

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Morgan v State of Queensland (Queensland Health)* [2022] QIRC 081

PARTIES: **Morgan, Peter**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2021/407

PROCEEDING: Application in existing proceedings

DELIVERED ON: 11 March 2022

MEMBER McLennan IC

HEARD AT: On the papers

ORDER: **1. Pursuant to r 61 of the *Industrial Relations (Tribunals) Rules 2011 (Qld)*, the Attendance Notice is set aside.**

CATCHWORDS: PUBLIC SERVICE - EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY - PROCEDURE - where appellant filed request for attendance notice to produce - where respondent objects to attendance notice and seeks that it be set aside - whether attendance notice is incompatible with s 195(2) of the *Public Service Act 2008* - whether documents sought are directly relevant to the proceedings - whether attendance notice constitutes a fishing expedition - where attendance notice set aside

LEGISLATION: *Industrial Relations Act 2016 (Qld)* s 195

Industrial Relations (Tribunals) Rules 2011 (Qld)
r 59, r 61

- CASES: *Jones v State of Queensland (Queensland Police Service)* [2019] QIRC 104
- Kelly v State of Queensland (Queensland Health)* [2021] QIRC 055
- McAllister v State of Queensland (Queensland Health)* [2021] QIRC 435
- Varghesekutty v State of Queensland (Queensland Health)* [2021] QIRC 319

Reasons for Decision

Background

- [1] On 26 November 2021, the Australian Workers' Union (the AWU) on behalf of Mr Peter Morgan (the Appellant) filed an appeal against a decision made by Queensland Health, State of Queensland (the Respondent).
- [2] The decision subject of the Appeal is the Respondent's deemed decision to not convert the Appellant to permanent employment under s 149B of the *Public Service Act 2008* (Qld) (the PS Act).
- [3] On 29 November 2021, I issued a Directions Order seeking that the parties file and serve written submissions with respect to the Appeal.
- [4] The parties subsequently filed written submissions in compliance with the Directions Order.
- [5] On 20 December 2021, the Appellant filed a Form 32 Request for Attendance Notice (the Attendance Notice) seeking that the Respondent produce the following documents:
- a. copies of any and all documentation (if any) pertaining to how the Appellant's conversion to permanency will prevent the Respondent from being able to fulfill its obligations under s 25 & s 26 of the Public Service Act 2008 (QLD) to provide a responsive, effective and efficient service to the community as outlined in paragraph 12a. of the Respondent's submissions filed on 13 December 2021;
 - b. copies of any and all documentation (if any) pertaining to how the Appellant's conversion to permanency will prevent the Respondent from being able to fulfill its obligations under s 25 & s 26 of the Public Service Act 2008 (QLD) to ensure the effective, efficient and appropriate use of public resources as outlined in paragraph 12b. of the Respondent's submissions filed 13 December 2021;
 - c. copies of any and all documentation (if any) pertaining to how the Appellant's conversion to permanency will prevent the Respondent from being able to fulfill its obligations under s 25 & s 26 of the Public Service Act 2008 (QLD) to manage public resources efficiently,

responsibly and in an accountable way as outlined in paragraph 12c. of the Respondent's submissions filed on 13 December 2021; and

- d. copies of any and all documentation (if any) evidencing that the Respondent's need for contingency labour has reduced or 'abated' since engaging the Appellant on 14 October 2019 as outlined in paragraphs 22. of the Respondent's submissions filed on 13 December 2021.

[6] On 24 December 2021, the Respondent filed further submissions in the Appeal that relevantly included:

5. The Respondent requests that the Industrial Commissioner exercise their discretion to set aside the request for Attendance notice to produce (Forms 32 and 32B) filed by the Appellant on 20 December 2021, pursuant to section 61 of the Industrial Relations (Tribunals) Rules 2011.
6. Furthermore, the Respondent is of the view that the request to produce the documentation as per Form 32B is not compatible with section 195(2) of the Act which states that:
 - a. A person can not appeal against, or in an appeal call in question in anyway, a decision that decides the policy, strategy, nature, scope, resourcing or direction of the public service or a department.

[7] On 11 January 2022, I issued a Directions Order inviting submissions with respect to the Respondent's request that the Attendance Notice be set aside.

[8] I have decided not to approach the writing of this Decision by summarising the entirety of the parties' submissions but will instead refer to the parties' key positions in considering the questions to be decided.

Question to be decided

[9] Based on the Respondent's submissions, I have determined that the questions to be decided are:

- Is the Attendance Notice incompatible with s 195(2) of the PS Act?
- Should the Attendance Notice be set aside pursuant to r 61 of the Rules?

Is the Attendance Notice incompatible with s 195(2) of the PS Act?

[10] Section 195(2) of the PS Act provides that "A person can not appeal against, or in an appeal call in question in any way, a decision that decides the policy, strategy, nature, scope, resourcing or direction of the public service or a department."

[11] The Respondent contends that the Attendance Notice is incompatible with s 195(2) of the PS Act because:

- in order to meet its obligations under ss 25-26 of the PS Act, the Respondent has been reviewing and setting strategies regarding the supply chain services provided to hospitals; and
- the Respondent is still considering the scope and operation of the new distribution centre.¹

[12] The Appellant submits he is not seeking to call in question a decision contemplated under s 195(2) of the PS Act but is instead seeking the material relied upon by the Respondent to make the conversion decision.²

[13] I agree with the Appellant in this regard and refer to my consideration of a similar argument presented by the Respondent in *Varghesekutty v State of Queensland (Queensland Health)*.³ In that matter, I rejected the proposition that a conversion decision falls under s 195(2) of the PS Act and noted that if that proposition were to be accepted, the opportunity for an employee to appeal a conversion decision under s 194(1)(e) of the PS Act would be quite inexplicable.

[14] Further, any attempted argument by the Respondent to adopt this erred interpretation would seemingly result in prohibiting most staffing conversion determinations from ever being challenged through a Public Service Appeal. Clearly, this is not the intention of either the PS Act or Directive 09/20. On that basis, I reject the argument that the Attendance Notice is incompatible with s 195(2) of the PS Act and it will therefore not be set aside on that basis.

Should the Attendance Notice be set aside pursuant to r 61 of the Rules?

Relevant provisions

[15] Rule 61 of the Rules provides that "The court, commission or registrar may, by order, set aside part or all of the attendance notice."

[16] Rule 59 of the Rules provides:

- An attendance notice requiring a person to produce a stated document or thing must
- (a) adequately describe the document or thing; and
 - (b) contain a notice, in the approved form, telling the person that the person has the right to apply to the court or commission to have the attendance notice set aside on any sufficient grounds, including for example -
 - (i) the document or thing is not directly relevant to the proceedings; or
 - (ii) privilege; or

¹ Respondent's Submissions, 18 January 2022, 2 [2]-[3].

² Appellant's Further Submissions in Reply, 11 January 2022, 1 [3].

³ [2021] QIRC 319, 6 [21]-[22].

- (iii) oppressiveness, including oppressiveness because substantial expense may be incurred that may not be reimbursed; or
- (iv) noncompliance with these rules.

Submissions

[17] The Appellant takes issue with the fact that the Respondent is refusing to produce evidence of its conclusions.⁴ The Appellant contends that if the Respondent cannot produce the documents or rationale for how it drew its conclusions, then the claims should either be withdrawn by the Respondent or disregarded by the Commission.⁵

[18] The Appellant further submits:

It is not in order for the Respondent to be able to make claims as to why it has made certain decisions with respect to the Appellant's conversion application without the Appellant being able to have access to a review of the merits of those decisions. If the Appellant is to be successful in 'proving his case', they must be provided with the materials to do so whereby those materials are reasonably beyond his scope to access such as the Respondent's claims in this particular matter. It is fair and reasonable for the Notice to Produce to be allowed by the Commission.⁶

[19] The Appellant refers to the decision of *McAllister v State of Queensland (Queensland Health)* ('*McAllister*') in which Merrell DP stated:

The onus is always on the Appellant to demonstrate that the decision was not fair and reasonable. If an appellant disputes any assertion made by the respondent in an appeal such as this, then, he or she of course has the discretion to make an application to the Commission to seek leave to make further submissions and, or in the alternative, to make further submissions and to lead evidence which might tend to disprove the assertions made by the Respondent.⁷

[20] With reference to *McAllister*, the Appellant argues the purpose of the Attendance Notice is to lead evidence which might tend to disprove the assertions made by the Respondent and argues that a different decision may have been made in *McAllister* had such material been produced.⁸ The Appellant also refers to *Kelly v State of Queensland (Queensland Health)* in which Commissioner Pidgeon concluded that the Respondent had not submitted any detailed or specific information to support its assertions regarding management of public resources.⁹

[21] The Respondent submits that the documentation sought is not currently available and regardless, it would not be appropriate to release this commercially sensitive information that relates to the resourcing of a distribution centre.¹⁰

[22] With respect to the final category of documentation under d., the Respondent provided an attachment referred to as "Advertising Statistics for Supply Officers 2014 - 2021" which it contends demonstrates the exceptional increase in demands for 2019 and 2020

⁴ Appellant's Further Submissions in Reply, 11 January 2022, 1 [4].

⁵ Ibid 2 [4].

⁶ Ibid.

⁷ [2021] QIRC 435, 8 [37].

⁸ Appellant's Further Submissions in Reply, 2 [6].

⁹ [2021] QIRC 055, [50]; Appellant's Further Submissions in Reply, 25 January 2022, 1 [4].

¹⁰ Respondent's Submissions, 18 January 2022, 2 [4].

by the number of advertisements for casual and fixed term temporary supply officers. The Respondent contends there is no further documentation it can provide to support its assertions in this regard.¹¹ In response, the Appellant submits that the attachment referred to conversely shows an increase in the demand for labour.¹²

- [23] In its final submissions, the Respondent states that the HR representative nominated in the Form 32B Request has little information to provide and is not a decision maker.¹³

Consideration

- [24] In *Jones v State of Queensland (Queensland Police Service)*, Commissioner Thompson stated:

- [75] For a Notice to meet any challenge it must satisfy the "legitimate forensic purpose test", meaning that the documentation being sought must be relevant information to the substantive matter being considered by the Commission and material that could reasonably be expected to be in the possession of the organisation or person upon whom the Notice is served. That is a test that the person serving the Notice must satisfy to be able to successfully resist an objection to refuse or as in this case set aside part of a Notice.
- [76] The Notice can not act as a "fishing expedition" for the purposes of determining the strength of a case to be met by the applicant or whether such a case exists in the first place.
- [77] Further, the applicant is required to establish that it is "on the cards" that the documents being sought would benefit the case in respect of the substantive matter being dealt with by the Commission.
- [78] In *Ragg v Magistrates' Court of Victoria & Corcoris (Ragg)*²⁷, Bell J found:
- 119 In my view, the governing principle is that an accused person is entitled to seek production of such documents as are necessary for the conduct of a fair trial between the prosecution and the defence of criminal charges that have been brought. When objection is taken, the accused must identify expressly and with precision the forensic purpose for which access to the documents is sought. A legitimate purpose is demonstrated where the court considers, having regard to its fundamental duty to ensure a fair trial, that there is a reasonable possibility the documents will materially assist the defence. That is a low threshold, but it's a threshold.
- 120 I put the principle that way because I think it expresses in more certain language that Gibbs CJ probably had in mind when he used the "on the cards" metaphor in *Alister v R*, because it gives proper effect to the underlying fundamental duty of the court to ensure a fair trial because it is consistent with the human rights of an accused person to equality before the law and a fair hearing specified in art 14 of the International Covenant on Civil and Political Rights, as well as the equality of arms principle that has been stated in the international jurisprudence by reference to those rights.
- [79] I accept that *Ragg* related to a criminal matter which generally allowed for considerations with more latitude than in matters of a civil nature however the importance of the outcome was the requirement to ensure a "fair trial".¹⁴

¹¹ Ibid [5].

¹² Appellant's Further Submissions in Reply, 25 January 2022, 2 [6].

¹³ Respondent's Further Submissions, 7 February 2022, 1 [1].

¹⁴ [2019] QIRC 104.

- [25] The issue for my determination in the Appeal will be whether the decision appealed against is fair and reasonable.
- [26] Ultimately, I do not consider that the absence of the documents the Appellant is seeking will be directly relevant to my determination of the question to be decided. Each party has been given the opportunity to present any evidence they possess in support of their position. The other party may point out a lack of evidence and I will take that into consideration.
- [27] Less weight will ordinarily be given to assertions made that are not supported by evidence when it appears likely that the party ought to possess documentation that tends to prove or disprove that assertion. Therefore, if a party makes a series of assertions that it cannot support with evidence, then I may prefer the counter arguments made by its opponent that are supported by evidence. In the alternative, I accept that not all arguments are supportable by evidence but are rather just that, an argument in support of a position.
- [28] Upon review of the Appellant's submissions, I am not satisfied he has identified expressly and with precision the forensic purpose for which access to the documents is sought. Simply alluding to the fact the documentation may support his case is insufficient.
- [29] Further to that point, the Attendance Notice could be characterised as a fishing expedition in that it does not comprise a particularised request with a genuine forensic purpose to obtain documents of direct relevance but rather an attempt to obtain documents so that the Appellant can ascertain whether any of that material assists his case. It appears the Appellant is of the opinion he requires this information to successfully prove his case and that submission supports my conclusion that the Attendance Notice comprises an unnecessary fishing expedition.
- [30] Finally, the Respondent submits and I accept that there is not a lot of documentation that can be provided. I do not believe the Respondent would make such a concession if it were not true and I do not consider it is in the interests of either party for this matter do be drawn out any longer.

Conclusion

- [31] For the reasons outlined above, I accept the Respondent has presented sufficient grounds to have the Attendance Notice set aside and I will order accordingly pursuant to r 61 of the Rules.

Order

- 1. Pursuant to r 61 of the *Industrial Relations (Tribunals) Rules 2011 (Qld)*, the Attendance Notice is set aside.**