# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Witthahn & Ors v Wakefield (Chief Executive of Hospital & Health Services & Director General of Queensland Health) & Ors* [2022] QSC 95 |
| PARTIES: | **BERNARD WITTHAHN**<br>(first applicant)<br>**SARAH WINDSOR**<br>(second applicant)<br>**CAMERON EVERS**<br>(third applicant)<br>**BEN NOSOV**<br>(fourth applicant)<br>**PETER THOMSON**<br>(fifth applicant)<br>**MELANIE TRAKOSAS**<br>(sixth applicant)<br>**MICHAEL STUTH**<br>(seventh applicant)<br>**BRITTANY LEVEN**<br>(eighth applicant)<br>**JOSHUA TUNLEY**<br>(ninth applicant)<br>**BENJAMIN ELLIOT VIGNAND BAXTER**<br>(tenth applicant)<br>**DAREN LONGOBARDI**<br>(eleventh applicant)<br>**SIMON MORRISON**<br>(twelfth applicant)<br>**DONNA BOWMAN**<br>(thirteenth applicant)<br>**v**<br>**JOHN WAKEFIELD, CHIEF EXECUTIVE OF HOSPITAL AND HEALTH SERVICES AND DIRECTOR GENERAL OF QUEENSLAND HEALTH**<br>(first respondent)<br>**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(first intervenor)<br>**QUEENSLAND HUMAN RIGHTS COMMISSIONER**<br>(second intervenor) |
| FILE NO: | 11258/21 |
| DIVISION: | Trial |
| PROCEEDING: | Interlocutory application |
| ORIGINATING COURT: | Supreme Court of Queensland |

DELIVERED ON: 26 May 2022

DELIVERED AT: Brisbane

HEARING DATE: 14 February 2022

JUDGE: Dalton J

ORDER:

1. **No order as to costs thrown away by the adjournment of the hearing on 14 February 2022.**

2. **Order that the sixth applicant and the respondent bear their own costs of this proceeding.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – ADJOURNMENT – where the Acting Commissioner of the Queensland Ambulance Service made a decision to make a directive mandating COVID-19 vaccinations – where the Applicants challenged the decision under the *Judicial Review Act* – where the directive was revoked and replaced with a new directive – where the Applicants sought leave to amend their application at the commencement of trial – where the trial was adjourned – whether the Applicants should pay the costs thrown away by the adjournment

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – DISCONTINUANCE OF OR WITHDRAWAL FROM PROCEEDING – where the Chief Executive of Queensland Health made a decision to mandate COVID-19 vaccinations – where the Sixth Applicant challenged the decision under the *Judicial Review Act* – where the Sixth Applicant sought leave to adjourn at the commencement of trial – where leave to adjourn was refused – where the Sixth Applicant sought leave to discontinue – where leave to discontinue was granted – whether the Sixth Applicant should pay the costs of the proceeding

COUNSEL: D Villa SC with P Santucci and W Liu for the applicants
MH Hindman QC with B McMillan for the first respondent
FJ Nagorcka and KJE Blore for the Attorney-General (Qld) intervening
P Morreau for the Queensland Human Rights Commission intervening

SOLICITORS: Alexander Law for the applicants
Crown Law for the first respondent
Crown Law for the first intervenor
Queensland Human Rights Commission for the second intervenor

[1] This is a costs decision consequent on my orders of 14 February 2022: (1) adjourning the final hearing of this proceeding, and (2) giving the sixth applicant leave to discontinue her proceeding.

[2] On 27 September 2021 the applicants filed an originating application challenging the directives of the Chief Executive of Queensland Health to make COVID-19 vaccinations compulsory for ambulance officers and, so far as the sixth applicant (a nurse) is concerned, to make COVID-19 vaccination compulsory for nurses in public hospitals. The initial basis for the challenge to those directives was the *Judicial Review Act 1991* (Qld). Because an application under that Act had been brought, seeking to have the relevant decisions declared unlawful, the applicants were able to seek relief and remedies under the *Human Rights Act 2009* (Qld), see s 59(2) and s 58 of that Act. It was apparent from the submissions which were filed and served in the expectation that these matters would proceed to a final hearing on 14 February 2022, that the greater part of the applicants' argument rested on the *Human Rights Act.*

[3] Orders made by Boddice J on 30 September 2021 listed this proceeding to be heard over two days commencing 20 October 2021. I reviewed the matter on 12 October 2021 and counsel for all parties were of the view that the applications could not be heard on the dates allocated due to preliminary issues of jurisdiction and standing. I made orders vacating the trial dates.

[4] At a review on 1 November 2021 I listed the final hearing of the applications over three days commencing on 13 December 2021. Directions were made as to the applicants filing and serving their expert evidence, and for the respondents to file their evidence in reply.

[5] I reviewed the matter on 9 December 2021. The respondents had not complied with the timetable for filing and serving their expert reports. The applicants said that, as a result of the delay, they were unable to prepare evidence in reply prior to the allocated trial dates. I vacated the trial dates commencing on 13 December 2021, and made orders listing the matter to be heard over three days commencing on 14 February 2022.

[6] On the morning of 14 February 2022, counsel for the applicants applied for an adjournment of the hearing. They sought leave to amend the application which, at the time, challenged a superseded directive of the Queensland Ambulance Service (QAS). A new directive had been made on 31 January 2022. Further, the new directive was made in different factual circumstances, namely, the emergence of Omicron as the dominant variant of COVID-19 in Australia. This factual difference meant that different evidence to that already obtained, as to vaccine efficacy and transmission of disease by vaccinated people, would be needed at the hearing. For these reasons I adjourned the hearing of the case between the 12 applicants who were QAS employees and the first respondent. The first respondent sought an order that the costs thrown away by reason of the adjournment be its costs in any event. I reserved that costs decision.

[7] The sixth applicant was not an employee of QAS, but was an employee of Queensland Health. The directive which she challenged had not changed, so there was no obvious reason why her application could not have proceeded on 14 February 2022. I refused to adjourn her matter.

[8] After that ruling, counsel acting for the sixth applicant informed me that the sixth applicant sought leave to discontinue. I gave that leave and reserved the question of costs.

[9] Neither the Attorney-General intervening under the *Human Rights Act,* nor the Human Rights Commission sought an order as to costs on 14 February 2022.

**Sixth Applicant's Costs of the Proceeding**

[10] Counsel for the sixth applicant submitted that I should make an order that the sixth applicant bear only her own costs. They referred to both s 49 of the *Judicial Review Act* and to more general principles which were conveniently set out by Applegarth J in *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors (No 2).*[1]

[11] Section 49(1)(e) of the *Judicial Review Act* provides that if a review application is made under the *Judicial Review Act,* the Court may make an order, "that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding".

[12] Section 49(2) provides:

> "(2) In considering the costs application, the Court is to have regard to–
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> (a) the financial resources of –
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> (i) the relevant applicant; or
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> (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
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> (b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
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> (c) if the relevant applicant is a person mentioned in subsection (1)(a) – whether the proceeding discloses a reasonable basis for the review application; and
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> (d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c) – whether the case in the review application of the relevant applicant can be supported on a reasonable basis."

[13] Section 49(4) of the *Judicial Review Act* provides that, "Subject to this section, the rules of Court made in relation to the awarding of costs apply to a proceeding arising out of a review application".

[14] In *Anghel v Minister for Transport (No 2)*[2] McPherson JA noted the general power of the Supreme Court to award costs under the rules and said of that power:

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1 [2020] QSC 174.

2 [1995] 2 Qd R 454, 458.

> "… It is a power which, were it not for the specific provisions of s 49, would no doubt be exercisable in proceedings under the *Judicial Review Act.* However, the plain effect of s 49 is to displace [the Supreme Court costs rule] to the extent that its provisions are inconsistent with s 49. …
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> … s 49 is intended to be the dominant provision. It may be now the only source of power to award costs in proceedings arising out of review applications. …
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> …
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> The correct view is that the power of awarding costs in a matter like this is the power specifically conferred by s 49 rather than the general power invested by [the Supreme Court costs rule]."

[15] In my view, the language of s 49(1)(e) and s 49(4) is wide enough to comprehend costs of the whole proceeding where a review application forms only part of that proceeding. The words "a party to the review application" in s 49(1)(e) are clearly wide enough to include the sixth applicant. Further, the whole of this proceeding is capable of being described by the words "a proceeding arising out of a review application" in s 49(4), because the applicants would have no right to apply for relief under the *Human Rights Act* but for the fact of the review application.

[16] Each of the factors set out at s 49(2) of the *Judicial Review Act* must be considered by the Court which hears the costs application.[3]

[17] There was no material put before me as to the sixth applicant's financial resources, and no material put before me to show that the sixth applicant was being assisted by someone who had significant financial resources – s 49(2)(a).

[18] Section 49(2)(b) of the *Judicial Review Act* says that in considering a costs application under s 49 the Court is to have regard to, "whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant". I note that s 49(2)(b) does not require that the proceeding be entirely in the public interest, just that the proceeding involve an issue that affects, or might affect, the public interest, in addition to the personal rights and interests of the applicant.

[19] In *Anghel v Minister for Transport (No 2)* McPherson JA commented that the words of the section seemed in part reflective of the idea that it was "undesirable that responsible citizens with a reasonable grievance who wish to challenge government action should only be able to do so at the risk of paying costs to the government if they fail".[4]

[20] There are numerous statements to the effect that most judicial review applications will concern the public interest to some extent.[5] The extent to which the public

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3 *Burragubba v Minister for Natural Resources and Mines (No 2)* [2017] QSC 265, [14] and the cases cited there.

4 Above, p 460. See *Kent v Cavanagh* (1973) 1 ACTR 43, 55, per Fox J cited there.

5 A selection of these cases is collected at footnote 27 of *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors (No 2)* (above). See also *Burragubba* (above), [18].

interest is an issue in the particular proceeding under consideration will determine how influential the consideration at s 49(2)(b) is in any particular case.[6]

[21] In my opinion the issues raised in this proceeding do substantially affect and concern the public interest. The directive which the sixth applicant challenged was one of several directives, all of which are unusual in our society, to the point of being extraordinary, given in circumstances which are themselves extraordinary: a pandemic. The power of the administrative decision-maker, in this case the Director-General of the Department of Health, to make such a directive raises fundamental issues about the rights and obligations of citizens in the public employ.

[22] While there have been reports in the media about persons who have been irresponsible about vaccination issues, there is nothing in the material before me which shows that the sixth applicant (or indeed any of the other applicants) advances any irresponsible agenda. There is no indication in the material that the applicant is other than a sincere person grappling with rapidly changing medical and societal issues brought about by the pandemic, and the response of government to the pandemic.

[23] In a case such as this I think there is a public interest not only in the substance of the issues raised by the application, but also a public interest in having those issues resolved by the Courts. To apply the general rule that costs follow the event in such a case as this might substantially discourage parties from resolving their disputes in that way.

[24] As to s 49(2)(c), the proceeding had been listed for final hearing, and not heard, at the time I granted the sixth applicant leave to discontinue. Full written submissions on the hearing on behalf of the applicant, the first respondent, the Attorney-General for the State of Queensland intervening under the *Human Rights Act,* and the Human Rights Commission had been filed. I had read these in preparation for the hearing. I had also read expert reports prepared on behalf of both the applicants and the first respondent. I am comfortably satisfied that there was a reasonable basis for the applicants' judicial review application. Whether it would have succeeded, had it not been discontinued, is of course another matter.

[25] One factor weighing in my discretion as to costs in this case is that, against the history set out in paragraphs [3]-[5] above, the sixth applicant sought leave to discontinue her proceeding on the first day of trial having not foreshadowed this, and not giving any explanation as to why she wished to discontinue the proceeding. There had been a proposal made on behalf of the sixth applicant in correspondence that her proceeding be adjourned to be heard with other proceedings being run by the same solicitors (*Baxter*). However, that position was not advanced by counsel acting for the sixth applicant at the hearing, they simply asked that the sixth applicant's proceeding be discontinued.

[26] Separately, I consider the sixth applicant is in a worse position on this costs application than a litigant who had the courage of their convictions and ran a case which ultimately failed, because the sixth applicant sought to discontinue at a late stage, without explanation.

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6 *Ibid*.

[27] Weighing these last two considerations with those which I have discussed at [21]-[24] above, I think that the fairest order in all the circumstances is that the sixth applicant and the respondent each bear their own costs of this proceeding.

[28] I add that, if I am wrong in my interpretation of s 49 of the *Judicial Review Act* at [15] above, and the costs of the proceeding so far as it concerned the *Human Rights Act* fall to be determined according to r 681 of the *Uniform Civil Procedure Rules 1991* and general principles, my costs decision would be the same. I think the matters of public importance and public interest raised by this application warrant a departure from the usual rule that costs follow the event.

**Costs Thrown Away because of Adjournment of QAS Challenge**

[29] The substantive reason for the adjournment in the case of the QAS applicants was that the QAS directive was superseded by a new directive on 31 January 2022, 14 days before the final hearing in this proceeding. Presumably the applicants were given notice of that by their employer at the time it happened. The evidence was that Crown Law wrote to the solicitors for the QAS applicants on 7 February raising the matter. In my *ex tempore* reasons for granting the adjournment on 14 February 2022, I accepted that the new directive, and the new circumstances in which it was made, meant that the factual and expert evidence which the parties had prepared for trial needed to change.

[30] I am critical of both the applicants' and the first respondent's solicitors for simply letting matters drift after 31 January 2022 and arriving at Court on the first day of the hearing to announce for the first time that the case needed to be adjourned. Nonetheless, when the reason for the adjournment was caused by the first respondent's behaviour, I think that the order proposed by the applicants' counsel – that there be no order as to costs of the adjournment – is fairer than that sought by the first respondent. In fact, I found it hard to discern a clearly articulated reason for the order which the first respondent sought.