

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Koenders, Maurice v State of Queensland (Queensland Corrective Services)* [2023] QIRC 320

PARTIES: **Koenders, Maurice**
(Applicant)

v

State of Queensland (Queensland Corrective Services)
(Respondent)

CASE NO: TD/2022/241

PROCEEDING: Application for reinstatement

DELIVERED ON: 9 November 2023

MEMBER: Pidgeon IC

HEARD AT: On the papers

ORDER: **1. That the proceeding is dismissed pursuant to the *Industrial Relations (Tribunals) Rules 2011 (Qld)* r 45(3)(a).**

CATCHWORDS: INDUSTRIAL LAW – QUEENSLAND – OTHER MATTERS – whether to dismiss proceeding – where applicant was directed to attend conferences and a mention and failed to appear – where the applicant failed to comply with directions – consideration of the *Industrial Relations (Tribunals) Rules 2011 (Qld)* r 45 – substantive application for reinstatement dismissed

LEGISLATION: *Industrial Relations Act 2016 (Qld)* s 541
Industrial Relations (Tribunals) Rules 2011 (Qld) r 45

CASES: *Drage v State of Queensland (Queensland Health) (No 2)* [2023] QIRC 74

Janulewicz v State of Queensland (Queensland Health) [2023] QIRC 26

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

Mocnick & Ors v State of Queensland (Queensland Health) [2023] QIRC 74

Quaedvlieg and Ors v Boral Resources (Qld) Pty Ltd [2005] ICQ 59

Quinlan v Rothwell & Anor [2001] QCA 176

Smith v Workers' Compensation Regulator [2017] QIRC 070

Workers' Compensation Regulator v Varga [2019] QIRC 028

Reasons for Decision

Introduction

- [1] Mr Maurice Koenders ('the Applicant') filed an application for reinstatement on 2 November 2022 ('the substantive application').
- [2] This decision concerns an application in existing proceedings filed by the State of Queensland (Queensland Corrective Services) ('the Respondent') on 28 September 2023 for an order pursuant to the *Industrial Relations Act 2016* (Qld) s 541(b)(ii) ('the IR Act') that the Queensland Industrial Relations Commission ('the Commission') exercise its discretion not to hear the substantive application on the basis that it would not be in the public interest.

Background

- [3] It is useful to briefly summarise the history of the proceedings before the Commission.
- [4] Pursuant to a Directions Order issued by the Industrial Registry on 3 November 2022, the Respondent, represented by Crown Law, filed an Employer Response to Mr Koenders' application on 17 November 2022.
- [5] The Industrial Registry subsequently wrote to the parties on 21 November 2022 requesting that the parties provide their availability for a conciliation conference on a date between January to March 2023.
- [6] The Respondent promptly provided its availability.

[7] Mr Koenders wrote to the Industrial Registry on 23 November 2022, with his correspondence addressed to the lawyer at Crown Law with carriage of the matter, saying: *'Hi Rachel, i had to find a new job because of this and am now fulltime working again, as such i am only available weekdays after 4:30pm or on weekends'*.

[8] With a view of accommodating Mr Koenders' circumstances and progressing the matter towards a conciliation conference, the following correspondence was sent to the parties on behalf of my chambers on 28 November 2023:

Dear Mr Koenders

We note your availability for the conciliation.

The Commissioner is content to list the conciliation in order to give you notice to organise leave from work to attend the conference during the hours of the Commission.

Could you please confirm your availability between December to March?

The Respondent's availability between January to March has been received. Ms Maynard, could you also please confirm your availability in December?

Given Mr Koenders' location, the conciliation will be listed as a teleconference.

[9] At all stages when the Respondent has been requested to provide its availability for a listing, the Respondent has done so.

[10] Having not received Mr Koenders' availability, a reminder was sent to Mr Koenders as follows on 8 December 2022:

Dear Mr Koenders

Further to the below, could you please confirm your availability for conciliation between December to March?

[11] Another reminder email was sent to Mr Koenders on 20 December 2022 as set out below:

Dear Mr Koenders

I refer to the previous correspondence sent to you by the Industrial Registry to confirm your availability for conciliation.

Could you please confirm your availability for a telephone conference in the new year?

[12] Mr Koenders responded to the Industrial Registry on 24 December 2022 saying: *'Hi Rachel, I am available weekdays before 7:45 am and after 5pm or on the weekends as I have recently acquired a new job'*.

[13] My chambers wrote to Mr Koenders again on 3 January 2023 in an attempt to progress the matter. That email said:

Dear Mr Koenders

To clarify, your application is before Commissioner Pidgeon for conciliation.

The request for you to confirm your availability for a telephone conciliation was made by Commissioner Pidgeon's chambers and not Crown Law who act for the Respondent.

I refer to the Commission's earlier email dated 28 November 2022. The Commissioner is content to list the conciliation in order to give you notice to organise leave from work to attend the teleconference **during the hours of the Commission.**

All parties are asked to please confirm their availability for conciliation between January to March. I note that the dates previously provided by the Respondent across December 2022 have now passed.

Mr Koenders, you must copy in the Respondent to all communications with the Commission. On this occasion, I have copied in the Respondent on your behalf.

- [14] Having not received Mr Koenders' availability by 25 January 2023, the conciliation conference was listed for 21 February 2023 at 2:00 pm by telephone. This gave the parties one month's notice of the listing. The Notice of Listing was accompanied by a message requesting that the parties confirm their appearances and contact details for the teleconference by 14 February 2023 at 4:00 pm.
- [15] An email was sent to the parties on 16 February 2023 seeking their appearances. Having not received confirmation from Mr Koenders, a phone call was made to him on 17 February 2023 to remind him of the listing. An email was sent to him following this phone call on 17 February 2023 stating:

Dear Mr Koenders

Further to our conversation by phone earlier this morning, please find **attached** Notice of Listing for a conciliation before Commissioner Pidgeon on **Tuesday 21 February 2023 at 2:00 pm.**

Given your location, you can appear by telephone.

Please confirm your attendance and your best contact number as soon as possible.

If you would like to call the Industrial Registry back, please call 1300 592 987.

- [16] The listing was cancelled on 20 February 2023 as Mr Koenders advised the Commission that he could not attend the conference. My chambers wrote to Mr Koenders on 21 February 2023 as follows:

Dear Mr Koenders

I refer to the **attached** cancelled Notice of Listing.

Today's conciliation was vacated as you advised the Industrial Registry by telephone on 20 February 2023 that you were unable to attend due to work commitments.

The Commissioner noted your initial correspondence of 24 November 2022 advising that you were unable to attend a conciliation during work hours. Correspondence was sent to you on 28 November 2022 which advised you that a conference would be held during the hours of the Commission, that the Commissioner would list the conference with enough notice to enable you to attend, and requested that you confirm your availability for a conciliation between December to March.

The Industrial Registry emailed you again on 20 December 2022 and 3 January 2023 to obtain your availability.

As you did not respond, a Notice of Listing was sent to the parties on 25 January 2023 to list a conference on 21 February 2023 at 2:00 pm. You were provided with almost a month's notice of the conference.

Reminder emails were sent to you on 16 February 2023 and 17 February 2023 regarding the listing, and the Commission called you on both 16 February 2023 and 20 February 2023 to confirm your attendance.

All non-urgent Commission business, including a hearing should your matter fail to settle at conference, will be held during work hours. The Commissioner is therefore minded that you need to make yourself available during the hours of the Commission.

With this in mind, please confirm whether you intend to proceed with your matter and nominate dates when you are available to attend a conciliation during the hours of the Commission.

[17] Further time passed without engagement from Mr Koenders. On 1 March 2023, my chambers wrote to Mr Koenders requesting the following:

Dear Mr Koenders

I refer to the below correspondence.

Please advise the Commission by **Wednesday 15 March 2023** if you intend to proceed with your matter and provide appropriate times and dates for a conference.

[18] Mr Koenders again failed to respond to this correspondence and his file was returned to the Industrial Registry to be placed in abeyance subject to the ordinary rules surrounding the lapsing of an application.

[19] On 28 September 2023, the Respondent filed its application seeking orders that Mr Koenders' application for reinstatement not be heard by the Commission. The application was accompanied by an affidavit sworn by Ms Samantha Kate Gray on 28 September 2023. Exhibited to Ms Gray's affidavit are the Respondent's submissions in support of the application. The application and Ms Gray's affidavit were sent by the Industrial Registry to all parties, including Mr Koenders, that same day.

[20] On 3 October 2023, a telephone mention was listed for 10 October 2023 at 9:30 am. The parties were provided with a week's notice of the mention. The listing was accompanied by a message which explained that the purpose of the mention was to address the Respondent's application and requested that the parties confirm their appearances and contact details.

[21] Mr Koenders did not confirm that he intended to attend the mention. His telephone number was added to the conference call, but after speaking to the operator and explaining that he could not attend, Mr Koenders failed to appear at the mention.

[22] A Further Directions Order was issued on 10 October 2023 which said:

FURTHER DIRECTIONS ORDER (1)

FURTHER to the Notice of Listing issued to the parties on 3 October 2023 for a telephone mention which was held before Commissioner Pidgeon on 10 October 2023, it is noted that the Applicant answered the call and advised that he would not attend the mention.

Having regard to the application in existing proceedings filed by the Respondent on 28 September 2023 and the accompanying affidavit sworn by Ms Samantha Kate Gray on 28 September 2023, and served on the Applicant by email on 28 September 2023, IT IS ORDERED:-

1. That the Applicant file in the Industrial Registry, and serve on the Respondent, written submissions (of no more than five pages in length and any relevant attachments) as to why the proceeding should not be dismissed under r 45 of the *Industrial Relations (Tribunals) Rules 2011* (Qld) by **4:00pm on 17 October 2023**.
2. That the Respondent file in the Industrial Registry, and serve on the Applicant, written submissions in reply to the Applicant's submissions (of no more than five pages in length and any relevant attachments) by **4:00pm on 24 October 2023**.
3. Unless any party requests by **4.00pm on 27 October 2023** for leave to make oral submissions or further written submissions, the matter will be dealt with on the papers pursuant to s 451(1) of the *Industrial Relations Act 2016* (Qld) unless otherwise ordered.

[23] Mr Koenders did not file submissions.

[24] An Amended Further Directions Order (1) was issued on 19 October 2023 inviting the Respondent to file submissions, with the opportunity for Mr Koenders to reply, and a standard direction allowing the parties to seek leave to make oral submissions or further written submissions.

[25] Mr Koenders did not seek leave to file further written submissions or to be heard orally.

[26] The Respondent has advised the Industrial Registry that it relies upon its filed material. In accordance with the Amended Further Directions Order (1), my decision was reserved on 7 November 2023.

Legal Framework

[27] Section 541(b)(ii) of the IR Act states:

541 Decisions generally

The court or commission may, in an industrial cause do any of the following—

...

(b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers—

...

(ii) further proceedings by the court or commission are not necessary or desirable in the public interest

[28] Rule 45 of the *Industrial Relations (Tribunals Rules) 2011* (Qld) (the Tribunals Rules) is in the following terms:

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 hearing or 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 considers appropriate, including, for example, a final order; or
 - (d) make orders under paragraphs (b) and (c).

[29] In *Workers' Compensation Regulator v Varga* ('*Varga*'),¹ O'Connor VP considered r 45(3) of the *Industrial Relations (Tribunals) Rules 2011* ('the Rules'). In that decision, his Honour also referred to r 6 of the Rules which sets out the purpose of the rules and said, '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.'² Vice President O'Connor held that r 6 recognises an obligation on the Commission and the parties to ensure the expeditious disposition of matters in the Commission.³

[30] In *Varga*, O'Connor VP referred to the decision of *Lenijamar Pty Ltd and Ors v AGC (Advances) Ltd*,⁴ where their Honours Wilcox and Gummow JJ considered a similar provision under the Federal Court Rules and stated that the discretion conferred by the rule was:

[36] ... 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 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.

[37] 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.⁵

¹ [2019] QIRC 028 ('*Varga*').

² *Ibid* [11].

³ *Ibid* [12].

⁴ [1990] 98 ALR 200 ('*Lenijamar*') cited in *Varga* (n 1) [16].

⁵ *Lenijamar* (n 4) [36]-[37].

[31] In determining whether to exercise my discretion to dismiss the matter, I am also guided by *Quaedvlieg and Ors v Boral Resources (Qld) Pty Ltd*,⁶ where Hall P, considering an application to strike out for want of prosecution, cited with approval the reasoning of his Honour Thomas JA in *Quinlan v Rothwell & Anor*:⁷

[29] 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.

[32] In *Smith v Workers' Compensation Regulator*,⁸ O'Connor DP (as his Honour then was) said:

[10] The Commission has an obligation to actively manage the matters filed in the Industrial Registry and to ensure the parties comply with the directions orders issued by it. The Rules aid the Commission to case manage its list; to assist the parties to prepare their cases; to ensure the efficient use of the Commission's time and resources; and to assist in the resolution of the real issues in the proceedings...

The Respondent's application and submissions

[33] The Respondent's material replicates much of the background set out at [1]-[26] of these reasons for decision regarding the Commission's attempts to engage with Mr Koenders and progress his application to a conciliation conference.

[34] Ms Gray's affidavit explains that Crown Law has also attempted to engage with Mr Koenders directly. Ms Rachel Maynard, Principal Lawyer at Crown Law emailed Mr Koenders on 9 March 2023 asking whether he intended to proceed with his application.⁹ Ms Maynard wrote:

Dear Mr Koenders,

I refer to the below emails from the QIRC Registry seeking your availability to attend a conference.

I attach the recent decisions of Vice President O'Connor in *Mocnik & Ors v State of Queensland (Queensland Health)*,¹⁰ Commissioner Dwyer in *Janulewicz v State of Queensland (Queensland*

⁶ [2005] ICQ 59 ('*Quaedvlieg*').

⁷ [2001] QCA 176, 8 cited in *Quaedvlieg* (n 6) 2.

⁸ [2017] QIRC 070, [10].

⁹ Affidavit of Samantha Kate Gray sworn 28 September 2023, 'SKG-02'.

¹⁰ [2023] QIRC 58 ('*Mocnik*').

Health)¹¹ and Deputy President Hartigan in *Drage v State of Queensland (Queensland Health) (No 2)*.¹²

In light of these decisions, can you please advise whether you intend to proceed with your Application?

Please advise of any queries.

- [35] On 10 March 2023, Mr Koenders responded to Ms Maynard and confirmed that he wished to proceed with his application. He said, ‘*Yes I still want to go ahead. Maurice Koenders*’.¹³ This exchange occurred between the parties and the Industrial Registry was not included in the correspondence.
- [36] Ultimately, the Respondent points to s 541(b)(ii) of the IR Act set out above at [27] and submits that the matters raised by Mr Koenders in his application have been extensively considered and determined by the Commission, namely in *Mocnick & Ors v State of Queensland (Queensland Health)*.¹⁴ The Respondent submits that none of the matters raised in Mr Koenders’ application have, to date, been found in favour of an employee or former employee. Therefore, the Respondent says that Mr Koenders’ application is misconceived and lacking in substance and it would not be in the public interest for Mr Koenders’ application to be heard by the Commission.
- [37] Further, the Respondent says that Mr Koenders has demonstrated an unwillingness to progress his application, either in a timely manner or at all. Mr Koenders has failed to respond to the Commission on at least five occasions, which the Respondent says indicates that Mr Koenders has either lost interest in progressing his application or has a ‘complete disregard and lack of courtesy for the Commission’. Moreover, six months have passed since Mr Koenders wrote to Crown Law advising that he wished to proceed with his application. In this time, Mr Koenders has not provided his availability for a conference.
- [38] Finally, the Respondent submits that it is Mr Koenders’ application and it is not the role of the Respondent or the Commission to run his matter for him. While the proceeding remains on foot, the Respondent says it continues to incur legal costs.
- [39] Given that the matters raised in Mr Koenders’ application are not novel and have been extensively heard and determined by the Commission, and in light of Mr Koenders’ unwillingness to progress his application, the Respondent seeks that the Commission exercise its discretion to not hear the application as it would not be in the public interest.

¹¹ [2023] QIRC 26.

¹² [2023] QIRC 74.

¹³ Affidavit of Samantha Kate Gray sworn 28 September 2023, ‘SKG-02’.

¹⁴ *Mocnick* (n 10).

Consideration

- [40] The discretion to dismiss a proceeding provided for in r 45(3)(a) of the *Industrial Relations (Tribunals) Rules 2011* (Qld), is enlivened when a party receives notice of a hearing or conference for the proceeding and fails to attend the hearing or conference.¹⁵ The rule also applies where a direction has been made and the party fails to comply with the order.¹⁶
- [41] The chronology provided above and addressed in the Respondent's submissions sets out a range of occasions where Mr Koenders has failed to attend listed conferences or mentions and has not complied with a direction to file submissions. Mr Koenders was informed that a failure to comply with a direction may lead to his matter being dismissed under the rules.¹⁷
- [42] I am satisfied that Mr Koenders has been provided with multiple opportunities to make himself available to progress his application. Mr Koenders was put on notice that his application may be dismissed, both by way of the application in existing proceedings filed by the Respondent and by my request that he make submissions addressing r 45. The application is Mr Koenders' and I agree with the submission of the Respondent that it is not for the Respondent or the Commission to run it for him.
- [43] Time is of the essence in an application for reinstatement. Almost one year has passed since Mr Koenders filed his application and he has consistently failed to take any steps to progress it. There is a prejudice to Mr Koenders if I exercise the discretion to dismiss the matter, in that he will not have his application heard. However, in circumstances where Mr Koenders has told the Commission on a number of occasions that he has secured new employment and that as a result of that employment he is unable or unwilling to attend the Commission during the Commission's normal operating hours, I find the prejudice is minimal. This is to be compared with the actions of the Respondent, who have, in my view, acted as a model litigant in: reaching out to Mr Koenders to ascertain the status of the matter; providing extensive availability to list matters; attending listed proceedings or being available to attend listed matters which were vacated due to Mr Koenders non-attendance or unavailability, and taking steps to bring the application in existing proceedings.
- [44] For the foregoing reasons, I am satisfied that I should exercise the discretion provided for by r 45(3) and dismiss the matter.

¹⁵ *Industrial Relations (Tribunals) Rules 2011* (Qld) r 45(1)(a)-(b).

¹⁶ *Ibid* r 45(2)(a)-(b).

¹⁷ Both the Further Directions Order (1) issued on 10 October 2023 and the Amended Further Directions Order (1) issued on 19 October 2023 included the phrase 'FAILURE TO COMPLY WITH DIRECTIONS OF THE COMMISSION MAY LEAD TO THE MATTER BEING DISMISSED' in bold font.

[45] Having determined to dismiss the application under r 45(3), there is no utility in considering the application in existing proceedings to dismiss the matter under s 541(b)(ii).

Order

- 1. That the proceeding is dismissed pursuant to the *Industrial Relations (Tribunals) Rules 2011 (Qld) r 45(3)(a)*.**