposing an unacceptable burden on the respondent.**<sup>4</sup>

- [19] Such reasoning was followed by his Honour O'Connor VP in this jurisdiction in *Workers' Compensation Regulator v Varga*,<sup>5</sup> and *Seymour v Workers' Compensation Regulator*,<sup>6</sup> as well as by his Honour Merrell DP in *Cady v Capital SMART Repairs Australia Pty Ltd & Anor*.<sup>7</sup>
- [20] Ms Jackson's default is certainly continuing, given her ongoing failure to comply with the substantive requirements outlined in the Directions Orders. Ms Jackson has also failed to comply with simple requests for explanation of delay that invited an informal response for consideration.
- [21] Ms Jackson's default imposes an unacceptable burden on the Respondents, as they are unable to meaningfully respond to the Complaint without understanding Ms Jackson's case. Further, the Respondents are left in limbo with a Complaint filed against them, unaware of when and if Ms Jackson will proceed.
- [22] I have no doubt that Ms Jackson understands her obligation under the Directions Orders with respect to time period, as this was clearly stipulated. Notwithstanding, the clear lack of regard for the substantive directions indicates that Ms Jackson does not want to put enough effort into responding and further, that she does not intend to proceed with her Complaint.
- [23] I acknowledge that Ms Jackson is now a self-represented litigant. In that regard, I would note that a lack of representation is a misfortune, which should be met with necessary procedural assistance, but is not a privilege entitling a self-represented

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<sup>4</sup> *Lenjamar Pty Ltd and Ors v AGC (Advances) Ltd* [1990] 98 ALR 200, 210.

<sup>5</sup> [2019] QIRC 028.

<sup>6</sup> [2017] QIRC 061.

<sup>7</sup> [2019] QIRC 144.

litigant to special consideration at the expense of the party or parties who are represented or more experienced in the jurisdiction.<sup>8</sup>

- [24] In circumstances where every possible assistance has been provided to Ms Jackson, her non-compliance with the Directions cannot be said to arise from her lack of understanding of the law.
- [25] Noting that Ms Jackson has failed to comply with two sets of Directions Orders (as well as several email requests for explanation), the cumulative effect of her non-compliance is substantial enough to satisfy me that Ms Jackson is either unwilling to comply or for some reason is unable to do so and as a result, the Respondents' case is prejudiced.
- [26] In the exercise of my discretion under r 45 of the Tribunal Rules, I am also minded to consider the purpose of the Tribunal Rules, as set out in r 6:

#### 6 Purpose of rules

The purpose of these rules is to provide for the just and expeditious disposition of the business of the court, the commission, a magistrate and the registrar at a minimum of expense.

- [27] The terms 'just' and 'expeditious' may sometimes appear to be at odds. Australian Courts and Tribunals often wrestle with the task of maintaining the precarious balance between expeditious resolutions, and the ability of parties to prepare for and present their case. In considering that balance while dealing with an application to dismiss for want of prosecution, his Honour Thomas JA in *Quinlan v Rothwell & Anor* provided (emphasis added):

There is now a consciousness of the need for some level of efficiency in the use of the courts as a public resource. That, of course, must not displace the need for reasonable access to the courts and the provision of justice according to law in each matter, but it highlights the fact that the former *laissez faire* attitude by courts towards the leisurely conduct of actions at the will of the parties has ended. At the same time **the rules of court are not an end in themselves. They do not exist for the discipline of practitioners or clients, or for the protection of courts from inefficient litigants, but rather as a means of ensuring that issues will be defined in an orderly way and that parties have the opportunity of full preparation of their case before the trial commences. The rules also afford defendants the means of bringing to an end actions in which the other party will not abide by the rules.**<sup>9</sup>

- [28] While his Honour Thomas JA was considering the *Uniform Civil Procedure Rules 1999* (Qld), that passage has been adopted in this jurisdiction on a number of occasions,<sup>10</sup> as

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<sup>8</sup> See *Workers' Compensation Regulator v Bero* [2019] QIRC 36; *Treanor v State of Queensland* [2019] QIRC 146.

<sup>9</sup> *Quinlan v Rothwell & Anor* [2001] QCA 176, 8.

<sup>10</sup> See *Quaedvlieg and Ors v Boral Resources (Qld) Pty Ltd* [2005] QIC 73; *Workers' Compensation Regulator v Varga* [2019] QIRC 028, 5-6.

the underlying question to be determined is consistent with the exercise of discretion under r 45 of the Tribunal Rules.

- [29] In this matter, Ms Jackson's failure to comply with directions has resulted in a fundamental undermining of the Respondents' ability to fully prepare its case or indeed respond to any case at all. As such, this matter cannot proceed.
- [30] Time limits are imposed to ensure fairness between the parties as well as to ensure the expeditious advancement of the matter. Repeated failure to comply with such directions is not consistent with r 6 of the Tribunal Rules.
- [31] One alternative to dismissal would be to place this matter into abeyance until either Ms Jackson complies with the directions, or the matter lapses due to inactivity. However, Ms Jackson has never expressed any genuine desire to comply with the directions, presently or at some stage in the future. Ms Jackson has not explained at all why she continues to fail to comply with the substantive requirements of the Directions Orders.
- [32] Ms Jackson's decision to not respond to the email correspondence and Directions Orders evinces, to my mind, an intention that she was not, and is not, genuinely intending to comply with my Directions. As such, further delay would create a futile and unnecessary impediment to the expeditious resolution of this matter.
- [33] Therefore, in my opinion, the purpose of the Tribunal Rules is best fulfilled in this case by exercising the discretion under r 45 of the Tribunal Rules to dismiss Ms Jackson's Application.

### **Costs**

- [34] The power to award costs is ultimately discretionary. Given that the Respondents have not been required to file any significant material in this matter, and that the matter has not progressed beyond conference stage, I am not minded to award costs.

### **Conclusion**

- [35] Ms Jackson has failed to comply with Directions Orders on several occasions. The non-compliance has come about because Ms Jackson simply has not responded. Those failures have not been explained nor have extensions been sought. The substantive aspects of the Directions have still not been complied with. That is, despite the Industrial Registry prompting Ms Jackson with information so that she may understand her obligations.
- [36] Ms Jackson has been unwilling or unable to take the necessary steps to prosecute her case in accordance with the Directions.

[37] The Respondents are entitled to understand the case they have to answer. This has been rendered impossible in the continuing circumstances of Ms Jackson's non-compliance.

[38] As such, I find that Ms Jackson's Complaint should be dismissed under r 45 of the Tribunal Rules. I order accordingly.

### **Order**

- 1. That the proceeding is dismissed.**