

IN THE SUPREME COURT OF QUEENSLAND

No. 10267 of 1997

Brisbane

Before Williams J

BETWEEN:

ALFRED GILLESPIE

First Appellant

AND:

IPEX INFORMATION TECHNOLOGY GROUP PTY LTD  
ACN 007 433 623

Second  
Appellant

AND:

LYNDELL GOODWIN

Respondent

**CATCHWORDS:**

**Discrimination - Anti-Discrimination Act 1991 - s.167  
considered - asking requires the complainant to have  
personal knowledge of request - 28 day period runs from  
when complainant has such knowledge.**

Counsel: A. Morris Q.C. for appellants.

G R Mullins for respondent.

Solicitors: Suthers and Taylor for appellants.

Quinn & Scattini for respondent.

Hearing Date: 14 July 1995.

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JUDGMENT - WILLIAMS J

Judgment delivered 20 July 1998

This is an appeal brought by way of notice of motion from a decision of the Queensland Anti-Discrimination Tribunal made on 30 September 1997. The appeal is brought pursuant to s.217 of the Anti-Discrimination Act 1991; it is limited to questions of law.

Section 134 of the Act defines who may make a complaint of an alleged contravention of the Act. Firstly, "a person who was subjected to the alleged contravention" may complain and the next paragraph says that "an agent of the person" may also do so. That is what happened in this case. O'Donnell, who was the Branch Secretary of the Federated Clerks Union of Australia, the Union of which the respondent, Lyndell Goodwin, was a member, made a complaint on her behalf on 31 July 1995 to the Commission. The respondent had been an employee of the second appellant for some time prior to ceasing such employment on about 21 July 1995. At all material times the first appellant was the manager of the Townsville Branch of the second appellant; the respondent was employed at that Branch.

Prior to the termination of her employment the respondent had made arrangements to take 12 months leave without pay to enable her to go on an overseas honeymoon. It would appear that the appellants were aware for some time of the respondent's intention to leave for overseas early in August 1995. In fact the respondent left for overseas on 2 August 1995.

The Commission accepted the complaint and took steps to deal with it in accordance with the Act. It is not irrelevant to note that other employees of the second appellant made similar complaints at about the same time as the respondent, and such complaints were also being duly processed by the Commission. Some problems with respect to the respondent's complaint arose because of her absence overseas. Insofar as the Commission dealt with her complaint during the period in question communication was either with O'Donnell or Quinn & Scattini, Solicitors, who were acting on the respondent's behalf.

This appeal is primarily concerned with the proper construction and application of s.167 of the Act. So far as is relevant it is in these terms:

- "(1) If the Commissioner has not finished dealing with a complaint 6 months after informing the complainant and the respondent that the complaint has been accepted, either the complainant or the respondent may, by written notice, request the Commissioner to refer the complaint to the Tribunal.
- (2) The Commissioner may defer acting on a request for up to 28 days, if there is a significant prospect that the matter can be resolved by conciliation within that period.
- (3) If the matter is not resolved at the end of 28 days, the procedure in subsection (4) or (5) apply.
- (4) If the respondent requests the Commissioner to refer the complaint-
  - (a) the Commissioner must ask the complainant whether the complainant agrees to the complaint being referred; and
  - (b) if the complainant agrees in writing - the Commissioner must refer the complaint to the Tribunal; and

- (c) if the complainant does not agree in writing within 28 days - the complaint lapses, and the complainant cannot make a further complaint relating to the act or omission that was the subject of the complaint; and
- (d) the Commissioner may extend the 28 day period, but only if the complainant asks, in writing, for an extension before the 28 days have passed.
- (5) If the complainant requests the Commissioner in writing, to refer the complaint, the Commissioner must comply."

It is accepted that by April 1996 a period of at least 6 months had elapsed since the parties had been informed that the complaint had been accepted. By letter dated 26 April 1996, the solicitors for the first appellant wrote to the Commission *inter alia* requesting, pursuant to s.167 of the Act, that the complaint in question with respect to the first appellant be referred to the Tribunal.

The response of the Commission was to write under the hand of an employee a letter dated 14 May 1996 to O'Donnell dealing not only with the respondent's matter, but also with complaints made by other employees of the second appellant. Relevantly, in the section of that letter dealing with the complaint of the respondent, the following appeared:

"I also wish to notify you that Mr Gillespie's representatives have requested in a letter dated 26 April 1996 that Miss Goodwin's complaint be referred to the Queensland Anti-Discrimination Tribunal (the Tribunal) pursuant to s.167 of the Anti-Discrimination Act (the Act). I would be grateful if you would advise whether Miss Goodwin agrees that her complaint be referred or whether she seeks an extension of time in which to allow for a further attempt at conciliation. As you are aware, pursuant to s.167(4)(b),(c) and (d), any request for referral or for an extension of time must be in writing and, pursuant to s.167(4)(c) and (d), Miss Goodwin's response must be received within 28 days of the date

giving this notice to her. For the purposes of calculating this 28 day period, I consider it should run from the time you provide details of this notice to her."

As at May 1996 the respondent was still overseas. On 17 May 1996 the second appellant wrote to the Commission seeking to have the complaint in question with respect to the second appellant referred to the Tribunal. (The respondent has never been "asked" in relation to that referral.) On 5 June 1996 the Commission sent a letter to Messrs Quinn & Scattini asking when the respondent was returning to Australia and when she would be available to attend a conciliation conference. The letter also included the following: "Specifically advise Miss Goodwin's ... response to the issue arising under s.167 of the Act as outlined in my letter of 14 May 1996 to Mr O'Donnell bearing in mind the time limits specified in s.167." Quinn & Scattini replied by letter dated 12 June 1996; relevantly it said that the solicitors were unaware when the respondent was returning to Australia though they were attempting to find out. The letter also said: "We do not currently have instructions to respond to the issue under s.167 on behalf of Miss Goodwin".

By about 13 June 1996 28 days had elapsed from when the Commission wrote to O'Donnell advising of the first appellant's request for referral of the complaint. Material from both O'Donnell and the respondent asserts that the respondent was not aware of the first appellant's request for referral by that time. For present purposes (there being no appeal on matters of fact) it must be accepted that the respondent had no knowledge of the request for referral during the 28 day period immediately after the Commission sent the letter of 14 May 1996 to O'Donnell.

The material before the Tribunal on the application the subject of this appeal is somewhat uncertain as to when the respondent became aware of s.167 of the Act and the contents of the Commission's letter of 14 May 1996. There was correspondence between O'Donnell and the respondent in August in which she indicated her intention of proceeding

with the complaint and at some time prior to 23 October 1996 she informed O'Donnell that she wanted the complaint referred to the Tribunal. The following statements are found in an affidavit of the respondent sworn 29 April 1997 and used on the relevant application before the Tribunal:

"12. I returned to Australia in late October, 1996 and I have been in contact with James O'Donnell ever since about this matter.

13. During my contact with James O'Donnell, he never advised me of any obligation to answer any request by the Q.A.D.C. for an election to object or not object to my complaint being referred to the Q.A.D.C. I was never aware of such a requirement and I always assumed that I would be required to attend a conciliation conference and that if the matter was not then resolved, it would be referred to the Tribunal.

14. I have never seen any documents from the Q.A.D.C, requiring a response from me."

The application in question before the Tribunal was made by the first and second appellants. They applied for orders that the complaint not be accepted, heard or determined by the Tribunal on the basis that it had lapsed pursuant to s.167. They also asked that the complaint be dismissed for want of jurisdiction. On the basis of material before the Tribunal, Member Holmes made findings of fact; that material essentially contained the facts set out in these reasons for judgment.

Here I digress to mention s.169 of the Act; so far as is relevant it provides:

"(1) If the Commissioner is of the reasonable opinion that a complainant has lost interest in continuing with a complaint, the Commissioner must tell the complainant in writing that the complaint will lapse

unless the complainant indicates that the complainant wishes to continue with it.

- (2) If the complainant does not give the indication within 28 days, the complaint lapses...".

Though somewhat different words are used, the procedure outlined in that section is similar, if not identical, to that required by s.167(4)(a)(b). In each case a decision by the complainant evidenced by writing is required.

Member Holmes dealt with the critical point in issue as follows:

"A more difficult issue is whether the Complainant has been asked whether she agrees to referral, for the purposes of s.167(4)(c) if the relevant enquiry is sent, not to her personally, but to the agent by whom she lodged the complaint. I was referred by the Complainant's Counsel to a decision of the then President of the Tribunal, Ms R Atkinson, in Stanley v McKell (No. H55 of 1995; heard on 20 March, 1996; decision given 12 July 1996). That case arose under s.169 of the Act ... President Atkinson decided that a letter from the Commission to the Legal Aid Office (Queensland) did not amount to telling the complainant in writing that her complaint would lapse.

I propose to follow Stanley v McKell in holding that s.167(4) requires that the complainant be notified personally rather than through an agent."

Thereafter there was reference to a number of authorities in other fields of the law; the Member found support for her approach in those decisions. She then went on:

"Having regard to those authorities, to the clear words of the Act, and to its objects, I do not think that there is any warrant for a conclusion that an enquiry of the Complainant's agent rather than of the Complainant personally, will suffice for the purposes of s.167(4). Accordingly, in the circumstances of the present case, I

have reached the view that the Complainant was not asked whether she agreed to the complaint being referred, and that being the case, no procedure which would lead to the lapsing of the complaint was set in train."

It is from that decision that this appeal is brought.

The critical requirements of s.167(4) are that the complainant be asked a question and that she respond in writing to that question within 28 days of being asked. It is significant in my view that, whereas s.134 permits the complaint to be made by "an agent of the person", s.167(4) does not expressly permit the agent to respond - it must be the complainant personally who agrees in writing. In practical terms a complainant personally can only respond in 28 days in circumstances where the complainant personally is aware of the obligation to do so and of the question to which a response is required. The consequences of failing to respond within the 28 days are very serious for the complainant (the complaint lapses and cannot be renewed). Justice would normally demand that such a consequence only follow a conscious act of the complainant.

But it does not follow that the request (the asking) must be made directly to the complainant. The term "ask" is much more informal than the term "serve" which is regularly used in connection with legal proceedings. Here there is no need for a document to be served personally on the complainant. The complainant may be asked orally whether she agrees to the complaint being referred to the Tribunal; certainly such an oral request could be made in the course of some hearing before a Commissioner. Often (as appears to be the case here) the complainant will not wish to divulge her address to the Commission and the person against whom the complaint is made - she may fear further harassment if her address was known. In those circumstances the complainant can lodge the complaint through an agent and have communications between herself and the Commission made through that agent. I can see no reason why the asking referred to in s.167(4)(a) cannot be made through the agent; in other words a letter asking that question could



be forwarded to the complainant through her agent. To the extent that the conclusion of the Tribunal Member that s.167(4) "requires" that the complainant be notified personally rather than through an agent" conflicts with what I have just said I would hold that she erred in law.

The asking can be directed to the complainant through the agent, but the 28 day period does not commence to run until the request has reached the complainant personally. When the request was received by the complainant personally is a matter which would have to be established by evidence before the appropriate tribunal of fact. I would also note that what constituted an agreement in writing for purposes of s.167(4)(c) would also be a question of fact to be determined by that tribunal. It is interesting to note that the section does not require the agreement in writing to be communicated to the Commissioner within 28 days; it is sufficient if the complainant creates something in writing within 28 days which in fact constitutes an agreement to the referral of the complaint to the Tribunal.

Counsel for the appellants relied heavily on the contention that the general law of agency applied to the circumstances of this case. The respondent chose to lodge her complaint through an agent and, it was said, she thereby authorised her agent to be her alter ego for purposes of the proceedings. It is often said that he who does an act through another is deemed in law to do it himself, and that is the proposition relied on here by the appellants. However, the law does not always equate knowledge in the agent with that of the principal, and there are many exceptions to the general rule. In Neilson v Peters Ship Repair Pty Ltd [1983] 2 Qd R 419 and Sola Optical Australia Pty Ltd v Mills (1987) 163 CLR 628 especially at 637-8 it was recognised that for purposes of statutory limitation provisions knowledge in an agent was not necessarily to be imputed to the principal. Properly construed the legislative provisions in question there provided that the knowledge of the material facts must be

knowledge in the plaintiff personally. It was the wording of the statute which required that conclusion.

Those authorities were referred to in the judgment of the Tribunal here, and in my opinion they are apposite by way of analogy. Here, as in those cases, properly construed the statute requires the making of a personal decision; the decision cannot be made by the agent.

To similar effect is the reasoning in Secretary, Department of Social Security v Garratt (1992) 109 A.L.R. 149 at 157 and Secretary, Department of Social Security v Sevel (1993) 110 A.L.R. 627 at 640; again both those authorities were referred to in the Tribunal decision.

The legislation in question here permits of representation by non-lawyers. Such an agent cannot be equated with a solicitor formally appearing on the record in litigation in a superior court. There are no rules here providing, for example, that documents may be served on the agent or giving the agent specific powers with respect to the conduct of the proceedings.

Certainly it must be said that here there is nothing in the Act, particularly in s.167, which empowers the agent who initiated the complaint to make the decision to refer on behalf of the complainant. Indeed the clear meaning and intent of the statutory provision is to the contrary.

The gravamen of the appellants' case was that the 28 days for purposes of s.167 ran from 14 May 1996 when the Commissioner's letter was sent to the respondent's agent. The submission was that as a matter of law the 28 day period ran from then and in consequence of there being no agreement in writing from the complainant within that 28 day period referring the matter to the Tribunal, the Tribunal had no jurisdiction to deal further with it - the complaint had lapsed. For the reasons given that argument must be rejected, and it follows that the appeal must fail.

The notice of motion should be dismissed with costs.