

SUPREME COURT OF QUEENSLAND

CITATION: *Sandy v Queensland Human Rights Commissioner (No 2)*
[2023] QSC 74

PARTIES: **ALEC RICHARD SANDY**
(applicant)
v
QUEENSLAND HUMAN RIGHTS COMMISSIONER
(respondent)

FILE NO/S: BS No 644 of 2022

DIVISION: Trial Division

PROCEEDING: Hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 April 2023

DELIVERED AT: Brisbane

HEARING DATE: 24 March 2023

JUDGE: Williams J

ORDER: **THE ORDER OF THE COURT IS THAT:**

- 1. The applicant be granted leave to file a further amended application in the form of Annexure "A".**
- 2. The proceeding continue as if it had been started as an application for review, pursuant to r 569 *Uniform Civil Procedure Rules 1999 (Qld)*.**

THE COURT DECLARES THAT:

- 1. That part of the Queensland Human Rights Commissioner's decision dated 17 December 2021 pursuant to s 136 of the *Anti-Discrimination Act 1991 (Qld)*, which purported not to accept the applicant's complaint, was made beyond power and is thereby invalid.**

FURTHER, THE COURT ORDERS THAT:

- 1. The respondent consider the applicant's complaint under the *Anti-Discrimination Act 1991 (Qld)* lodged on 15 March 2021 according to law.**
- 2. There be no order as to costs.**

CATCHWORDS: HUMAN RIGHTS – DISCRIMINATION LEGISLATION – HUMAN RIGHTS LEGISLATION – where reasons in respect of the application heard on 19 September 2022 were delivered on 9 December 2022 (**Reasons**) – where the Reasons found that the respondent’s decision not to accept the applicant’s complaint under the *Anti-Discrimination Act* 1991 (Qld) (**AD Complaint**) (**AD Complaint Decision**) was beyond power – where the Reasons indicated that the parties would be heard further in relation to the appropriate form of orders, including costs – where the applicant and the Contradictor filed written submissions – where the matter was also listed for further oral submissions – whether the Court should exercise its discretion to grant declaratory relief in light of the Reasons – whether an order should be made setting aside or quashing the AD Complaint Decision – whether it is appropriate in the circumstances to make any declarations in respect of s 58(1)(a) and (b) of the *Human Rights Act* 2019 (Qld) – whether there is utility in making declarations in respect of a decision where the decision is found to be invalid – whether it is appropriate to make an order that the respondent consider the applicant’s AD Complaint under the *Anti-Discrimination Act* 1991 (Qld) according to law

COUNSEL: B J Coyne for the applicant
A L Wheatley KC with V G Brennan as Contradictor

SOLICITORS: Legal Aid Queensland for the applicant JA Ball for the respondent

- [1] On 9 December 2022, I delivered reasons in respect of the application heard on 19 September 2022 (**Reasons**). My reasons indicated that the parties would be heard further in relation to the appropriate form of orders, including costs.
- [2] The parties agreed a timetable for the delivery of submissions whereby the applicant would file and serve submissions by 3 February 2023, the Contradictor by 17 February 2023 and the applicant in reply by 24 February 2023. Further, the matter was listed on 24 March 2023 for further oral submissions.
- [3] These reasons use the defined terms set out in the Reasons, unless indicated otherwise.

Further amended application

- [4] Prior to the further hearing, the applicant was requested to provide a draft further amended application which had been foreshadowed in the submissions and also the draft orders proposed by the applicant in light of the Reasons and the submissions.
- [5] It was submitted that the proposed amendments to the application would enable the Court to grant relief in circumstances where the JR Act did not apply given the findings in the Reasons that the AD Complaint Decision not a decision reviewable under s 20 of the JR Act.

[6] Ultimately, at the further hearing, the applicant and the Contradictor agreed that it would be open to the Court to order that:

- (a) The applicant be granted leave to file a further amended application; and
- (b) The proceeding continue as if it had been started as an application for review, pursuant to r 569 *Uniform Civil Procedure Rules 1999* (Qld).

[7] Following the further hearing, the applicant provided a revised further amended application which incorporated some further amendments foreshadowed at the further hearing. The proposed further amended application is set out at **Annexure A**.

[8] In the circumstances, I consider that:

- (a) it is appropriate to regularise the application in light of the Reasons; and
- (b) it is appropriate to make the orders identified at [6] above.

Declaration of invalidity

[9] At the further hearing, submissions were made as to the power of the Court to make declarations in light of the Reasons and also whether it was appropriate to do so in the circumstances.

[10] The draft order proposed by the applicant was as follows:

“A declaration is made that the AD Complaint Decision is void for jurisdictional error.”

[11] There are some difficulties with this proposed form of the declaration.

[12] The Contradictor submitted that a preferable form of declaration, should the Court consider it appropriate to grant declaratory relief, would be in the following form:

“THE COURT DECLARES THAT:

That part of the Queensland Human Rights Commissioner’s decision dated 17 December 2021 pursuant to section 136 of the *Anti-Discrimination Act 1991* (Qld) which purported not to accept the applicant’s complaint was made beyond power and is thereby invalid.”

[13] Ultimately, at the hearing the applicant agreed that the Contradictor’s proposed form of declaration was acceptable.

[14] The Contradictor’s proposed form of declaration of invalidity is preferable as it clearly articulates what is encapsulated by the AD Complaint Decision and that the purported decision was made beyond power.

[15] The second issue for consideration is whether the Court should exercise its discretion to grant declaratory relief. The applicant urges the Court to make such a declaration. The Contradictor accepts that the Court has power to make the declaration but submits that in the circumstances the Court should not exercise its discretion to do so.

- [16] The contradictor refers the Court to the decision of *Taylor v O'Beirne & Ors* [2009] QSC 395 where A Lyons J (as her Honour then was) considered whether a declaration should be made in respect of purported decisions under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). Reference is made to her Honour's considerations at [55] and [56].
- [17] That case concerned an application whereby the applicant sought a declaration that the respondents had no power to make the decision. Her Honour acknowledged that the Court had power to grant declaratory relief but noted, consistent with the authorities, that declarations are not to be lightly granted.
- [18] The relevant authorities include the High Court in *Ainsworth v Criminal Justice Commission*¹ which referred to the Privy Council decision in *Ibeneweka v Egbuna*.² The Privy Council stated:
- “The general theme of judicial observations has been to the effect that declarations are not lightly granted ... Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciation of legal principle as administrative cautions issued by eminent and prudent judges to their, possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth then the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration.”
- [19] As identified at [56] by her Honour, the decisions involved in that case were more in the nature of warnings, they were not final and determinative, and they did not impose a penalty or affect legal rights.
- [20] That is in sharp contrast to the circumstances here. In effect, the purported decision by the respondent was the summary dismissal of the applicant's complaint under the AD Act.
- [21] The practical effect of the purported decision in the context of the AD Complaint, which raised serious allegations of discrimination and human rights issues, was to deprive the applicant of his complaint being dealt with according to law.
- [22] Further, given the finding of invalidity, the AD Complaint lodged by the applicant with the respondent now falls to be considered according to law.
- [23] There is a clear interest for the applicant and for the respondent to have the position in respect of the purported exercise of the power pursuant to s 136 of the AD Act clearly determined. This will give both parties certainty as to the status of the AD Complaint Decision.
- [24] In the circumstances, it is appropriate to make the declaration in the terms proposed by the Contradictor.

¹ (1991) 175 CLR 564 at [581].

² [1964] 1 WLR 219 at [224]-[225].

Order that the AD Complaint Decision be set aside

- [25] The applicant also sought an order that the AD Complaint Decision be quashed or set aside. The Contradictor contended that there was no utility in such an order if the Court made a declaration as to invalidity.
- [26] Further, the Contradictor contended that here there were no rights that had been altered as a result of the AD Complaint Decision that need to be “adjusted” as a result of the invalidity of the purported decision. It was recognised that this may vary in respect of different decisions. That is, in some circumstances it may be appropriate to make a declaration of invalidity together with an order setting a decision aside. However, that is not the case here.
- [27] The Contradictor contends that while the rights of the applicant may have been impacted by the purported decision, they have not been altered such that they need to be restored to their starting position by setting aside the decision. Here, the finding of invalidity results in the AD Complaint remaining to be dealt with by the respondent under the AD Act.
- [28] In the circumstances, there is no utility in making the order sought by the applicant as it does not add anything to the declaration of invalidity of the AD Complaint Decision. Accordingly, on balance it is not appropriate to make a separate order quashing or setting aside the AD Complaint Decision.

Declarations in relation to s 58 HR Act

- [29] There is a further issue as to whether it is appropriate in the circumstances to make any declarations in respect of s 58(1)(a) and (b) of the HR Act.
- [30] The applicant’s position is that it is open to the Court to declare that the AD Complaint Decision was unlawful in that:
- (a) it was made in a way that was not compatible with human rights within the meaning of ss 8 and 58(1)(a) HR Act; and
 - (b) it was made in a way that failed to give proper consideration to human rights within the meaning of s 58(1)(b) HR Act.
- [31] The Contradictor’s position is that given the findings in the Reasons there is no basis for making such declarations. In particular, the contradictor points to [107] and [108] and the conclusion in [110] of the Reasons in support of that position.
- [32] The respondent is a public entity under s 9 of the HR Act. Considerations in respect of s 58 of the HR Act do therefore arise.
- [33] However, the issue arises as to the utility of making declarations where the decision is found to be invalid. This is reflected in the Reasons as follows:
- “[107] It is also illogical to undertake the analysis in respect of the substantive limb obligation and the procedural limb obligation.
 - [108] The reasons show that the Commissioner did not identify or acknowledge the potential or actual impact on human rights

in the reasoning process, let alone consider whether the limit was reasonable or justified. Further, the Commissioner did not identify the relevant human rights that may be affected by the decision or at all.

[109] However, where the act or decision of ‘not accepting’ the complaint purportedly under s 136 of the AD Act was beyond power and not authorised by that section, there is no effective decision to consider for the purposes of s 58 of the HR Act.

[110] Accordingly, while ground 4 may remain in the circumstances there is no utility in undertaking the required analysis as the AD Complaint Decision under s 136 of the AD Act is beyond power.”

[34] In the circumstances, there is no utility in making a declaration in respect of s 58(1) of the HR Act. Consequently, I am not satisfied that it is appropriate to make a declaration in respect of s 58(1) of the HR Act.

[35] However, this outcome does not alter that both the substantive limb obligation and the procedural limb obligation pursuant to s 58(1) of the HR Act are relevant to the respondent now considering the applicant’s AD Complaint.

Order for the respondent to consider the AD Complaint according to law

[36] Submissions were also made in respect of the appropriate form of order regarding the respondent dealing with the AD Complaint according to law.

[37] The applicant submitted that an order that the respondent consider the applicant’s complaint under the AD Act lodged on 15 March 2021 according to law would be appropriate in the circumstances.

[38] The Contradictor ultimately agreed that an order in that form was appropriate in the circumstances.

[39] As a result of the finding of invalidity (to be reflected in the declaration of invalidity) the AD Complaint remains to be considered by the respondent. An order will give certainty as to the status of the AD Complaint. Accordingly, I am satisfied that it is appropriate to make an order that the respondent consider the applicant’s AD Complaint under the AD Act according to law.

Costs

[40] In respect of costs, it was agreed between the parties that there be no order as to costs.

Other matters

[41] Ms Ball appeared at the further hearing on behalf of the respondent.

[42] Ms Ball referred to the decision of Douglas J in *State of Queensland v Walters* [2007] QSC 12 at [18] in relation to the time for making a decision in respect of a complaint.

[43] It is not necessary for me to consider that issue as part of finalising the orders in the current application. However, the assistance of the respondent in respect of this issue

is acknowledged and it may assist the parties as to the future progress of the AD Complaint.

Orders

[44] Accordingly, the orders of the Court are as follows:

THE ORDER OF THE COURT IS THAT:

1. The applicant be granted leave to file a further amended application in the form of Annexure "A".
2. The proceeding continue as if it had been started as an application for review, pursuant to r 569 *Uniform Civil Procedure Rules* 1999 (Qld).

THE COURT DECLARES THAT:

1. That part of the Queensland Human Rights Commissioner's decision dated 17 December 2021 pursuant to s 136 of the *Anti-Discrimination Act* 1991 (Qld), which purported not to accept the applicant's complaint, was made beyond power and is thereby invalid.

FURTHER, THE COURT ORDERS THAT:

1. The respondent consider the applicant's complaint under the *Anti-Discrimination Act* 1991 (Qld) lodged on 15 March 2021 according to law.
2. There be no order as to costs.

ANNEXURE A

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER:

Applicant: **ALEC RICHARD SANDY**
AND
Respondent: **QUEENSLAND HUMAN RIGHTS
COMMISSIONER**

**FURTHER AMENDED APPLICATION FOR A STATUTORY ORDER OF
REVIEW**

Application to review that part of the decision of the Respondent dated 17 December 2021 (the **Decision**) to not accept the Applicant's complaint under the *Anti-Discrimination Act 1991* (Qld) (the **ADA**).

The Applicant is aggrieved by the Decision because:

- (a) The Applicant is a prisoner and the Decision deprives him of an opportunity to be granted parole;
- (b) The Decision deprives the Applicant of the opportunity to have his complaint against the Parole Board of Queensland proceed to a conciliation conference under the ADA; and
- (c) The Decision deprives the Applicant of the opportunity to refer his complaint to the Queensland Civil and Administrative Tribunal (**QCAT**) and have his case proceed to a hearing under the ADA.

The grounds of the application are:

1. The Respondent took an irrelevant consideration into account in making the Decision; and/or
2. The Respondent failed to take a relevant consideration into account in making the Decision; and/or
3. The Respondent exercised his power so unreasonably that no reasonable person could so exercise the power; and/or
4. The Decision was unlawful for the purpose of s.58 of the *Human Rights Act 2019* (Qld); and/or

5. The Decision involved an error of law, in that it applied an incorrect interpretation of s 136, s 10 and s 11 of the ADA.

The Applicant claims:

1. ~~an order quashing or setting aside that part of the Respondent's Decision of 17 December 2021 not to accept the Applicant's complaint under the ADA;~~
 2. ~~an order remitting the said Decision back to the Respondent for further consideration to be determined in accordance with law;~~
 3. ~~an order that the Respondent reconsider the matters within 28 days;~~
 4. ~~an order that the Respondent notify the Applicant of the reconsidered decision within seven days of the reconsidered decision being made;~~
 5. ~~an order that the Respondent pay the Applicant's costs of and incidental to the proceedings; and~~
 6. ~~such other orders that this Honourable Court deems appropriate.~~
1. An order, pursuant to the *Uniform Civil Procedure Rules 1999* (Qld) r.569 that the proceeding continue as if it had been started as an application for review;
 2. A declaration pursuant to the *Judicial Review Act 1991* (Qld) ss.43(2) and 47 or alternatively, the Court's inherent jurisdiction or alternatively the *Human Rights Act 2019* (Qld) s.59, that the AD Complaint Decision is void for jurisdictional error;
 3. An order pursuant to either *Judicial Review Act 1991* (Qld) ss.43(1) and 47, or alternatively, the *Human Rights Act 2019* (Qld) s.59, that the AD Complaint Decision be quashed or set aside;
 4. A declaration, pursuant to the *Human Rights Act 2019* (Qld) s.59, that the AD Complaint Decision was unlawful in that:

 - (a) it was made in a way that was not compatible with human rights within the meaning of the *Human Rights Act 2019* (Qld) ss.8 and 58(1)(a); and
 - (b) further or in the alternative, it was made in a way that failed to give proper consideration to human rights within the meaning of the *Human Rights Act 2019* (Qld) s.58(1)(b); and
 5. An order pursuant to either the *Judicial Review Act 1991* (Qld) ss.43(1) and 47, or alternatively, the *Human Rights Act 2019* (Qld) s.59, remitting the AD Complaint to the Respondent for acceptance according to law.

TO THE RESPONDENT:

A directions hearing in this application (and any claim by the Applicant for an interlocutory order) will be heard by the Court at the time, date and place specified below. If there is no attendance before the Court by you or by your counsel or solicitor, the application may be dealt with and judgment may be given or an order made in your absence. Before any attendance at that time, you may file and serve a notice of address for service

APPOINTMENT FOR DIRECTIONS HEARING

Time and date:

Place:

Signed:

Dated:

PARTICULARS OF THE APPLICANT:

Name: Alec Richard Sandy

Residential or Business Address: c/- Legal Aid Queensland

Applicant's solicitor's name: Brittany Smeed, Senior Lawyer, Legal Aid Queensland

And firm name: Legal Aid Queensland

Solicitor's Business address: 44 Herschel St, Brisbane City QLD 4000

Address for service: GPO Box 2449, Brisbane QLD 4001

Telephone: 1300 65 11 88

Fax: (07) 3917 0697

E-mail address: discrimination@legalaid.qld.gov.au

Signed:

Description: Solicitor for the Applicant

Dated:

This application is to be served on: Queensland Human Rights Commissioner
Level 20, 53 Albert St
BRISBANE QLD 4000