



# SAT

State  
Administrative  
Tribunal

Western Australia

## **HUMAN RIGHTS**

### **DECISIONS BULLETIN**

**for the period 1 October 2008 - 31 October 2008**

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This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Human Rights stream for the period 1 October 2008 - 31 October 2008. The full text of decisions and reasons can be found on the Tribunal's website at [www.sat.justice.wa.gov.au](http://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)**

**OWENS AND PASTORALISTS AND GRAZIERS ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED [2008] WASAT 233**

**8 OCTOBER 2008**

**MS J TOOHEY (SENIOR MEMBER), MS D DEAN (MEMBER), PROF C MULVEY (SESSIONAL MEMBER)**

**Discrimination - Impairment - Employment - Applicant on sick leave with work-related illness - Employer required medical clearance before return to work - Full clearance not provided - Whether applicant was refused graduated return to work - Employment terminated - Whether termination of employment was unlawful discrimination - Finding that applicant was not refused a graduated return to work - No less favourable treatment - Application dismissed**

The applicant alleged that the respondent unlawfully discriminated against him on the ground of his impairment by refusing to allow him a graduated return to work and by dismissing him when he was unable to get a full medical clearance to return to work after a period of sick leave.

The respondent denied that the applicant had asked to return to work on a graduated basis and denied, in any event, he had been treated less favourably than any other employee in materially comparable circumstances. The respondent agreed it had terminated the applicant's employment because he was not able to provide a medical clearance to return to work. However, it said, his continuing illness made his employment untenable, in particular because his position was funded under a Federal government grant which required a full-time employee.

The Tribunal was not satisfied that the applicant had in fact been refused a graduated return to work but, in any event, there was no evidence that he was treated less favourably than the respondent treated, or would have treated, another employee in similar circumstances who did not have the same impairment. The Tribunal did not accept that any of the employees cited by the applicant was an appropriate comparator.

The Tribunal found that the appropriate comparator for the purposes of the claim concerning termination was a full-time employee who had been off work for the same length of time with a physical injury suffered in the course of work and who was seeking to return to the same full-time duties. It accepted the respondent's evidence that it would have required a full clearance from a person in those circumstances before they could return to work.

Even if the respondent might have allowed the applicant more time, and might have offered him a trial graduated return to work, the applicant had to make out his claim of unlawful discrimination. The Tribunal was not satisfied that he had done so and dismissed his application.

## **GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)**

**BB AND LG [2008] WASAT 234**

**9 OCTOBER 2008**

**MS D DEAN (MEMBER), MS M JORDAN (SENIOR SESSIONAL MEMBER),  
MS V O'TOOLE (SENIOR SESSIONAL MEMBER)**

**Guardianship and administration - Capacity to make reasonable judgments - Need for a guardian - Need for an administrator - Application to revoke or vary terms of enduring power of attorney - Conflict between daughter and husband of represented person - Need for an independent decision maker**

LG is a widow with three daughters and a son. Prior to his death, LG's husband executed a new will leaving his entire estate to their three daughters, with nothing to LG or their son JG. Consideration was being given as to whether an application to contest the will should be made on behalf of LG.

In 2007 and 2008 LG executed three enduring powers of attorney. In the first she appointed her sister DM donee, in the second she appointed her daughter BB donee and in the third she appointed her son JG donee. BB, a beneficiary of LG's husband's will, and JG have a highly conflictual relationship resulting in no direct communication between them.

BB made applications to the Tribunal for both guardianship and administration orders. Both BB and JG nominated themselves in both roles.

The Tribunal found, based on evidence of their actions while acting as donees and the possible conflict of interests in relation to LG's husband's will, that it was not in LG's best interests to have either BB or JG appointed as either guardian or administrator. The Tribunal considered that her interests were best served by the appointment of the Public Trustee, an administrator independent of the family.

The Tribunal found that it was in LG's best interests to have her sister, with whom she has a close and supportive relationship and who has good relationships with all family members, to be appointed limited guardian to make medical treatment decisions. Other decisions such as accommodation had been made appropriately by family members and appeared to be operating in LG's best interests.

The Tribunal revoked all three enduring powers of attorney and made both the guardianship and administration orders reviewable in two years time. Decisions as to a claim against LG's husband's will should have been made in that time and family

relationships may have recovered to the point where a family appointed administrator may be appropriately considered.

**EBF AND DMW [2008] WASAT 236**  
**10 OCTOBER 2008**  
**MR J MANSVELD (MEMBER)**

**Guardianship and administration - Application for legal costs to be paid from the represented person's estate - Principle that parties bear their own costs - That principle may be overturned in certain circumstances - Applicant in a position not dissimilar to the majority of applicants who appear before the Tribunal - Applicant entitled to legal representation to protect her own interests - Application dismissed**

The daughter of an elderly woman (now deceased) made an application for her legal costs to be paid from the woman's estate.

The daughter had applied to the Tribunal for a guardian and administrator to be appointed for the woman. The daughter and her brother were in disagreement about the management of the woman's estate which had led to the bank accounts of the woman being frozen.

In all the circumstances of the case, it could not be said that the legal assistance obtained by the daughter justified her legal costs being paid from the woman's estate. In respect of the proceedings she was in a position not dissimilar to the majority of applicants and parties that appear before the Tribunal without legal assistance.

Although the daughter had every right to seek legal advice to protect her interests, it was not considered necessary to the final determination of the Tribunal which was to make a decision in the best interests of DMW.

In dismissing the application for costs, the Tribunal took the view that it should not depart in this case from the principle that parties bear their own costs in proceedings.

**KB AND DB AND KW [2008] WASAT 239**  
**10 OCTOBER 2008**  
**MS J TOOHEY (SENIOR MEMBER)**

**Costs - Application for appointment of administrator - Proposed represented person capable of managing her financial affairs - Application withdrawn - Application by proposed represented person for her legal costs to be paid by the applicants - Applicants ordered to pay contribution towards costs**

The daughters of an elderly woman applied to the Tribunal for an administration order for their mother. The applicants were involved in proceedings in the Supreme Court against their mother in connection with the estates and will of her late husband. They said she was vulnerable and appeared not to understand the complex proceedings. They were concerned that their brother, who was their mother's attorney under an enduring power of attorney, was not acting in her best interests.

At the time of lodging the application, the applicants did not have medical information about their mother's capacity to make reasonable judgments about her estate. Information subsequently obtained by the Tribunal from her general practitioner indicated that she was capable of making reasonable judgments about her estate.

The applicants withdrew their application and their mother sought an order under s 87(2) of the *State Administrative Tribunal Act 2004 (WA)* that they pay the legal costs she incurred in resisting their application.

The Tribunal took into account that the applicants had no medical evidence to support their application and had made no attempt to obtain such information. Nor had they contacted their mother to clarify their concerns about her understanding of the

Supreme Court proceedings. Their application could not possibly have succeeded on the evidence. It was reasonable in the circumstances for their mother to engage legal representation particularly as the applicants were themselves legally represented.

The Tribunal ordered the applicants to pay a contribution of \$3,000 towards the costs of \$4,019.40 incurred by their mother.

**UK [2008] WASAT 245**  
**22 OCTOBER 2008**  
**MR M ALLEN (SENIOR MEMBER)**

**Guardianship and administration - Review of administration and guardianship orders - Represented person continuing to suffer from dementia with deteriorating mental and physical capabilities - Finding that represented person still suffers from decision-making disabilities, is incapable of looking after his own health and safety, and is in need of oversight care and control in the interests of his own health and safety - Consideration of whether guardian needs power to authorise the use of chemical or physical restraints**

The Tribunal reviewed an administration order made some years ago appointing the Public Trustee plenary administrator for an elderly man, UK. Since the time that order was made UK's mental disabilities have increased and he remains unable to manage his financial affairs. In the meantime, UK's need for an administrator has increased due to the sale of his former home and the need to invest the proceeds of that sale. The Tribunal confirmed the existing administration order in favour of the Public Trustee.

The Tribunal also reviewed an existing guardianship order in which the Public Advocate was appointed limited guardian for UK. The Tribunal was satisfied that the guardian no longer needed the powers to make decisions in relation to accommodation and services or the power to authorise the use of chemical restraints for UK, but was satisfied that there is now a need for the guardian to be able to authorise the use of physical restraints. The Tribunal considered that the types of physical restraints that were anticipated to be used were primarily for the physical safety of UK, but recognised that the boundary between protection of safety and physical restraint was unclear. For the avoidance of doubt, the guardian was given the power to authorise the use of physical restraints for UK.