

CITATION: Webb v Sunshine Coast Hospital and Health Service & Anor [2014] QCAT 40

PARTIES: Beverley June Webb
(Applicant)
v
Sunshine Coast Hospital and Health Service
(First Respondent)
Kevin Hegarty
(Second Respondent)

APPLICATION NUMBER: ADL108-13

MATTER TYPE: Anti-discrimination matters

HEARING DATE: 21 January 2014

HEARD AT: Brisbane

DECISION OF: **Senior Member Endicott**

DELIVERED ON: 31 January 2014

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The Tribunal notes the undertaking made by the respondents in the letter dated 15 January 2014 from Minter Ellison to Corney & Lind.**
- 2. The application for an injunction is dismissed.**

CATCHWORDS: ANTI-DISCRIMINATION – where complaint had been referred to tribunal – where interim order sought to prevent a workplace assessment – where interests of justice not found to require interim order

Queensland Civil and Administrative Tribunal Act 2009 ss 58 & 59

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Beverley June Webb represented by Mr S Grant of Counsel instructed by Corney & Lind Lawyers

RESPONDENT: Sunshine Coast Hospital and Health Service and Kevin Hegarty represented by

Mr C Murdoch of Counsel instructed by Minter
Ellison Lawyers

REASONS FOR DECISION

- [1] Beverley Webb is employed as a pharmacist with the Sunshine Coast Hospital and Health Service. Her employer notified Ms Webb that she was suspended on full pay from her employment as from 31 December 2012. Ms Webb subsequently underwent a medical examination at the direction of her employer. The report by the examining doctor was completed in February 2013. He concluded that Ms Webb was fit to return to work as did Ms Webb's GP.
- [2] Ms Webb had told her employer that she wants to return to work to her substantive position. Her employer has not lifted her suspension from work. On 7 May 2013 Ms Webb lodged a complaint with the Anti-Discrimination Commission Queensland against the respondents. That complaint has been referred to QCAT.
- [3] On 2 December 2013 the employer notified Ms Webb that it had appointed an external consultant to conduct an organisational wellness assessment on the Pharmacy team at Caloundra Hospital. The terms of reference for the engagement of the consulting psychologist was provided to Ms Webb and she was invited to provide her comments on them. She was informed that the assessment would involve discussions with past and present members of the Pharmacy team. It was stated that the objective of the assessment is to provide advice to the Chief Executive of the first respondent in relation to the viability of returning Ms Webb to the team and if viable, to provide advice in relation to options for this to occur.
- [4] In response, Ms Webb has applied to QCAT for an injunction to prevent the engagement of the consultant and the conduct of the assessment. The injunction is opposed by the respondents.
- [5] The injunction being sought is in the nature of an interim order until the finalisation of the anti-discrimination complaint by the tribunal. QCAT has power under section 58 of the *Queensland Civil and Administrative Tribunal Act 2009* to make interim orders it considers appropriate in the interests of justice. The tribunal has power under section 59 of the QCAT Act to grant an injunction if it is just and convenient to do so. The making of an interim order is discretionary although the QCAT Act gives examples of circumstances when such an order may be appropriate. Those examples suggest that the tribunal should consider making an interim order when there is a need to take action to ensure that the final hearing can address fairly the issues in dispute and not be frustrated due to intervening actions by the parties or by some factors impacting on the tribunal process.
- [6] Ms Webb alleges that the proposed assessment process will have dire effects on her return to work prospects, has been designed to result in the

termination of her employment and will restrict the range of relief she can obtain from QCAT in her anti-discrimination complaint.

- [7] It is submitted by Ms Webb that the inference to be drawn from the Terms of Reference for the proposed assessment is that her conduct is responsible for any adverse organisational issues and culture that the Pharmacy team may have. It is submitted that the report prepared at the end of the assessment is designed to elicit one outcome: a finding that Ms Webb ought not to return to her substantive position at her place of employment.
- [8] These assertions are denied by the respondents. The evidence provided to the tribunal by the second respondent, Kevin Hegarty, is that he had not reached any view about the underlying cause of the reported dynamics and culture within the Pharmacy department. He wanted to be informed about the causal and contributing factors by the assessment that is proposed. He gave evidence that he had not predetermined that termination of Ms Webb's employment would be appropriate. His evidence is that he wants Ms Webb to return to work in accordance with medical advice received and in a way that is safe and practical for Ms Webb and other employees in the Pharmacy department and hospital.
- [9] The evidence from Mr Hegarty was not essentially challenged by Ms Webb. Indeed it would be difficult to be challenged as there is no express statement in the terms of Reference to any predetermination of outcome. The best that Ms Webb can submit are that inferences to that effect should be drawn from the Terms of Reference. However there was no evidence produced by her on which any such inferences could be reasonably drawn. I am not satisfied that the Terms of Reference commit the assessment to a predetermined outcome as alleged by Ms Webb.
- [10] It was submitted by Ms Webb that the principles of natural justice require Ms Webb to hear the context and the allegations made against her by persons interviewed by the consultant during the assessment. However, the proposed assessment will not provide her with an opportunity for scrutiny of all the information, including verbal information, gained during the process by Ms Webb but only summarised themes with anonymity being offered to interviewees. Ms Webb is concerned about two particular staff members who will provide information to the consultant and Ms Webb alleges that these persons have already acted in a discriminatory manner against her. It is submitted by Ms Webb that she will not be accorded any procedural fairness in this process due to her restricted access to the information to be gathered.
- [11] The respondents deny that the assessment process will not accord adequate procedural fairness to Ms Webb. It was submitted by the respondents that the information and issues to be put to Ms Webb in the report will be presented to her fairly and for her response before the report is finalised. It was submitted that the issues of concerns in the workplace are not unknown by Ms Webb and are referred to in the document attached to the affidavit of Mr Williams filed in the tribunal. That document

provides a summary of the information he had gained from interviewing seven staff members who had worked with Ms Webb.

- [12] While the information attached to Mr Williams' affidavit does not identify "who said what", the information is unambiguous and in my view provides a clear indication of the concerns expressed by Ms Webb's colleagues. I am satisfied that Ms Webb is aware of the issues to be looked at during the proposed organisational wellness assessment and that she has a genuine opportunity to have adequate input both at the start of the process with regard to input into the Terms of Reference and at the end of the assessment before the report is finalised.
- [13] The respondents argue that the proposed assessment is just that: an investigation into the issues at the workplace that are relevant to the return of Ms Webb to work at that workplace. They submitted that the assessment in itself does not constitute action adverse to Ms Webb triggering a requirement by the employer to provide all the raw information gathered during the process. The respondents submitted that Ms Webb had not established that there would be any denial of natural justice and procedural fairness if the information from persons interviewed by the consultant was provided in the report in themes and with anonymity.
- [14] I accept the submissions on this point from the respondents. The process sought to be stopped by injunction is not a process to terminate Ms Webb's employment. It is a process that seeks to investigate what is described as the organisational wellness within the Pharmacy department at the hospital where Ms Webb is employed.
- [15] While the conduct of Ms Webb will be considered in the assessment, so will the impact of that conduct on other staff as well as the conduct of those other staff members overall. The Terms of Reference expressly require the consultant to report on broader team issues and dynamics within the department as well as issues only relating to Ms Webb and to her relationship with other staff. The assessment is not a disciplinary process and does not give rise to a requirement for the employer to provide to Ms Webb the extent of information that a disciplinary process might require.
- [16] It is submitted by Ms Webb that it will be difficult for staff who may not have had any direct dealings with Ms Webb, or even the consultant who is engaged, to fairly interact with her having regard to the impression portrayed by the Terms of Reference. Ms Webb produced no evidence that the consultant's conclusions would be impugned in any way by the information he gathers during the assessment process. It would be surprising if a professional engaged to carry out an assessment within his area of expertise would be unable to fairly interact with Ms Webb. I am not prepared to make a finding that the involvement of the consultant will be prejudicial to Ms Webb because of the allegations he hears about her.
- [17] Similarly I consider there is little plausibility in the assertion that staff unfamiliar with Ms Webb will be unable to work with her in the future

merely because of their involvement in the organisational wellness assessment process. It is reasonable to infer that “new” staff members would already know about the concerns about Ms Webb expressed by their colleagues. It would be an unusual workplace if they remain ignorant of the views held by their colleagues who had worked with Ms Webb. I fail to be convinced by the submissions that Ms Webb’s future working relationships with staff who were employed subsequent to her suspension would be undermined if all present employees were involved in the assessment.

- [18] It is submitted by Ms Webb that a finding that she ought not to return to her substantive position at her place of employment is likely to prejudice the orders available to QCAT at the end of hearing this complaint. It is submitted that if Ms Webb’s employment were to be terminated as a result of the finding from the assessment, her substantive position is likely to be filled making a re-instatement order practically difficult to achieve.
- [19] The respondents submit that the application for an injunction is premature. They submit that the outcome of the assessment is unknown as the assessment has not yet taken place. The report from the assessment may lead to a decision being made by the employer to facilitate a return to the workplace by Ms Webb or it may lead to a decision that she cannot return safely to the workplace. If the latter decision is made by the employer after considering the report, including Ms Webb’s response to the findings in the report, she has the right to take industrial action about that decision or to seek some form of injunctive relief at that time.
- [20] The respondents’ submissions are convincing. I am not satisfied by the submissions of Ms Webb that unless an injunction is made to prevent the assessment process, the tribunal will be necessarily limited in the orders it can make at the end of the hearing of the complaint of Ms Webb. I prefer the submissions made by the respondents that the tribunal’s options for making orders would tend to be enhanced if an assessment of the organisational wellness is available at the time that the tribunal considers whether a re-instatement order is practical or not.
- [21] That report could constitute evidence to support re-instatement or evidence against re-instatement. It is mere speculation to find at this early stage that the assessment would reduce the orders available to the tribunal to compensate Ms Webb for the impact of unlawful discrimination if that conclusion were to be ultimately reached by the tribunal at the end of the hearing of her complaint.
- [22] It was submitted by Ms Webb that if her employment were to be terminated, she would have great difficulty advancing her complaint through QCAT as she could not then afford to engage private legal representation. It was submitted that the complaint contains complex issues of fact and law so that Ms Webb would be unlikely to be able to have the capacity to represent herself. While that may well be the case, I consider that it is premature to speculate on whether Ms Webb’s employment will be terminated or not.

- [23] It was submitted by Ms Webb that a prima facie case of discrimination had been established and that the balance of convenience is in favour of an injunction being granted. The respondents would have in that case to retain Ms Webb in her position and not progress any process until the finalisation of the anti-discrimination proceeding. As Ms Webb has already been on paid leave for over 12 months, it was submitted that no prejudice would arise to the respondents if they had to continue with her pay while she either remains on suspension or returns to her employment.
- [24] The respondents are prepared, for the purposes of this application, not to contend that there is no prima facie case in the anti-discrimination complaint. However they do contend that the balance of convenience is against the injunction being granted. They submit that without the assessment, Ms Webb cannot safely return to her place of employment and Ms Webb will have to remain on suspension on full pay until the finalisation of the complaint in QCAT.
- [25] The respondents submitted that returning Ms Webb to the workplace in the absence of an assessment may compromise the employer's ability to provide a functional pharmacy at the hospital. While those submissions may be valid, the balance of convenience appears to me to lie more with Ms Webb than the respondents.
- [26] However a finding about where the balance of convenience lies is not particularly pertinent in this case as I am unable to conclude that the interests of justice require injunctive relief to be granted. The test to be satisfied before an interim injunction is granted by QCAT is not solely the considerations found at common law but also the statutory requirements of sections 58 and 59 of the QCAT Act. Those statutory requirements must lead me to consider whether an interim order is appropriate in the interests of justice.
- [27] I have not been satisfied for the reasons expressed in the preceding paragraphs that on the arguments raised by Ms Webb it is appropriate in the interests of justice that injunctive relief via an interim order as sought by her should be granted. I was not satisfied that preventing the organisational wellness assessment is necessary to protect Ms Webb's position prior to finalisation of her complaint.
- [28] The assessment cannot of itself result in the termination of Ms Webb's employment but may provide some viable workplace options for the consideration of her employer. If the report finds that the workplace dynamics cannot support a return to work by Ms Webb and the employer then commences steps towards termination of her employment, her right to seek injunctive relief would be able to be exercised at that stage.
- [29] I was not satisfied that an interim order providing injunctive relief would secure the effectiveness of the exercise of the tribunal's jurisdiction for this complaint. To the contrary, the existence of a report following an assessment of the workplace will provide very useful evidence to the tribunal when considering if re-instatement should be ordered at the end of

the hearing. The existence of such a report could be seen to enhance the effectiveness of the outcomes open to the tribunal to provide relief to Ms Webb if she establishes that she has been unlawfully discriminated against by the respondents.

- [30] Quite apart from the application seeking to prevent the organisational wellness assessment, Ms Webb also sought other injunctive relief. Ms Webb seeks an order that the respondents not only be restrained in undertaking the assessment but also to be restrained from engaging in discussions with staff of the Pharmacy Team in relation to Ms Webb, the viability of her return to work or the nature of any past or present dispute between Ms Webb and the employer or staff until further order.
- [31] The respondents submitted that granting an injunction in the terms sought by Ms Webb in her application might prevent them from co-ordinating a defence of this complaint that they have acted contrary to the *Anti-Discrimination Act 1991*. This submission is well made as the actual scope of the injunctive relief set out in the application is very wide.
- [32] Counsel for Ms Webb contended at the hearing that the injunction was not purposed to prevent the respondents from preparing their response to the anti-discrimination complaint. However it would be impossible for witness statements to be obtained for the final hearing of the complaint if staff are prevented from discussing Ms Webb and the issues at the workplace with the respondents and their representatives. It could not be in the interests of justice for that position to arise by virtue of an order of QCAT. I would not for that reason be prepared to grant an injunction in terms of paragraph two of the orders being sought in the application.
- [33] Counsel for Ms Webb tendered into evidence a letter dated 20 January 2014 from his instructing lawyers to the lawyers for the respondents. In that letter Ms Webb proposed an alternative assessment process. The respondents rejected that proposal as not being adequate for addressing and managing the issues inherent in a return to the workplace by Ms Webb given the responsibilities of an employer to all employees at a workplace. I do not need to make any findings on that alternative proposal. It is not a relevant factor in the conclusion reached that an interim order providing injunctive relief is not in the interests of justice on the evidence and submissions made in this case.
- [34] However I have noted a tendered letter written by the lawyers for the respondents to the lawyers for Ms Webb dated 15 January 2014 which contained terms of an undertaking that the respondents were willing to give if an interim order were not to be made. The offered undertaking was that the employer agreed to consult with Ms Webb about the Terms of Reference, to provide Ms Webb with a draft copy of the organisational assessment report for her response before it is finalised and an offer not to make any decision or take adverse action without ensuring that Ms Webb has a reasonable period to consider the proposed decision or action.

- [35] At the hearing, counsel for the respondents informed the tribunal that the undertaking was still offered by the respondents should the tribunal want to incorporate terms into its orders. That offer is a sensible and practical way forward for the parties and I have incorporated that undertaking into the order made refusing an interim order.