

**HUMAN RIGHTS****DECISIONS BULLETIN****for the period 1 September 2008 - 30 September 2008**

This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Human Rights stream for the period 1 September 2008 - 30 September 2008. 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.

EQUAL OPPORTUNITY ACT 1984 (WA)	1
BUKILIC AND LIFENET (WA) FINANCIAL ADVICE PTY LTD [2008] WASAT 213	1
GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)	2
AR AND RR [2008] WASAT 215	2
JR AND MC [2008] WASAT 217	3
RE JMM; EX PARTE JMM [2008] WASAT 221	3
RE SS; EX PARTE RA [2008] WASAT 218	4
EH [2008] WASAT 222	5
GT AND TC [2008] WASAT 225	6
MO AND JB [2008] WASAT 228	7
STATE ADMINISTRATIVE TRIBUNAL ACT 2004 (WA)	7
PJC AND RJC [2008] WASAT 224	7

EQUAL OPPORTUNITY ACT 1984 (WA)**BUKILIC AND LIFENET (WA) FINANCIAL ADVICE PTY LTD [2008] WASAT 213
17 SEPTEMBER 2008****MS J TOOHEY (SENIOR MEMBER), MS F CHILD (MEMBER)**

Discrimination - Pregnancy - Employment - Whether employer changed the applicant's conditions of employment after learning she was pregnant - Whether any changes were less favourable - Whether changes amounted to discrimination - Constructive dismissal not made out - Tribunal satisfied that probation period changed - Detriment - Respondent to pay \$1000 compensation

The applicant claimed that her former employer, through one of its employees, discriminated against her on the ground of her pregnancy. She claimed that the conditions of her employment were changed once the respondent learned that she was pregnant and that she was treated in such a way that she was constructively dismissed.

The respondent denied that there had been any change to the applicant's conditions of employment and said that any apparent changes resulted from correcting typographical errors in its offer of employment. It denied that the applicant's pregnancy had any bearing on her treatment and said she left her employment of her own accord.

The Tribunal found, on the balance of the evidence, that the respondent increased the applicant's probation period after it learned of her pregnancy and on the ground of her pregnancy. It accepted that this constituted a detriment and found that the respondent's

conduct in this regard amounted to unlawful discrimination. It ordered the respondent to pay the applicant \$1000 compensation for the distress caused by its conduct.

The Tribunal was not satisfied that the respondent discriminated against the applicant by changing her hours of employment. It did not accept that she was constructively dismissed; it found that she left her employment of her own accord.

GUARDIANSHIP AND ADMINISTRATION ACT 1990 (WA)

AR AND RR [2008] WASAT 215

17 SEPTEMBER 2008

MS J TOOHEY (SENIOR MEMBER), MR J MANSVELD (MEMBER), MS D DEAN (MEMBER)

Guardianship - Administration - Applications dismissed - Applications for costs - Whether applicant should pay contribution towards legal costs of proposed represented person - Whether applicant entitled to have costs paid by proposed represented person - Applications dismissed

The applicant had asked the Tribunal to appoint an administrator and a guardian and for his brother who he believed was suffering from depression as a result of which his health was at risk and he was vulnerable to financial exploitation.

At the time of the applications the proposed represented person had not seen a doctor for a long time and was refusing to do so. There was no medical evidence before the Tribunal about his capacity to make decisions for himself.

The proposed represented person engaged a solicitor to represent him in the proceedings, in the course of which he agreed to see a general practitioner who assessed him as capable of making decisions for himself.

The Tribunal dismissed both applications.

The proposed represented person applied for a costs order under s 87(2) of the *State Administrative Tribunal Act 2004*. He said it was reasonable for him to engage a lawyer to resist the applications. He said the applicant had acted unreasonably in bringing the applications without evidence to support them; he had been on notice from early in the proceedings that the proposed represented person would seek a costs order but he pressed on regardless. The proposed represented person asked for an order that the applicant pay half his legal costs of approximately \$14,750.

The Tribunal accepted that it was reasonable for the proposed represented person to engage a solicitor to resist the applications but it was not satisfied that there was sufficient reason to depart from the general rule in s 87(1) of the *State Administrative Tribunal Act 2004* that parties to proceedings before the Tribunal bear their own costs.

The applicant asked for an order under s 16(4) of the *Guardianship and Administration Act 1990* for his costs, which he described as significant but which he did not quantify, to be paid by his brother. He said his applications were given substance by concerns expressed by family members and others involved with his brother, the police and the Public Advocate; he had not wished the proceedings to become adversarial and it was not necessary for his brother to engage a solicitor; given the lack of medical evidence, he had been prepared to withdraw the applications but the Tribunal had decided it should hear them.

The Tribunal was not satisfied, in the circumstances, that it should make an order under s 16(4) of the Act which must be read in light of the general rule that parties bear their own costs.

The Tribunal dismissed both applications for costs.

**JR AND MC [2008] WASAT 217
19 SEPTEMBER 2008
MS D DEAN (MEMBER)**

Applications for guardianship and administration - Need for a guardian - Need for an administrator - Application by daughter to be appointed - Applications opposed by brother and son - Conflict about where the represented person should live - Disagreement as to whether represented person should have active medical treatment or palliative care - Views and wishes of the represented person - Whether in the represented person's best interests for applicant to be appointed guardian and or administrator

Applications for both guardianship and administration were made to the Tribunal in the context of extreme conflict between the applicant and her brother and uncle who opposed her decisions in relation to her mother's medical treatment and accommodation. The applicant proposed herself as both administrator and guardian.

MC, the mother, was diagnosed with terminal brain metastases associated with previously treated breast cancer and had a life expectancy of several weeks at the time of the hearing of the applications. MC's daughter was very supportive and had been making all medical and lifestyle decisions for MC after she was deemed by her treating doctors as no longer capable of doing so herself. MC had had little or no contact with her son for thirty years and she had always had a fractious relationship with her brother.

In consultation with the medical treating team, the daughter made a decision that MC not have radiotherapy treatment which had a limited chance of extending her life for a few months and improving her confusion. The brother of MC did not accept that MC had lost the capacity to make decisions for herself and did not accept the terminal nature of her illness. He wanted MC to have active treatment which he said she also wanted for herself.

The Tribunal heard evidence from the treating geriatric registrar in the hearing, which confirmed the evidence provided in written medical reports to the Tribunal, that MC was not capable of making reasonable judgments for herself and that her illness was terminal.

The Tribunal found that the daughter had been making decisions in MC's best interests and there was every indication that she would continue to do so. Furthermore, the Tribunal accepted that the daughter had made appropriate attempts to keep both the brother and the son informed and involved.

The Tribunal appointed the daughter plenary administrator and limited guardian to make medical treatment decisions and to decide where MC was to live.

**RE JMM; EX PARTE JMM [2008] WASAT 221
19 SEPTEMBER 2008**

MS F CHILD (MEMBER), MR J JAMES (SENIOR SESSIONAL MEMBER), DR D STEPNIAK (SENIOR SESSIONAL MEMBER)

Guardianship and administration - Review of appointments of the Public Advocate and the Public Trustee - Family conflict - Need for orders appointing independent decision-makers

On periodic review of guardianship and administration orders, the Tribunal confirmed the appointment of the Public Advocate as guardian for an elderly woman and the Public Trustee as administrator of her estate.

The woman had a diagnosis of dementia. Two daughters of the woman proposed that the orders, which had been made the year before, be revoked and that an enduring power of attorney, which had been revoked by the Tribunal, be reinstated. They argued that this, together with assistance from a bank, would provide for the financial management of their mother's estate.

The daughters proposed that the Public Advocate's appointment as guardian be revoked and that the conflicts about the living arrangements of their mother and the contact she had with others be worked out between the family members themselves.

None of the other family members supported the revocation of the orders and the representative of the Public Advocate submitted that the appointments should be confirmed in the best interests of the woman because of the level of the continuing conflict between family members.

The Tribunal determined that there was still a need for the appointments of both an independent administrator and guardian because of the evident conflict between the daughters and the rest of the family. The Tribunal found that the conflict might worsen or have an adverse impact on the woman if the orders were revoked. The proposals from the daughters were unrealistic as the conflict made informal decision-making about the personal and financial affairs of their mother unworkable.

The Tribunal confirmed the orders appointing the Public Advocate and Public Trustee, and revoked an enduring power of attorney by which the daughters had been appointed attorneys of their mother. The enduring power of attorney was inconsistent with the order made to reappoint the Public Trustee as administrator.

Although the Tribunal considered that the woman would wish family members to make decisions for her, this was not possible because of the ongoing family conflict, and the appointment of independent decision-makers was necessary in her best interests.

**RE SS; EX PARTE RA [2008] WASAT 218
19 SEPTEMBER 2008**

MS F CHILD (MEMBER), MS J STANTON (SENIOR SESSIONAL MEMBER), MS S GILLETT (SENIOR SESSIONAL MEMBER)

Guardianship and administration - Application to intervene in an enduring power of attorney - Donor deceased - Requirement that the applicant have proper interest to bring application - Protective trust - Trustees donees of enduring power of attorney - Whether trust transactions made 'in connection with the power'

Applications were before the Tribunal for the appointment of a guardian and an administrator for an elderly woman and for intervention in an enduring power of attorney she had executed, and were part heard when the woman died.

Although the applications for the appointment of a guardian and an administrator fell away following the woman's death, the applicant asked that his application for intervention in the enduring power of attorney proceed because he was suspicious about actions undertaken by the woman's accountant and solicitor who had been appointed trustees of a trust into which substantial funds of the woman had been transferred.

The trustees had also been appointed donees of an enduring power of attorney the woman had executed on the same day that the trust was created. These arrangements had taken place in the months before her death and the applicant remained concerned about the impact they now had on the interests of the man, also his friend, who he said had been the de facto partner of the woman.

Although the Tribunal found that the woman's memory was impaired, the medical evidence supported her capacity to execute the enduring power of attorney, and she had endorsed the creation of the trust and the reasons for it in the first hearing. The trust had been created on the advice of her accountant but the woman had had independent legal advice.

Although the Tribunal plays a supervisory role in respect of enduring powers of attorney and can intervene even where the donor of the power has died, the Tribunal determined that this was not a case for intervention because the applicant did not have a proper interest in the bringing of the application or in the financial information which could be obtained if the orders he sought were made.

The applicant had, at around the time of the applications, assisted the man who he considered to be the woman's de facto partner, in a dispute about the ownership of a property the woman had purchased. The applicant also was the donee of an enduring power of attorney executed by the man and believed him to have an interest in the funds transferred into the trust. This placed the applicant in a position of conflict in respect of his application before the Tribunal. The reason given by the applicant for the continuation of his application after the woman had died was to advance the interests of the man in the woman's deceased estate.

The transaction which raised suspicion in the mind of the applicant was a transfer by the woman of her cash assets into the trust. The transfer was not undertaken by the donees in their capacity as donees of the enduring power of attorney but as trustees. Whether the transactions were 'made in connection with the power' was arguable but did not need to be decided by the Tribunal.

The Tribunal concluded that although the Tribunal could order donees of enduring powers of attorney to account, the purpose of this role was to ensure the proper operation of enduring powers of attorney in the interests of donors in their lifetime and not for the purposes of the present application.

The Tribunal concluded that the applicant did not have a proper interest in bringing the application as required by the legislation. For this reason the application for intervention was dismissed.

EH [2008] WASAT 222

23 SEPTEMBER 2008

MS J TOOHEY (SENIOR MEMBER), MR J MANSVELD (MEMBER), MS S GILLETT (SENIOR SESSIONAL MEMBER)

Guardianship and Administration Act 1990 (WA) - Administration - Whether Tribunal can retrospectively authorise a payment or disposition of a charitable, benevolent or ex gratia nature - Protective intent of legislation - Tribunal's authority under s71(5) prospective only - No power to authorise payments retrospectively - Public Trustee's authority to relieve administrator of liability - Application dismissed

Joint plenary administrators sought an amendment to the order appointing them so as to include authorisation, after the event, of distributions from their mother's estate.

On advice from their mother's bank and Centrelink, the administrators had made two distributions of \$10,000 equally between themselves and their four siblings. The purpose was to take advantage of Centrelink's 'gifting allowance' and minimise the effect of her cash asset on her pension and her nursing home payments. There was no suggestion that the administrators acted other than in what they believed were their mother's best interests.

Section 72(3) of the *Guardianship and Administration Act 1990* prohibits an administrator from making a payment or disposition of a charitable, benevolent or ex gratia nature without the authority of the Tribunal. The Tribunal accepted that the payment in this case was ex gratia in nature. The issue was whether it could authorise a payment of this kind retrospectively.

The Tribunal found that its power under s 71(5) of the Act to allow an administrator to make a s 72(3) type payment is prospective and does not include the power to authorise retrospectively. An administrator's relief is by way of s 80 of the Act which gives the Public Trustee the function of examining accounts and the authority to relieve an administrator of liability for any certified loss.

The Tribunal dismissed the application.

Guardian and administration - Application for guardianship order - Proposed represented person having high care needs and conflict between him and his carers - Proposed represented person not accepting medical treatment and other care - Finding that proposed represented person is unable to look after his own health and safety, is unable to make reasonable judgments in respect of matters relating to his person, and is in need of oversight, care or control in the interests of his own health and safety - Consideration of role of guardian beyond formal decision-making - Finding that the proposed represented person needs a guardian who can make decisions on his behalf about medical care and treatment, but who can also provide advocacy and representation services on behalf of the proposed represented person

The Tribunal was asked to appoint a guardian for a severely disabled man with high level care needs. The proposed represented person requires 24-hour care in supported accommodation and considerable conflict has arisen between him and his carers relating to his care and medical treatment. The proposed represented person wished to remain as independent as possible and was not willing or able to accept the point of view of his carers that his health and wellbeing was placed at considerable risk by his refusal to accept treatment and care in the manner that the carers thought appropriate and necessary.

The Tribunal concluded that the proposed represented person was incapable of looking after his own health and safety, was unable to make reasonable judgments in respect of matters relating to his person, and was in need of oversight care and control in the interests of his own health and safety.

The Tribunal considered that a guardian needed to be appointed to make decisions about and give consent for any medical treatment that the proposed represented person may require.

In addition, the Tribunal considered the role of a guardian, noting two alternative approaches. One approach involves a guardian being only a substituted decision-maker, and the other involves a guardian being, in addition to that, a person who has a broader responsibility for the care and general wellbeing of the represented person. The Tribunal considered the latter approach to be the one contemplated by the *Guardianship and Administration Act 1990*.

The Tribunal concluded that the proposed represented person in this case required a guardian who could advocate generally on behalf of the represented person in relation to all matters concerning his accommodation, care and wellbeing.

The Tribunal considered whether the roles referred to above could be performed by the proposed represented person's sister, who lives interstate, and concluded that although the sister was otherwise a suitable person to be appointed, the roles contemplated by the orders to be made require a guardian to be resident in Western Australia. Accordingly, the Tribunal ordered that the Public Advocate be appointed as guardian with powers of consenting to treatment and health care and to advocate generally. The guardian was directed to liaise with the siblings of the proposed represented person to the fullest extent possible.

MO AND JB [2008] WASAT 228

26 SEPTEMBER 2008

MS J TOOHEY (SENIOR MEMBER), MS S GILLETT (SENIOR SESSIONAL MEMBER), DR D STEPNIAK (SENIOR SESSIONAL MEMBER)

Guardianship and Administration Act 1990 - Applications for appointment of administrator and intervention in enduring power of attorney - Administrator appointed - Enduring powers of attorney revoked - Applications for costs - Whether applicant's legal costs should be paid out of the estate of the represented person under s 16(4) of the Guardianship and Administration Act 1990 - Represented person ordered to pay contribution of one-half of applicant's legal costs

Cross-applications were made to the Tribunal for intervention in enduring powers of attorney made by JB and for the appointment of an administrator to manage her financial affairs. The Tribunal revoked the enduring powers of attorney and appointed an administrator. JB's capacity was in dispute and the proceedings were protracted.

At the conclusion of the proceedings, cross-applications were made by JB's niece for costs pursuant to s 16(4) of the *Guardianship and Administration Act 1990* and by JB's administrator for costs pursuant to s 87(1) of the *State Administrative Tribunal Act 2004*.

In the first application, the Tribunal ordered that one half of the niece's legal costs be paid out of JB's assets. It was satisfied that the niece acted in JB's best interests given medical evidence of her diminishing capacity due to dementia, and that she had reason to be concerned that her estate was at risk. It was relevant that, at the final hearing, JB's partner, who had previously strongly resisted the appointment of an administrator, conceded the need for an administrator and was herself appointed.

The Tribunal dismissed the application on behalf of JB. It did not accept, in the circumstances, that her niece should have exhausted other avenues before bringing the proceedings, that she inflamed the situation by doing so or that her conduct added to JB's legal costs. The Tribunal was not satisfied there was sufficient reason to depart from the rule in s87(1) of the *State Administrative Tribunal Act 2004* that parties to Tribunal proceedings bear their own costs.

STATE ADMINISTRATIVE TRIBUNAL ACT 2004 (WA)

PJC AND RJC [2008] WASAT 224

23 SEPTEMBER 2008

MR J MANSVELD (MEMBER)

Guardianship and administration - Applicant failed to give proper attention to the basis of the guardianship and administration applications - Costs - Guardianship and administration legislation is protective in its intent - Applicant has a responsibility to consider the substance of (and intent behind) applications for guardianship and administration before proceeding - Applicant to have a reasonable belief, objectively grounded, that the person for whom protection is sought is no longer capable of managing his or her affairs

On 12 November 2007, the Tribunal dismissed applications for administration and guardianship in respect of PJC made by his son RJC under the *Guardianship and Administration Act 1990*.

The applications were dismissed because there was no evidence to support the contention of RJC that PJC was no longer capable of managing his personal and financial affairs.

PJC made an application for costs of \$7,058.60 against RJC pursuant to s 87(2) of the *State Administrative Tribunal Act 2004*.

Despite being put on notice, prior to the hearing of the administration and guardianship applications, that the medical information available to the Tribunal would likely not displace the presumption of capacity under the *Guardianship and Administration Act 1990*, RJC proceeded with the applications.

RJC was unable to provide the Tribunal with any information of probative value both prior to and at the hearing to give weight to his contention that PJC could not manage his affairs other than an assertion that a daughter of PJC was influencing his decision-making.

The Tribunal found that despite the protective intent of the *Guardianship and Administration Act 1990* and the fact that RJC was unrepresented in the proceedings, RJC had failed to give proper attention to the basis of the applications for administration and guardianship.

In the circumstances, the Tribunal ordered that RJC contribute to the legal fees and disbursements incurred by PJC in the sum of \$3,697.80.