

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Smith v State of Queensland (Queensland Health)* [2022] QIRC 190

PARTIES: **Smith, Paul Joseph**
(Applicant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO.: AD/2022/38

PROCEEDING: Application for order protecting complainant's interests

DELIVERED ON: 2 June 2022

HEARING DATE: 1 June 2022

MEMBER: Power IC

HEARD AT: Brisbane

ORDER: **The Applicant's application for an order pursuant to s 144 of the *Anti-Discrimination Act 1991* (Qld) is dismissed.**

CATCHWORDS: HUMAN RIGHTS - DISCRIMINATION
LEGISLATION - GENERALLY - applicant lodged complaint with the Queensland Human Rights Commission - complaint that decision to employ a fixed term employee was direct and indirect discrimination contrary to the *Anti-Discrimination Act 1991* (Qld) on the basis of relationship status - complaint accepted by the Queensland Human Rights Commission - application by applicant pursuant to s 144 of the *Anti-Discrimination Act 1991* (Qld) for an order halting the recruitment and appointment process to the fixed term position - application refused

LEGISLATION: *Anti-Discrimination Act 1991* (Qld), ss 144 and 209

Industrial Relations Act 2016 (Qld), s 285

Mental Health Act 2016 (Qld)

Public Interest Disclosure Act 2010 (Qld)

CASES:

Coop v State of Queensland [2014] QCATA 205

McIntyre v Hastings Deering (Australia) Ltd and Anor [2012] QCAT 438

Mr A v Viva Energy Australia Pty Ltd [2021] QIRC 309

APPEARANCES:

Dr S. Sherlock for the Applicant.

Mr T. Longwill of McCullough Robertson Lawyers for the Respondent.

Reasons for Decision

Introduction

- [1] Mr Paul Joseph Smith ('the Applicant') is employed by the State of Queensland (Queensland Health) ('the Respondent') on a casual basis at the Royal Brisbane and Women's Hospital ('RBWH') by the Metro North Hospital and Health Service ('MNHHS') as a health practitioner technician in the Hyperbaric Medicine Service. The Applicant has not worked at the RBWH since September 2021 due to advice from his medical practitioner.
- [2] On 28 April 2022, the Applicant made a complaint to the Queensland Human Rights Commission ('the QHRC') alleging that the Respondent had contravened the *Anti-Discrimination Act 1991* (Qld) ('the Act').
- [3] By application filed on 20 May 2022, the Applicant, pursuant to s 144 of the Act, seeks an order in the following terms:

We seek an interim order to prevent MNHHS employing a temporary hyperbaric chamber operator whilst an investigation into nepotism and discrimination is underway as the position would prevent the discriminated party being able to pursue employment.
- [4] The Applicant submits that the Respondent's decision to recruit a temporary part-time Chamber Supervisor ('the temporary position') at the RBWH amounts to discrimination on the basis of his relationship status in the work area, in contravention of the Act.
- [5] At the hearing of the s 144 application, the Applicant was represented by his wife, Dr Susannah Sherlock. Dr Sherlock confirmed that the Applicant sought to halt the

progression of the appointment process to the temporary position, which she alleges amounts to unlawful discrimination were it to proceed.

- [6] The issue for determination is whether, pursuant to s 144 of the Act, I should exercise my discretion and make an order of the kind sought by the Applicant.

Background

- [7] Dr Sherlock made a public interest disclosure ('PID') in 2020 about a patient safety matter.
- [8] The Applicant applied for a Safety Director position ('the permanent position') with the Respondent in 2021. The Applicant alleges he was 'threatened' by one of the Directors, Dr Thistlethwaite, who he states was '*upset he had been removed from the interview panel due to (a conflict of interest)*'.
- [9] The Applicant alleges he had a 'brief psychotic episode' as a result of this interaction and was then hospitalised. The Applicant is currently fit to return to work, however medical advice is that he was not to return to the RBWH.
- [10] The matter was raised as a grievance with the Respondent internally and is now subject to an investigation.
- [11] An Expression of Interest was emailed to current casual employees, including the Applicant, for the temporary position by the Respondent on 26 April 2022. The Applicant submits that Dr Thistlethwaite who was under investigation was the advertised point of contact for the temporary position. The Applicant did not apply for this position.
- [12] On 28 April 2022, the Applicant lodged a complaint with the QHRC. It appears that in this complaint, the Applicant alleges discrimination on the basis of his relationship with Dr Sherlock and victimisation.
- [13] The QHRC confirmed in a letter dated 31 May 2022 that the complaint had been accepted on the basis that it alleges the following:
- A reprisal under the *Public Interest Disclosure Act 2010*;
 - Contravention/s under the *Anti-Discrimination Act 1991*; and
 - An unreasonable limitation of the right to recognition and equality before the law and right to taking part in public life under the *Human Rights Act 2019*.
- [14] The QHRC letter confirms that the complaint has been accepted but not substantiated, with the complaint alleging conduct that may be a breach of the Act and so the QHRC must try to resolve the matter.

The Applicant's submissions

- [15] The Applicant affirmed an affidavit for the purposes of his s 144 application.
- [16] The Applicant's affidavit outlines the following, in summary, that:

- (a) the Applicant had expressed interest in a permanent position at the RBWH that would be advertised following the retirement of the permanent incumbent;
- (b) Dr Thistlethwaite told the Applicant not to give up his other job as the incumbent always gets the job. The Applicant reported this exchange to Mr Peter Buttrum in an email on 20 May 2020;
- (c) the Applicant began to feel that Dr Thistlethwaite was starting to treat him differently to all the other technicians;
- (d) the Applicant applied for the permanent position in August 2021;
- (e) Dr Thistlethwaite threatened the Applicant as he was angry that the Applicant's wife had requested his removal due to a conflict of interest on the basis that the previous appointment process was under investigation by Mr Brady of Mapien as a possible PID reprisal;
- (f) the Applicant then became extremely unwell and was hospitalised;
- (g) the Applicant underwent a review by a psychiatrist who found him unfit to work;
- (h) following a further review on 26 November 2021, the Applicant's doctor provided clearance for him to return to work elsewhere but not to work at the RBWH; and
- (i) the Applicant was unable to apply for the temporary position advertised on 26 April 2022 because Dr Thistlethwaite, who had previously discriminated against him, was in charge of the recruitment process.

[17] Dr Sherlock affirmed an affidavit for the purpose of the Applicant's s 144 application.

[18] Dr Sherlock's affidavit outlines a chronology of ongoing disagreements with Dr Thistlethwaite, including her complaint about a number of safety-related issues which was acknowledged as a PID.

[19] Dr Sherlock deposes that following a deterioration in the working relationship with Dr Thistlethwaite and consequent impact on her health, she transferred to another workplace. Dr Sherlock then elevated a complaint to the Crime and Corruption Commission Queensland due to alleged ongoing reprisals after leaving the unit against herself, including reputational harm and recredentialling issues, and her husband through job discrimination from the temporary appointment.

[20] Dr Sherlock alleges that the Applicant has been subject to the following episodes of discrimination, that:

- (a) a temporary appointment was repeatedly extended beyond six months and then converted to permanent in February 2021 denying the Applicant an opportunity to apply for the position. The person placed in the temporary role and then extended was Mr Campbell, who was less meritorious;

- (b) the Applicant applied for the permanent position and invited Dr Thistlethwaite to lunch to discuss issues relating to a gas incident following which he received an email from Dr Webb that distressed him and he thought it was an attempt to tarnish his reputation prior to interviews. The Applicant had a psychotic episode at home and was taken by ambulance for assessment where he was admitted under a treatment authority pursuant to the *Mental Health Act 2016* (Qld). Dr Sherlock made a complaint to the Integrity unit that the Applicant had been intimidated and threatened after applying for a position and this has severely affected his health. This was accepted as a PID and is included in the terms of reference for the external investigator to include in the investigation of previous reprisals. Both Dr Sherlock and the Applicant were interviewed by the Mapien investigator and the investigation remains ongoing. Dr Sherlock states that she has been repeatedly assured that the interview process will be continued once the investigation is completed; and
- (c) the third allegation of discriminatory conduct relates to the recruitment of the temporary position. On 26 April 2022, Dr Thistlethwaite emailed all casual technicians including the Applicant, who is currently on unpaid leave from the RBWH, inviting them to apply for the position. Dr Sherlock emailed Dr Thistlethwaite and stated that he has an ongoing conflict of interest and that by being the point of contact, he was indirectly discriminating against the Applicant again.

[21] The Applicant's submission refer to a number of cases in which unlawful discrimination has been considered in other jurisdictions.

[22] The Applicant also made submissions regarding other statutes such as the *Public Interest Disclosure Act 2010* (Qld), including the reference to reprisals provisions.

[23] The Applicant submits that a wider interpretation of 'relationship status' should be adopted to include the identity of the partner to satisfy the purpose of providing equal employment opportunity.

[24] With respect to the temporary position, the Applicant submits that:

- (a) the advertisement appears neutral, however in practice there was discrimination against the Applicant as the contact person was Dr Thistlethwaite who has a conflict of interest;
- (b) the application process was in breach of the Recruitment and Selection Directive 12/20 as the minimum timeframe for advertising was not met;
- (c) the 'desirable qualifications' have no relevance to the position and are in breach of Directive 12/20; and
- (d) even if successful in obtaining the temporary position, he would have been in a subordinate position to the acting Safety Director who obtained his position in circumstances that resulted in a PID.

- [25] The Applicant submits that he was subject to indirect discrimination due to the following:

Mr Smith, was unable to apply due to the obvious conflict of interest he had with Dr Thistlethwaite, someone who was under investigation for threatening him previously.

Any other person who was aware of the position earlier, had no COI with Dr Thistlethwaite and was not married to someone who had lodged a PID against Dr Thistlethwaite, was able to comply with the process of registering interest. This would be the majority of people.

The process was unreasonable as it occurred during a period where Mr Smith remained off work directly as a result of an ongoing investigation into alleged previous discrimination and reprisals. This allowed Dr Thistlethwaite to organise a situation causing further detriment to Mr Smith by placing Bob Campbell into an Acting Safety Director position without a merit process.¹

- [26] The Applicant makes a number of submissions relating to the Respondent's conduct potentially contravening s 285(2) of the *Industrial Relations Act 2016* (Qld).
- [27] The Applicant's submissions relating to the balance of convenience relate to the broader circumstances of the complaint rather than the application under s 144.
- [28] In oral submissions, Dr Sherlock submitted the following with respect to the specific requirements of s 144:

The consequences if the interim order is not given to Paul is the ongoing lack of progress with the investigation. There'll be no incentive for Metro North to actually ever finish the investigation, and it will be hanging as an integrity issue forever.²

- [29] Dr Sherlock stated that the prejudice that will be suffered by the Applicant in essence relates to his potential lack of competitiveness in applying for the permanent position when compared with the candidate who will have had the experience of occupying the temporary role. Dr Sherlock submits:

So the difference between the calibre of the candidates at that point is completely changed if that candidate is now able to act as the acting safety director, again, without a merit process, and slip in one of the casuals into another position, effectively blocking anyone else, because traditionally they've had lots of casuals. I've seen a copy of the roster for June and it is covered by those two individuals only, which means that no one else gets to go in there and even keep their skill set up.³

- [30] Dr Sherlock made oral submissions regarding the experience of both herself and the Applicant with respect to integrity issues at MNHHS.

Respondent's submissions

- [31] Mr Peter Sparrow, Manager Workplace Relations & IR Capability of the Respondent affirmed an affidavit annexing a number of emails relating to the decision to recruit to the temporary position. Mr Sparrow states that the Respondent is currently dealing with workforce issues in a range of areas and the temporary position is being recruited on a temporary basis to urgently address one aspect of that workforce shortage.

¹ Applicant's submissions, filed on 30 May 2020, page 5.

² T 1-11, ll 22-24.

³ T 1-13, ll 15-21.

- [32] In oral submissions, the Respondent submitted that the relevant position was in fact a three-month temporary position rather than the proposed six-month position.
- [33] The Respondent submits that the recruitment process could not prejudice an order the Queensland Industrial Relations Commission ('QIRC') might make if the complaint were successful because:
- (a) the QIRC can order uncapped damages and make orders relating to recruitment processes;
 - (b) the recruitment process relates to an entirely different position than the position about which the complaint relates; and
 - (c) the position being recruited for is a three-month temporary position, which will be concluded long before this matter could be heard and determined.
- [34] The Respondent contends that:
- (a) the orders sought will prevent the Respondent's recruitment process from addressing an urgent workforce shortage;
 - (b) there is no guarantee the Applicant would be successful in obtaining the position or will be fit to perform that work; and
 - (c) if any procedural unfairness does arise through the conduct of the recruitment process, such as conflicts of interest, there are a range of more suitable alternative avenues to address such an issue, including a public service appeal.
- [35] The Respondent submits that there is no reason why the recruitment process would have any impact upon an order the QIRC might make after a hearing of the complaint.

Consideration

- [36] This Application has been brought pursuant to s 144 of the Act:

144 Applications for orders protecting complainant's interests (before reference to tribunal)

- (1) At any time before a complaint is referred to the tribunal, the complainant or the commissioner may apply, as provided under the relevant tribunal Act, to the tribunal for an order prohibiting a person from doing an act that might prejudice-
 - (a) the investigation or conciliation of the complaint; or
 - (b) an order that the tribunal might make after a hearing.
- (2) A party or the commissioner may apply, as provided under the relevant tribunal Act, to the tribunal for an order varying or revoking an order made under subsection (1).
- (3) If the tribunal is satisfied it is in the interests of justice, an application for an order under subsection (1) may be heard in the absence of the respondent to the application.

- [37] The Applicant's complaint has not been referred to the QIRC under the Act at the date of the hearing of this s 144 application. I note that the matter has been listed for conciliation on 5 July 2022 before the QHRC.
- [38] The QIRC has traditionally approached applications made pursuant to s 144 on a similar basis to that of injunctions, namely, that it must be established that there is an arguable case for relief and considering where the balance of convenience lies.
- [39] Deputy President Merrell has recently cast doubt on that approach in *Mr A v Viva Energy Australia Pty Ltd ('Viva')*.⁴ Deputy President Merrell outlined his concerns that the principles considered in interlocutory injunctions may be a distraction from the matters to which s 144 directs attention. On the basis of the *Viva* decision, I will be guided by the provisions of the statute in determining this application.
- [40] Section 209 of the Act provides for the orders the QIRC may make if it determines the Respondent has contravened the Act, including an order requiring the respondent to pay the complainant an amount it considers appropriate as compensation for the loss or damage caused by the contravention⁵ and an order requiring the Respondent to do specified things to redress loss or damage suffered by the complainant because of the contravention.⁶
- [41] The QIRC can make orders including damages and other orders potentially relating to recruitment process and the employee the subject of the allegations. It is unclear to me how the recruitment and appointment of a person to the temporary position could prejudice an order the QIRC might make if the Applicant's complaint were successful. The Applicant has not demonstrated why any of the orders outlined in s 209 would be prejudiced if an employee was appointed the temporary position.
- [42] In applying s 144, I note the decision in *Coop v State of Queensland ('Coop')*,⁷ in which Judge Horneman-Wren referred to the need for precision in the identification of both the act said to give rise to the material risk of prejudice and the orders which are said to be potentially prejudiced and in what way this prejudice will occur.
- [43] The act said by the Applicant to give rise to the material risk of prejudice is the recruitment of a temporary part-time technician at the RBWH. The manner in which this act may prejudice the investigation or conciliation of the Applicant's complaint or an order that the QIRC may make after a hearing has not been made clear.
- [44] In applying the decision of *McIntyre v Hastings Deering (Australia) Ltd and Anor*,⁸ the Applicant must show a possibility of prejudice that is tangible, or at least perceptible and plausible, and not too remote and unlikely.⁹
- [45] The Applicant has not demonstrated how the recruitment to the temporary position will prejudice the investigation or the conciliation of the complaint. The Applicant has also

⁴ [2021] QIRC 309, [54]-[57].

⁵ *Anti-Discrimination Act 1991* (Qld) s 209(1)(b).

⁶ *Ibid* s 209(1)(c).

⁷ [2014] QCATA 205 ('*Coop*').

⁸ [2012] QCAT 438.

⁹ *Ibid* [18].

not demonstrated how the recruitment to the temporary position may prejudice the range of orders that the QIRC may make following a hearing of the complaint. It seems that the Applicant is of the view that they may be discriminated against in their application for employment, however s 144 cannot be relied upon to prevent future discriminatory conduct. As stated in *Coop*:

Section 144 of the ADA does not confer power upon the Tribunal to grant general interlocutory injunctive relief to prevent future contraventions of the ADA. It may be invoked to prevent prejudice to the processes and remedies which might flow from a complaint that discrimination has occurred. It may not be invoked to prevent acts which, if performed, may found a complaint of discrimination.¹⁰

- [46] The Applicant submits that the Respondent have taken a significant amount of time to investigate the Applicant's complaints and that this is likely to continue unless this order is made. The relevant consideration is whether the act will prejudice the investigation, and there is no evidence that the recruitment to the temporary position will prejudice the investigation of the complaint.
- [47] I am not persuaded that the recruitment of the temporary position might prejudice the investigation or conciliation of the complaint or an order that the QIRC might make after a hearing. Consequently, I am not of the view that an order pursuant to s 144 should be made. I will, however, consider the usual injunction principles regarding establishment of a prima facie case and the balance of convenience.
- [48] Although the evidence of the Applicant and Dr Sherlock raise serious allegations about workplace culture and safety, it is not clear to me that the Respondent's conduct could potentially constitute discrimination on the basis of relationship status. This is primarily due to the expansive manner in which the submissions have been made, traversing the history of both the Applicant and Dr Sherlock's industrial issues at RBWH and alleged breaches of different statutes,¹¹ as well as the potentially novel approach taken to the interpretation of the attribute of 'relationship status' under the Act. However, given the preliminary nature of the complaint, I am unwilling to determine that a prima facie case does not exist in this matter.
- [49] In determining the balance of convenience, I have considered the affidavit of Mr Sparrow dated 31 May 2022 in which he affirms that the Respondent is recruiting for a frontline health worker to address an urgent workforce shortage. The temporary nature of the relevant position is of relevance given that the three month temporary engagement will likely be concluded prior to the substantive complaint being heard and determined. I note that the matter has not yet been referred to the QIRC and is unlikely to have moved through the QHRC and QIRC processes within a three month time period. If the recruitment process is stayed, the Respondent will be unable to address the workforce shortage in a reasonable manner. The prejudice to the Respondent if this application is granted is, in my view, significant.
- [50] The Applicant has not applied for the temporary position and current medical advice is that whilst he is fit to work, it is not recommended that he work in his previous

¹⁰ *Coop* (n 7) [142].

¹¹ Submissions were made relating to potential breaches of the *Public Interest Disclosure Act* 2010 (Qld) and *Industrial Relations Act* 2016 (Qld).

workplace at the RBWH. I note the submission that the Applicant will be at a disadvantage in applying for the permanent position against the incumbent of the temporary position. On balance, the prejudice to the Respondent in preventing the rostering of a consistent employee in a front line position is substantial and consequently, the balance of convenience favours the Respondent in this matter.

Conclusion

- [51] For the reasons outlined above, I decline to make an order, pursuant to s 144 of the Act, of the kind sought by the Applicant.

Order

- [52] I make the following order:

The Applicant's application for an order pursuant to s 144 of the *Anti-Discrimination Act 1991* (Qld) is dismissed.