

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

C.A. NUMBER: 2735 of 2012

QCATA NUMBER: APL302-11

Applicant: **STATE OF QUEENSLAND**

AND

First Respondent: **PETA MICHELLE ATTRILL**

AND

Second Respondent: **ANTI-DISCRIMINATION COMMISSIONER
QUEENSLAND**

SUBMISSIONS ON BEHALF OF THE SECOND RESPONDENT

The standing of the Second Respondent in the appeal proceedings

1. The Second Respondent is the Anti-Discrimination Commissioner appointed under s. 238 of the *Anti-Discrimination Act 1991* (**AD Act**).
2. The Commissioner and the Anti-Discrimination Commission are established under s.234 of the AD Act. The Commissioner's powers include the power to do all things that are necessary and convenient to be done for or in connection with the Commission's functions under the AD Act: s.236(2) AD Act.
3. The Commission's functions include, if the Commission considers it appropriate to do so, to intervene in a proceeding that involves human rights issues with the leave of the court hearing the proceedings: s.235(j) AD Act.
4. The Queensland Civil and Administrative Tribunal (**QCAT**) is established under the *Queensland Civil and Administrative Tribunal Act 2009* (**QCAT Act**) as a court of record: ss.161 and 164 QCAT Act.

**SUBMISSIONS OF THE
SECOND RESPONDENT**

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5. In exercising his powers in discharge of the Commission's functions, the Second Respondent sought to intervene in the appeal proceedings in QCAT. QCAT permitted the Second Respondent to intervene pursuant to s.41 of the QCAT Act.
6. The Commissioner has been made a respondent to this appeal proceeding and has been served with the notice of appeal: UCPR rr.749 and 752.

The decision of the QCAT appeal tribunal

7. By its decision,¹ the QCAT appeal tribunal allowed the appeal of the First Respondent. In reaching its decision, the QCAT appeal tribunal found that:
 - (a) the provisions and mechanisms created by Chapter 5, Part 7 of the *Public Service Act 2008 (PS Act)* were not inconsistent with the requirements of the AD Act;²
 - (b) there is no compelling reason that the two statutory regimes, viz, the AD Act and the PS Act, cannot operate in parallel;³
 - (c) Chapter 5, Part 7 of the PS Act does not contain a comprehensive and exhaustive regime that excludes operation of the AD Act;
 - (d) the requirements of the AD Act and the PS Act are intended to operate in a parallel and complementary fashion;⁴
 - (e) there is no contrariness or inconsistency between the AD Act and the PS Act;⁵
 - (f) there was a valid complaint by the First Respondent.⁶
8. The QCAT appeal tribunal was, with respect, correct in each of these findings.

A preliminary issue – Leave to appeal

9. By a notice of appeal the Appellant purports to appeal against the decision of QCAT of 24 February 2012.

¹ *Attrill v Department of Corrective Services* [2012] QCATA 31 (**decision**).

² Decision at [46].

³ Decision at [57].

⁴ Decision at [59].

⁵ *Ibid.*

⁶ Decision at [61].

10. An appeal from a final decision of the QCAT appeal tribunal requires the leave of the Court of Appeal: s.150(3)(b) QCAT Act.
11. The Appellant has not applied for leave to appeal. The appeal, as brought, is incompetent.

Substantive submissions

12. In reaching its decision and making its findings as set out at paragraph 7 herein, the QCAT appeal tribunal set out its extensive reasoning in support of those findings and that decision.
13. The Appellant has in its submissions wholly failed to address that reasoning or to identify any particular error in that reasoning.
14. In the Appellant's submissions, the error of law identified is that the QCAT appeal tribunal asked itself the incorrect question.⁷ The correct question, so it is submitted by the Appellant, was whether the First Respondent's complaint was a valid complaint for the purposes of the AD Act.⁸
15. The Appellant's submissions go on to contend that there was no valid complaint because Chapter 5, Part 7 of the PS Act impliedly repealed the AD Act to the extent of any inconsistency between the Acts, or alternatively, that the AD Act must be read subject to Chapter 5 Part 7 of the PS Act.⁹
16. In that regard, the Appellant contends that:
 - (a) Chapter 5, part 7 of the PS Act "establishes a comprehensive and exhaustive scheme to deal with public sector employees who are mentally or physically incapacitated";¹⁰ and
 - (b) "Given the detailed and exhaustive scheme established by Part 7 of Chapter 5 of the PS Act and that the PS Act is the later enactment, section 15 of the AD Act must be read subject to Part 7 of Chapter 5 of the PS Act or, alternatively, to the extent that Part 7 of Chapter 5 of the PS Act is inconsistent with section 15 of the AD Act, section 15 of the AD Act is impliedly repealed".¹¹
17. The Appellant's contention that the QCAT appeal tribunal asked itself the incorrect question is misconceived.

⁷ Paragraph 3.1 of the Appellant's Outline of Argument.

⁸ Ibid.

⁹ Paragraph 3.5 of the Appellant's Outline of Argument.

¹⁰ Paragraph 3.9 of the Appellant's Outline of Argument.

¹¹ Paragraph 3.14 of the Appellant's Outline of Argument.

18. At paragraph [61] of the QCAT appeal tribunal's decision (Appeal Record Book page 299) it found that the First Respondent had valid grounds to make a complaint. The appeal tribunal so found on the basis of its construction of the AD Act and the PS Act.
19. Those findings as to the construction of the AD Act and the PS Act, as summarised at paragraph 7 herein, for the detailed reasons provided by the tribunal, rejected the contentions of the Appellant that the PS Act established an exhaustive scheme which either repealed the AD Act, or subject to which the AD Act must be read.¹²
20. That is, the QCAT appeal tribunal addressed the question which the Appellant contends it ought to have asked itself as the correct question.
21. Furthermore, the QCAT appeal tribunal answered that question by rejecting the arguments advanced by the Appellant in the proceedings before it, and which the Appellant advances on this appeal. The QCAT Appeal tribunal did so in a detailed and, with respect, correct analysis of the two statutes.
22. However, apart from the bald assertion that the QCAT appeal tribunal was wrong, the Appellant makes no attempt to address the reasoning of the QCAT appeal tribunal in order to demonstrate error.

Powers of the tribunal under section 144 – Whether there needs to be a 'valid complaint'

23. The matter before the QCAT appeal tribunal was the rejection, at first instance, by QCAT of the First Respondent's application for an order under s.144 of the AD Act. QCAT had done so on the basis that there was not a valid complaint before it and, therefore, lacked jurisdiction to make an order under s.144. The appellant contends that, at first instance, QCAT was correct in this regard.
24. The jurisprudence concerning the effect of s.136 of the AD Act (a complaint must be in writing, set out details to indicate an alleged contravention and be lodged with the Commissioner), s.166 (a complainant is entitled to require the Commissioner to refer a complaint to the tribunal) and s.175 (the Tribunal must accept a complaint referred to it by the Commissioner) establishes that jurisdiction to deal substantively with a complaint is founded on the referral of a complaint complying with s.136.¹³
25. However, s.144 of the AD Act confers power of a different kind. Section 144 gives the tribunal power to make injunctive type orders to protect a

¹² See paragraphs [37] to [59] of the decision. Appeal Record Book pages 295 to 299

¹³ *Hopper v Mount Isa Mines Limited* (1999) 2 QdR 469; *Mt Isa Mines Limited v Hopper* [1998] QSC 287 at paragraphs 8, 55 & 59

complainant's interest prior to referral of the complaint. This power of the tribunal is not dependent on a referred complaint. To the contrary, the power is exercisable only in the absence of a referred complaint. It is clearly a further power conferred on the tribunal distinct from the powers to hear and determine complaints referred to it by the Commissioner.

26. Although the AD Act does not prescribe how the tribunal is to exercise the discretion in s.144, decisions of the former Anti-Discrimination Tribunal determined that the appropriate way to exercise the discretion is in accordance with the way in which the common law treats applications for interlocutory injunctions, that is, by first determining if there is a serious issue to be tried and, if so, then determining what is, on the balance of convenience, the most appropriate order to make.¹⁴
27. Approaching the operation of s.144 in this way achieves the usual purpose of an interlocutory injunction, namely to protect the applicant by preserving the circumstances that exist at the time of the application until the rights of the parties are finally determined by the proper procedures.¹⁵
28. The power to make an order under section 144 has generally been considered as requiring merely that there is a complaint before the Commission, which complaint gives rise to a serious question to be tried as to whether the act or acts complained of constitute unlawful discrimination, whether or not the complaint has been accepted by the Commission.¹⁶
29. Jurisdiction to make an order under s.144 does not require the existence of a 'valid complaint' as contended for by the Appellant. Approaching the issue on a proper basis, the competing contentions as to whether there was such inconsistency between Chapter 5, Part 7 of the PS Act and s.15 of the AD Act, QCAT could only have found that there was a serious question to be tried.
30. In any event, the QCAT appeal tribunal, correctly, found that there was a 'valid complaint' in the sense that First Respondent had grounds to make a complaint.¹⁷

Relationship between Chapter 5 part 7 of the PS Act and the AD Act

31. In the Decision under appeal, the QCAT appeal tribunal, correctly, referred to and applied the principles of statutory construction

¹⁴See for example, *Hastie v Ryan & Ors* [2003] QADT 29; *Transport Workers Union of Australia, Boss & Wood v Boral Resources (Qld) Pty Limited* [2006] QADT 10 at para 16; and *Connor v Evans & Salvation Army* [1998] QADT 14

¹⁵ *Heavener v Looms* (1924) 34 CLR 306 at 325 and 326.

¹⁶*Brackenreg v Queensland University of Technology* [1999] QADT 11; and *Transport Workers Union of Australia, Boss & Wood* (supra)

¹⁷ Decision at [61].

enunciated in the decisions of the High Court in *Goodwin v Phillips*¹⁸, *Ferdinands v Commissioner for Public Employment*¹⁹ and *Saraswati v The Queen*²⁰.

32. Where two statutes appear to be in conflict, there is a presumption that the legislature intended that both should operate. Accordingly, a court or tribunal must firstly attempt to reconcile the two statutes.
33. In order to give effect to the statutory purpose of section 15 of the AD Act, it is necessary to consider the Act as a whole. The effect of the AD Act as a whole, in relation to impairment discrimination, is to:
 - (a) prohibit treating a worker unfavourably in any way in connection with work, including dismissing a worker;
 - (b) impose an obligation on an employer to make reasonable adjustments for a worker's impairment; and
 - (c) allow the imposition of genuine occupational requirements for a position.
34. The obligation to make reasonable adjustments arises from the combined effect of the following provisions of the AD Act:
 - (a) section 10(5) – excluding as irrelevant, in determining whether a person treats or proposes to treat a person with an impairment less favourably than another person is or would be treated in the same or similar circumstances, the fact that the person with the impairment may require special services or facilities;
 - (b) section 11 – prohibiting imposing a term with which a person with an impairment is unable to comply;
 - (c) section 15 – prohibiting discrimination by treating a worker unfavourably in any way in connection with work, including by dismissal;
 - (d) section 25 – permitting a person to impose genuine occupation requirements for a position;
 - (e) section 35 – permitting discrimination on basis of impairment if special services or facilities are required, the supply of which would impose unjustifiable hardship; and
 - (f) section 5 – in defining the meaning of unjustifiable hardship.

¹⁸ (1908) 7 CLR 1

¹⁹ (2006) 225 CLR 130

²⁰ (1991) 172 CLR 1

35. The relevant part of the PS Act provides a mechanism for the employer to identify possible adjustments that can be made to accommodate a worker's impairment, determine whether those adjustments are reasonable, and to establish whether the worker is able to perform the genuine occupational requirements of the position.
36. The AD Act and the relevant part of the PS Act are thereby able to be reconciled. Read in conjunction with the AD Act, the relevant part of the PS Act authorises the unfavourable and otherwise unlawful, treatment of the worker only where adjustments would be unreasonable or would create unjustifiable hardship, or the worker is unable to perform the genuine occupational requirements of the position.
37. This was the conclusion reached by the QCAT appeal tribunal.²¹
38. Furthermore, as found by the QCAT appeal tribunal, the provisions of the PS Act do not support the Appellant's contention that Chapter 5, Part 7 of the PS Act establishes a comprehensive and exhaustive scheme to deal with public sector employees who are mentally or physically incapacitated.
39. Such a contention must be rejected in light of s.30 of the PS Act which requires government agencies, amongst other things, to act to:
 - (a) promote equality of employment opportunities for employees who are members of EEO target groups, which groups include persons with physical, intellectual or psychiatric disability;
 - (b) eliminate unlawful discrimination about employment matters by the entity against members of the EEO target groupin circumstances in which:
 - (c) unlawful discrimination is defined to mean discrimination that is unlawful under the AD Act; and
 - (d) employment matters are defined to include terms and conditions of service and separation of employees.²²

Disposition

40. Leave to appeal should be refused.
41. Alternatively, the appeal should be dismissed.

²¹ Decision at [42] to [47].

²² See decision at [15] to [18] and [40] to [41].

42. In either event, the Appellant should be ordered to pay the costs of the Second Respondent.

Dated: 28 May 2012

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