



HUMAN RIGHTS

DECISIONS BULLETIN

for the period 1 April 2009 - 30 April 2009

This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Human Rights stream for the period 1 April 2009 - 30 April 2009. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

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EQUAL OPPORTUNITY ACT 1984 (WA)

ENGSTROM AND FORTESCUE METALS GROUP LTD [2008] WASAT 314

3 APRIL 2009

MS J TOOHEY (SENIOR MEMBER), MS F CHILD (MEMBER), PROF C MULVEY (SESSIONAL MEMBER)

Discrimination - Pregnancy - Employment - Whether applicant offered casual or permanent employment - Medical assessment conducted after applicant commenced showed she was pregnant - Restructure of company - Whether results of assessment known to respondent - Whether applicant's employment terminated on ground of pregnancy - Tribunal not satisfied that anyone employed by the respondent in a position to make decisions concerning applicant's employment knew she was pregnant before decision to terminate - Application dismissed

The applicant alleged the respondent discriminated against her on the ground of pregnancy in the area of employment contrary to the *Equal Opportunity Act 1984 (WA)*.

The applicant claimed the respondent had offered her permanent employment subject to passing medical and drug tests and referee checks. She claimed that, when the respondent learned from the results of the medical test that she was pregnant, it terminated her employment and gave the position to another person.

The respondent denied offering the applicant permanent employment and said she was only offered casual employment pending recruitment of a permanent employee. It said that, while the recruitment process was still underway, it decided to restructure the company, as a result of which the position for which the applicant had been interviewed no longer existed. The position subsequently created required substantially more experience than that for which the applicant had been considered and, as a result, went to another, more experienced, person.

The respondent said that, in any event, the applicant's pregnancy had no bearing on any decisions concerning her employment because no-one in a position to make those decisions knew of her pregnancy until after the decision was made to restructure and after the respondent had advised the applicant that her employment was being terminated.

The Tribunal was not satisfied that the applicant had been offered permanent employment. It found she had been offered casual employment pending recruitment for the permanent position.

The Tribunal accepted the respondent's evidence concerning the confidentiality of the results of the medical examination and its claim that no-one in a position to make decisions concerning the applicant's employment knew she was pregnant at any material time. The Tribunal also accepted the respondent's evidence about its decision to restructure the company.

As no-one in a position to make decisions concerning the applicant's employment knew of her pregnancy until after the decisions to restructure and to terminate her employment, the Tribunal was satisfied it had no bearing on either decision.

The Tribunal dismissed the application.

GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)

M [2008] WASAT 262 (S)

2 APRIL 2009

MS J TOOHEY (SENIOR MEMBER), MR J MANSVELD (MEMBER), MS H LESLIE (SENIOR SESSIONAL MEMBER)

Application for administration - Public Trustee appointed plenary administrator for mother - Conflict between applicant and brother - Application opposed by mother and brother - Application for costs under s 87(2) *State Administrative Tribunal Act 2004* (WA) and s 16(4) *Guardianship and Administration Act 1990* (WA) - Factors to be considered in determining costs applications - Whether rule that parties bear own costs should be set aside - Whether applicant's costs should be paid out of his mother's estate - Tribunal not satisfied orders should be made - Application for costs dismissed

G had lodged applications which led to the appointment of an administrator for his mother, M. G was legally represented throughout the proceedings as were M and G's brother, E, both of whom opposed the applications.

At the conclusion of the proceedings, G sought an order under s 87(2) of the *State Administrative Tribunal Act 2004* (WA) that E pay his legal costs. Further, or in the alternative, he sought an order under s 16(4) of the *Guardianship and Administration Act 1990* (WA) that his costs be paid out of M's assets.

The amount of costs sought was \$105,426.88.

The Tribunal was not satisfied there was reason to depart from the rule in s 87(1) of the *State Administrative Tribunal Act 2004* (WA) that parties to proceedings before the Tribunal bear their own costs. In particular, it did not accept that the issues for determination concerning M were more complex than most matters in the guardianship and administration jurisdiction such that legal representation was necessary in order to bring and conduct the proceedings in a timely and coherent manner. The proceedings became unnecessarily adversarial and protracted mainly because of the brothers' business dealings and the conflict between them, rather than the complexity of their mother's financial affairs.

The Tribunal was not satisfied that G's legal costs should be paid out of his mother's estate. It was questionable how much he had acted in her interests, as opposed to his

own, in bringing the applications. The intensity of the conflict between the brothers was such that they refused to cooperate even where their mother's interests were adversely affected. In all the circumstances, while G was entitled to legal representation before the Tribunal, his mother should not be required to meet his costs.

The Tribunal dismissed the application for costs.

RM AND AVM [2009] WASAT 57

2 APRIL 2009

MS F CHILD (MEMBER)

Guardianship and administration - Represented person suffering acquired brain injury as a result of a stroke - Placement in residential care - Wishes of the represented person - Maintenance of supportive relationship - Independent decision-maker needed to make personal decisions - Public Advocate appointed limited guardian

The Tribunal decided that it was in the best interests of an elderly man, who was living in an aged care facility, that an independent guardian be appointed for him and so appointed the Public Advocate as his guardian to make personal decisions, including where he was to live, the contact he should have with others and to give consent to medical treatment on his behalf.

The Tribunal decided that an independent guardian was needed because of the failure of the man's son, who had applied to be his guardian, to acknowledge the relationship his father had with a woman with whom he had lived for 17 years when making the decision to place the man in permanent care.

The elderly man had been placed in an aged care facility because his partner could no longer care for him at home, but she had not been consulted about the placement and it was at such a distance from her home that regular access to the man was difficult. The Tribunal concluded that, based on his previous conduct, the man would want regular ongoing contact with his partner, but it was not satisfied that the son appreciated this or would take account of this important supportive relationship when making personal decisions for his father, particularly the decision as to where he should live.

PUBLIC TRUSTEE AND MB [2009] WASAT 68

15 APRIL 2009

MS F CHILD (MEMBER)

Guardianship and administration - Application by the Public Trustee as administrator of the estate of the represented person seeking directions about the payment of legal costs of the former donee of an enduring power of attorney - Whether the legal costs incurred were within the scope of the donee's role - Whether the donee had acted in the best interests of the represented person such that his legal costs should be paid

The Public Trustee as the administrator of the estate of an elderly woman with dementia applied to the Tribunal for directions as to whether the legal costs of the woman's son, the former donee of her enduring power of attorney, should be paid from her estate.

The Tribunal determined that the legal fees for representation at a hearing before the Tribunal were incurred in his personal capacity rather than as the woman's attorney and so they were not her debt which her administrator was obliged to pay. The son had engaged a solicitor to defend his own position in respect of the proceedings before the Tribunal which had been brought by the Public Advocate following an investigation of the financial management of the woman's affairs by the son.

The Tribunal decided that it was not appropriate to exercise its discretion to direct that the fees be paid from the estate on behalf of the son as an ex gratia payment.

The Tribunal also decided that a costs order, by which the legal costs of another person could be paid from the estate of the represented person if that person was found to have acted in the best interests of the represented person, should not be made on the facts of the case.

The application for directions was dismissed.

MD AND RD [2009] WASAT 74
23 APRIL 2009
MS S GILLETT (SENIOR SESSIONAL MEMBER)

Applications for guardianship and administration - Need for a guardian - Need for an administrator

Applications for guardianship and administration were made to the Tribunal by the mother and sister of a 39-year-old woman who has an intellectual disability. The applicants sought the appointment of a guardian or an administrator specifically to provide the authority to undertake the role of employer of the proposed represented person's carers.

It was not in dispute, and the Tribunal found on the evidence, that the proposed represented person was a person in respect of whom both guardianship and administration orders could be made. The Tribunal was satisfied, however, that her needs could be met by other less restrictive means and without the making of the orders sought. The Tribunal found that the proposed represented person's needs were being appropriately met and decisions were being made in her best interests through the existing arrangements already in place.

Accordingly, the Tribunal found the proposed represented person not in need of a guardian or an administrator and dismissed the applications.