

AUSTRALIA / JUDGMENT

Wilson v Britten-Jones [2019] FCA 747

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FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA

Wilson v Britten-Jones [2019] FCA 747

File number: NSD 214 of 2019

Judge: NICHOLAS J

Date of judgment: 24 May 2019

Catchwords: PRACTICE AND PROCEDURE – application for interlocutory injunction under s 46PP of Australian Human Rights Commission Act (1986) (Cth) – whether interlocutory injunction should be granted restraining respondents from convening meeting to consider whether applicant should be expelled from partnership – whether applicant demonstrated prima facie case for relief based on breach of s 14(3) and s 94 of the Sex Discrimination Act 1984 (Cth) – interlocutory injunction refused

Legislation: Australian Human Rights Commission Act (1986) (Cth) ss 3, 46P(2), 46PD, 46PF, 46PO, 46PP

Defamation Act 2005 (NSW) s 14

Disability Discrimination Act 1992 (Cth)

Federal Court of Australia Act 1974 (Cth) s 23

Partnership Act 1981 (SA) s 28

Sex Discrimination Act 1984 (Cth) ss 5, 17(3), 94

Cases cited: Australian Broadcasting Corp v O'Neill (2006) 227 CLR 57

Purvis v State of New South Wales (Department of Education and Training) (2003) 217 CLR 92

Samsung Electronics Co Ltd v Apple Inc (2011) 217 FCR 238

Warner-Lambert Co LLC v Apotex Pty Ltd (2014) 106 IPR 218

Date of hearing: 26 February 2019

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 89

Counsel for the Applicant: Dr C Ward SC

Solicitor for the Applicant: Mills Oakley

Counsel for the Respondents: Ms K Eastman SC with Ms S Fendekian

Solicitor for the Respondents: Clyde & Co

ORDERS

NSD 214 of 2019

BETWEEN: LEXIA WILSON

Applicant

AND: TONY BRITTEN-JONES (and others named in the Schedule)

First Respondent

JUDGE: NICHOLAS J

DATE OF ORDER: 24 May 2019

THE COURT ORDERS
THAT:

1. The interlocutory injunction granted by Jagot J on 18 February 2019 be discharged.
 2. The proceeding stand over to 9.30am on 3 June 2019 for a case management hearing and any argument in relation to costs.
- Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

REASONS FOR JUDGMENT

NICHOLAS J:

Background

1 Before me is an interlocutory application by the applicant seeking an interim injunction under s 46PP of the Australian Human Rights Commission Act (1986) (Cth) ("AHRC Act") and s 23 of the Federal Court of Australia Act 1974 (Cth) ("the FCA Act").

2 The applicant, Ms Wilson, is an equity partner of the law firm, Piper Alderman. The respondents to the proceeding are her partners in the firm. The applicant has been an equity partner of the firm since 1 March 2012 and, since that time, has worked in the Property Practice Group, primarily out of the Sydney office.

3 The proceeding was commenced by the filing of an originating application on 18 February 2019. On that date Jagot J granted the applicant an interlocutory injunction until further order pursuant to s 46PP of the AHRC Act restraining the respondents from proceeding to hold any meeting to consider any resolution the effect of which was to expel the applicant from the partnership.

4 The question before me is whether the interlocutory injunction granted by Jagot J should continue or whether it should be discharged or varied. Counsel for the applicant accepted that given the circumstances in which the interlocutory injunction was obtained (ie. on an urgent basis) this was a case in which it was for the applicant to persuade me, having regard to the evidence and the relevant principles, that the existing interlocutory injunction should be continued or, if not, that some other form of interlocutory relief should be awarded in its place.

5 The interlocutory relief sought by the applicant is, relevantly, an interim injunction under s 46PP of the AHRC Act and/or s 23 of the FCA Act restraining the respondents from proceeding to hold any meeting to consider a resolution the effect of which is to expel the applicant from the partnership until further order of the Court.

6 By her originating application, the applicant seeks various declarations against the respondents declaring that the first respondent (Mr Britten-Jones) contravened s 5 of the Sex Discrimination Act 1984 (Cth) ("the SD Act") and that the other respondents caused, aided or permitted him to engage in such conduct. The other respondents include the Chairman of Partners (Mr Gordon Grieve), the head of the Sydney office of the firm (Mr Simon Morris) and Mr Tim Capelin (a partner who has expertise in employment law), each of whom has had dealings with the applicant in relation to the matters which have given rise to this proceeding.

7 The applicant also seeks a declaration that the respondents contravened s 94(2) of the SD Act by committing an act of victimisation, namely, by purporting to deliver a notice of meeting of the equity partners of Piper Alderman dated 23 January 2019 seeking to move to expel the applicant from the partnership for reasons that included that she made allegations that the respondents had acted unlawfully by reason of a provision of Part II of the SD Act.

8 A further declaration sought by the applicant is that:

... the Respondents contravened s 5 of the SD Act by discriminating against the Applicant on the ground of her sex by:

- (a) Treating less favourably than male Respondents in the face of alleged bullying complaints and other allegations of unlawful conduct, including complaints and other allegations made against male Respondents alleging unlawful breaches of the SD Act;
- (b) Seeking to prevent the Applicant from enjoying sabbatical benefits under the Partnership Agreement that accrue with effect from 1 March 2019;
- (c) Failing to rendering to the Applicant's legal representatives the full information requested in the Applicant's legal representatives' letter dated 18 January 2019;
- (d) Excluding the Applicant from access to the Respondent's office in Sydney on 16 January 2019; and
- (e) Issuing the purported Notice.

9 The applicant also seeks a declaration that the notice of meeting was invalid and of no legal effect, together with a declaration that the respondents have contravened s 28 of the Partnership Act 1981 (SA) ("Partnership Act") by not rendering to the applicant's legal representatives the full information requested in a letter from the applicant's lawyers to the respondents dated 18 January 2019.

10 Damages are also sought for contraventions of the SD Act and breaches of the partnership agreement. Equitable compensation is also claimed for breaches of fiduciary duty owed by the respondents to the applicant.

11 The originating application filed by the applicant was not accompanied by a statement of claim or a concise statement. Nor does the originating application include any form of proposed declaration or injunction to indicate in what respect each of the respondents is alleged to have breached any fiduciary duty owed by them to the applicant.

12 In late October 2018 complaints were made against the applicant by two employees of the firm who were members of her practice group. In essence, the complaints concerned allegations of workplace bullying by the applicant of two more junior lawyers working under her supervision. I shall refer to them as Lawyer A and Lawyer B. On 9 November 2018, the Managing Partner of the firm, Mr Britten-Jones, informed the applicant of the two complaints.

13 The complaints were referred by Mr Britten-Jones to Mr Capelin who on or about 23 November 2018 referred them to a barrister, Ms Penny Thew, for investigation. She commenced her investigation soon afterwards, which appears to have been completed on about 14 December 2018. The report in what appears to be final form is dated 21 December 2018.

14 On 6 January 2019 Mr Britten-Jones wrote to the applicant informing her that she would receive a copy of the final report the next day. Mr Britten-Jones requested a response from her within the next seven days. He informed her that, in his capacity as Managing Partner, he was removing her from various positions that she held within the firm including Property Practice Team Leader and Deputy Managing Partner. Ms Thew's report was provided to the applicant on 7 January 2019.

15 There followed some short but seemingly polite email correspondence between Mr Britten-Jones and the applicant concerning her work arrangements. They agreed upon an arrangement which would allow the applicant to work from home and which would involve her spending as little time in the office as was feasible. The two employed solicitors who had made the complaints against the applicant were at that time still working in the Property Practice Group.

16 On 14 January 2019 Mills Oakley, who were by this time acting for the applicant, wrote to Mr Britten-Jones. The letter, written by Mr Malcom Davis, a partner of that firm, made a number of allegations and threats.

17 First, Mr Davis alleged that during a meeting held on 22 November 2018 Mr Britten-Jones engaged in "inappropriate bullying conduct". It was alleged that the applicant suffered a personal injury as a consequence of this conduct. The letter did not provide any meaningful particulars of the alleged conduct or the alleged injury.

18 Secondly, Mr Davis informed Mr Britten-Jones that he had advised the applicant that she has "separate rights in defamation" against three-named individuals including, Lawyer A and Lawyer B. The letter stated that Mills Oakley anticipated that in the near future they would be issuing each of those individuals with a "Concerns Notice" (see s 14 of the Defamation Act 2005 (NSW)).

19 Thirdly, the letter included a set of complaints as to the procedures adopted by Ms Thew and also the fact that there had been no mediation as an alternative to Ms Thew's appointment. The letter suggests that this manner of proceeding was contrary to the complaints handling procedure set out in the Grievance Resolution Policy of the firm.

20 Fourthly, the letter suggested that Ms Thew was not sufficiently experienced to undertake the investigation entrusted to her and that the matter should have been instead referred to a more senior practitioner.

21 Fifthly, the letter stated that the applicant had concerns regarding the integrity of a number of witnesses and suggested that one of them (who was not Lawyer A or Lawyer B) gave evidence that was "completely fictitious".

22 Sixthly, Mr Davis stated that his client was "... deeply troubled that falsified documents were provided to the investigator". That allegation apparently relates to an exit interview conducted with another solicitor who was previously employed by the firm and who had worked under the applicant's supervision prior to her resignation.

23 Seventhly, Mr Davis asserted that the investigation process was fundamentally flawed in that one or more of the complainants was interviewed by Ms Thew only after she interviewed the applicant. It was alleged that this approach was unconventional, and gave rise to a denial of natural justice in that the witnesses' allegations and assertions were never put to the applicant.

24 Mr Davis' letter of 14 January 2019 was responded to on behalf of the firm the following day by Mr Capelin. The allegations of bullying made against Mr Britten-Jones were denied.

25 With regard to the threat to send Concern Notices to the two complainants and a witness, Mr Capelin said that the firm considered that this amounted to further bullying behaviour by the applicant and an attempt by her to victimise witnesses in the investigation. He demanded that the threats be unconditionally withdrawn by 5.00pm the following day and that, if they were not, the applicant would be excluded from the workplace until the matter was finalised.

26 In his letter, Mr Capelin also stated that Mr Britten-Jones was considering Ms Thew's report and the applicant's response and that he would shortly decide how to proceed. He also stated that the applicant should be aware that there was a real possibility that a resolution would be put to a special meeting of the equity partners of the firm to expel her from the partnership.

27 The undertakings sought by Mr Capelin were not provided but on 17 January 2019 various undertakings were given to him by Mr Davis on behalf of the applicant. Those undertakings were as follows:

1. Our client will not, while she remains an equity partner of Pipers, issue Concern Notices to ... anyone involved in the Investigation conducted by Penny Thew relating to her alleged conduct in 2018, and

2. Whilst our client does not concede that exercising her statutory right to issue Concerns Notices in respect of alleged defamatory publications constitutes unlawful victimisation (as is inferred by you), our client will not, while she remains an equity partner of Pipers, engage in any conduct that constitutes unlawful victimisation towards ... anyone involved in the Investigation conducted by Penny Thew relating to her alleged conduct in 2018.
3. The above undertakings will lapse should any of the following occur:-
 - a. any partner of the [sic] Pipers seeks to interfere in any way with our client's attendance at the Premises or any of Pipers other offices or to act in a way that might prejudice her performance of services for client's; or
 - b. the current without prejudice dialogue between the parties is formally concluded, by the giving of 48 hours written notice to Pipers from our client, without an amicable resolution having been concluded.

28 Later that day Mr Capelin sent an email to Mr Davis confirming that on the basis of the undertakings the applicant had given, her access to the premises would be restored whilst without prejudice discussions between the parties continued.

29 On 18 January 2019 Mr Davis sent his response to Mr Capelin's letter of 15 January 2019. In his letter of response Mr Davis provided more information concerning the alleged bullying by Mr Britten-Jones. He asserted:

To be clear, our client alleges that since at least 23 October 2018, in breach of his fiduciary duties and contractual obligations to our client, Mr Britten-Jones has, by his actions and omissions, engaged in a course of unlawful, unreasonable, offensive, bemeaning [sic], belittling, victimising, intimidating, threatening and other inappropriate conduct towards our client intended to cause our client injury, including psychological injury, to bring about her departure from the partnership.

I will say more about this letter later in these reasons but I should draw attention to the extravagance of the language used and the fact that there was no attempt made in the applicant's evidence or her counsel's submissions to justify, even if only on a prima facie basis, the suggestion that Mr Britten-Jones had intentionally sought to cause the applicant injury either by lawful or unlawful conduct. The inflammatory tone of that letter, apparently written on the applicant's instructions, appears to reflect a remarkable lack of moderation and self-restraint.

The Relevant Statutory Provisions

30 Section 17(3) in Part II of the SD Act provides:

- (3) It is unlawful for any one or more of the partners in a partnership consisting of 6 or more partners to discriminate against a partner in the partnership on the ground of the partner's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

- (a) by denying the partner access, or limiting the partner's access, to any benefit arising from being a partner in the partnership;
- (b) by expelling the partner from the partnership; or
- (c) by subjecting the partner to any other detriment.

31 Section 5(1) of the SD Act provides:

- (1) For the purposes of this Act, a person (in this subsection referred to as the discriminator) discriminates against another person (in this subsection referred to as the aggrieved person) on the ground of the sex of the aggrieved person if, by reason of:
 - (a) the sex of the aggrieved person;
 - (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
 - (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.

32 Section 94 of the SD Act relevantly provides:

- (1) A person shall not commit an act of victimization against another person.

Penalty:

- (a) in the case of a natural person—25 penalty units or imprisonment for 3 months, or both; or
- (b) in the case of a body corporate—100 penalty units.
- (2) For the purposes of subsection (1), a person shall be taken to commit an act of victimization against another person if the first mentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:
 - (a) has made, or proposes to make, a complaint under this Act or the Australian Human Rights Commission Act 1986; or

...

or on the ground that the first mentioned person believes that the other person has done, or proposes to do, an act or thing referred to in any of paragraphs (a) ...

- (3) It is a defence to a prosecution for an offence under subsection (1) constituted by subjecting, or threatening to subject, a person to a detriment on the ground that the person has made an allegation that another person had done an act that was unlawful by reason of a provision of Part II if it is proved that the allegation was false and was not made in good faith.

33 Section 3 of the AHRC Act defines "unlawful discrimination" to mean "acts, omissions or practices that are unlawful" under (inter alia) Part II of the SD Act and includes any conduct that is an offence under (inter alia) s 94 of the SD Act.

34 A person aggrieved by alleged "unlawful discrimination" may lodge a complaint with the Australian Human Rights Commission ("the Commission") (s 46P(2)) within six months of the alleged unlawful discrimination (s 46PH(1)(b)). The complaint in the present case was lodged by or on behalf of the applicant on 30 January 2019.

35 The Commission must refer the applicant's complaint to the Commission's President (s 46PD) who must inquire into the complaint, terminate the complaint or inquire into and attempt to conciliate the complaint (s 46PF). So far as the evidence discloses, the applicant's complaint is still with the Commission and has not yet been terminated.

36 It is only when the complaint has been terminated that the applicant in the present case can make an application to this Court under s 46PO alleging unlawful discrimination by one or more of the respondents to the complaint.

37 Section 46PO relevantly provides:

46PO Application to court if complaint is terminated

(1) If:

- (a) a complaint has been terminated by the President under section 46PE, paragraph 46PF(1)(b) or section 46PH; and
- (b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination;

any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Circuit Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

(2) The application must be made within 60 days after the date of issue of the notice under subsection 46PH(2), or within such further time as the court concerned allows.

(3) The unlawful discrimination alleged in the application:

- (a) must be the same as (or the same in substance as) the unlawful discrimination that was the subject of the terminated complaint; or
- (b) must arise out of the same (or substantially the same) acts, omissions or practices that were the subject of the terminated complaint.

(3A) The application must not be made unless:

- (a) the court concerned grants leave to make the application; or

- (b) the complaint was terminated under paragraph 46PH(1)(h); or
- (c) the complaint was terminated under paragraph 46PH(1B)(b).
- (4) If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:
 - (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
 - (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
 - (c) an order requiring a respondent to employ or re-employ an applicant;
 - (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
 - (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
 - (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.
- ...
- (6) The court concerned may, if it thinks fit, grant an interim injunction pending the determination of the proceedings.
- (7) The court concerned may discharge or vary any order made under this section (including an injunction granted under subsection (6)).
- (8) The court concerned cannot, as a condition of granting an interim injunction, require a person to give an undertaking as to damages.

38 The Court is given power under s 46PO(5) to grant an interim injunction pending the determination of the proceeding in which the application under s 46PO(1) is made. However, a different provision of the AHRC Act (s 46PP) confers the Court with jurisdiction to grant an interim injunction prior to the termination of a complaint. I will refer to this provision in more detail shortly.

The relevant Principles

39 Section 23 of the FCA Act confers on the Court a general power to make interlocutory orders as it thinks appropriate. Despite the wide language of the section, the power conferred by it may only be exercised in accordance with some well settled principles.

40 There is no dispute between the parties as to the principles to be applied in deciding whether to grant or withhold the interlocutory relief sought by the applicant. They were considered by the High Court in *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57. In that case, Gummow and Hayne JJ said at [65]:

[65] The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [(1968) 118 CLR 618; [1968] ALR 469]. This court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued [(1968) 118 CLR 618 at 622–623; [1968] ALR 469 at 470–1]:

"The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."

By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument [(1968) 118 CLR 618 at 620; [1968] ALR 469 at 468]. With reference to the first inquiry, the court continued, in a statement of central importance for this appeal [(1968) 118 CLR 618 at 622; [1968] ALR 469 at 470]:

"How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks."

See also *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238 at [52]–[67] and *Warner-Lambert Co LLC v Apotex Pty Ltd* (2014) 106 IPR 218 at [68]–[72]. As the judgments in those cases also emphasised, the apparent strength of an applicant's case may be an important consideration in determining whether the balance of convenience favours granting or withholding interlocutory relief.

41 During the course of the hearing of the interlocutory application the applicant placed primary reliance upon s 46PP of the AHRC Act. It provides:

46PP Interim injunction to maintain status quo etc.

- (1) At any time after a complaint is lodged with the Commission, the Federal Court or the Federal Circuit Court may grant an interim injunction to maintain:
 - (a) the status quo, as it existed immediately before the complaint was lodged; or
 - (b) the rights of any complainant, respondent or affected person.

- (2) The application for the injunction may be made by the Commission, a complainant, a respondent or an affected person.
- (3) The injunction cannot be granted after the complaint has been withdrawn under section 46PG or terminated under section 46PE, paragraph 46PF(1)(b) or section 46PH.
- (4) The court concerned may discharge or vary an injunction granted under this section.
- (5) The court concerned cannot, as a condition of granting the interim injunction, require a person to give an undertaking as to damages.

42 Section 46PP(1) is the source of the Court's jurisdiction to grant an interim injunction in respect of a complaint lodged under s 46PP(2) of the AHRC Act before it has been terminated. However, it does not confer jurisdiction on the Court to grant an interim injunction in support of the applicant's case on grounds unrelated to the complaint lodged by the applicant with the Commission. The Court may only grant an injunction under s 46PP(1) in order to maintain the status quo, as it existed immediately before the complaint was lodged (subpara (a)), or to maintain the rights of any complainant, respondent or affected person (subpara (b)). It is clear that "the rights" referred to in subpara (b) of s 46PP(1) are rights under the AHRC Act which may ultimately be recognised or enforced by orders made by the Court pursuant to s 46PO(4).

The Evidence

43 The applicant relied on affidavits made by her on 5 February 2019, 8 February 2019, 22 February 2019 and 26 February 2019, together with an affidavit of her solicitor, Mr Davis, made on 18 February 2019. The respondents relied on affidavits made by Mr Morris on 18 February 2019 and Kiri Wilkinson also made on 18 February 2019. None of the deponents was cross-examined. The evidence includes a copy of Ms Thew's report and its annexures, the partnership agreement, and a notice convening a partners' meeting dated 23 January 2019 signed by Mr Britten-Jones.

The Complaint

44 The evidence also includes the written complaint lodged by the applicant with the Commission dated 30 January 2019 in which she alleges that she has been discriminated against by the respondents because of her sex. The complaint also includes an allegation by the applicant that she has been victimised because she made, or tried to make, a complaint about that discrimination. According to the applicant's complaint, the events that are alleged to have given rise to it occurred in "October 2018 to date and continuing". The complaint includes as an annexure a summary of the applicant's allegations against the respondents.

45 According to the summary, the applicant alleges that she was advised for the first time that complaints had been made in relation to her alleged conduct in the workplace on 9 November 2018 and that, on 23 November 2018, the complaints were referred for external investigation. The summary alleges that the respondents did not inform her of the complaints when they were first made as would have been the case had she been a male partner of the firm.

46 The summary alleges that the external investigation process, and its findings, were fundamentally flawed. The summary also alleges that on 16 January 2019, the respondents caused the applicant's access to its Sydney office to be cancelled with access to the office being restored the following day. The summary makes no mention of the circumstances that led up to the cancellation of the applicant's access to the office or the basis on which it was restored.

47 The summary further alleges that on 18 January 2019, the applicant wrote to Mr Capelin of Piper Alderman alleging that the managing partner, Mr Britten-Jones, and others had acted unlawfully by treating the applicant differentially, unfairly and less favourably when compared to their treatment of senior male staff and partners.

48 The summary also refers to a notice to produce issued by the applicant to Piper Alderman pursuant to s 28 of the Partnership Act and an alleged failure to comply or respond to that notice to produce.

49 The summary also refers to a notice issued by Piper Alderman on 23 January 2019 purporting to convene a meeting on 5 February 2019 for the purpose of considering a resolution to expel the applicant as a partner of the firm with effect from 15 February 2019.

50 These matters are relied upon in support of a general allegation to the effect that the respondents subjected the applicant to unfair and less favourable treatment that the applicant has received as a senior female partner of the firm as compared to her male partners.

51 The summary alleges that the respondents engaged in conduct in breach of s 17(3) of the SD Act on the grounds of the applicant's sex by:

- (a) Treating her less favourably than male Respondents in the face of alleged bullying complaints and other allegations of unlawful conduct, including complaints and other allegations made against male Respondents alleging unlawful breaches of the SD Act;
- (b) Seeking to prevent the Applicant from enjoying sabbatical benefits under the Partnership Agreement that accrue with effect from 1 March 2019;
- (c) Failing to render to the Applicant's legal representatives the full information requested in the Applicant's legal representatives' letter dated 18 January 2019;
- (d) Excluding the Applicant from access to the Respondent's office in Sydney on 16 January 2019; and
- (e) Convening the Meeting to Expel the Applicant.

52 The summary also includes allegations of victimisation in breach of s 94(2)(a) and s 94(2)(f) of the SD Act whereby the respondents are alleged to have subjected the applicant to a detriment by seeking to convene a meeting to expel the applicant from the partnership and failing to comply with the notice to produce. It is alleged that the respondents subjected the applicant to these detriments for reasons including that the applicant had alleged that Piper Alderman had acted unlawfully by reason of s 17(3) of the SD Act.

53 The summary includes what are said to be some examples of differential treatment that the applicant says she has witnessed involving senior male partners and staff who she says have not been subjected to comparable scrutiny by the firm. Four specific examples of such conduct are given. The summary also states that, to the best of the applicant's knowledge, the only time that there has been an expulsion meeting held in relation to a partner of the firm concerned a partner who was found to have been stealing.

The Strength of the Applicant's Case

54 In spite of what the declaration referred to in the originating application says, it is clear that the applicant alleges that the respondents have contravened s 17(3) of the SD Act. In that regard, it is important to note that s 5 of the SD Act is merely definitional. It defines what will constitute discrimination for the purposes of s 17(3). It does not have any operation that is independent of s 17(3) or other relevant provisions of the Act. Nevertheless, s 5 is critical to the operation of s 17(3) and it is therefore necessary to say a little more about its operation.

55 The plurality in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 ("Purvis") said at [213]-[214]:

[213] Section 5(1) of the Act requires comparison between the treatment which the discriminator gives, or proposes to give, to the aggrieved person and the treatment that the discriminator would give, or would propose to give, to a person without the aggrieved person's disability "in circumstances that are the same or are not materially different". If that comparison reveals that the disabled person was treated less favourably, the further question which must be asked is whether that was because of the disabled person's disability. Section 5(1), therefore, requires equality of treatment between the disabled and those who are not. Attention is invited to how the discriminator "treats or would treat a person without the disability" (emphasis added). The "comparator" identified by s 5(1) is "a person without the disability".

[214] The comparison that is to be made is of the treatment given or proposed to be given to the disabled person and the treatment of a person without the disability "in circumstances that are the same or are not materially different". Recognising that s 5(1) requires comparison with the treatment that would be given to a person without the disability is critical to the proper application of the Act. It is a comparison which is very different from the comparisons required by other forms of disability discrimination legislation.

56 *Purvis* was a case concerned with a complaint under the Disability Discrimination Act 1992 (Cth) which included a provision in substantially the same terms as s 5(1) of the SD Act but which was concerned with discrimination by reason of disability. It was common ground before me that the reasoning in *Purvis* applies to s 5(1) of the SD Act.

57 It follows that in the present case, for the purposes of assessing the strength of the applicant's case based on s 17(3), it is important to note that the applicant will ultimately need to show that she was treated less favourably than a man in the same or not materially different circumstances, and that a reason for that less favourable treatment was that she is a woman.

58 There are several observations to make in relation to the particular matters the subject of the complaint to the Commission.

59 First, the applicant alleges that the partners have attempted to prevent her from enjoying "sabbatical benefits" under the partnership agreement that accrue with effect from 1 March 2019. I accept that sabbatical benefits may be a relevant benefit under subpara (a) of s 17(3). It is then necessary to ask whether those benefits have or will be denied on the grounds that the applicant is a female.

60 The evidence does not provide any support for the suggestion that the partners were seeking to prevent the applicant from enjoying any sabbatical benefits accruing to her as at 1 March 2019 because she was a female. In any event, the applicant's sabbatical benefits have now accrued. Damages would be an adequate remedy in the event that the applicant was found to have been unlawfully deprived of her sabbatical benefits in breach of s 17(3). I do not see the matter of sabbatical benefits as having any real bearing on the applicant's application for interlocutory relief.

61 Secondly, the applicant alleges that the respondents breached s 17(3) by failing to provide to the applicant's legal representatives all the information requested in their letter of 18 January 2019. Whatever else may be said about this ground of complaint, it does not provide a justification for the interlocutory relief that is sought by the applicant. If the applicant has a right to obtain information under s 28 of the Partnership Act, then it was open to her to apply for orders remedying that situation.

62 Thirdly, the applicant alleges that the respondents breached s 17(3) of the SD Act in that they excluded the applicant from the Sydney office on 16 January 2019. I have already explained the circumstances surrounding that event. While it may be accepted that excluding a partner from the partnership's business premises may fall within either subpara (a) or subpara (b) of s 17(3), in the present case that action, as short lived as it was, could not provide a reasonable basis on which to grant the interlocutory relief sought by the applicant.

63 The most significant matter identified by the applicant in the summary attached to her complaint concerns the convening of a meeting of the partners to consider and vote on a resolution that the applicant be expelled as a partner. The substance of the applicant's complaint in this regard is that one or more of her partners had sought, or at least proposed, to convene a meeting at which such a resolution might be passed. The applicant's case is that she would not have been dealt with in that way were it not for the fact that she is a female and that other male partners in what she says were circumstances that were not materially different from her own, were not subjected to this form of detriment.

64 I did not understand the respondents to submit that subjecting the applicant to the expulsion process could not amount to subjecting her to a "detriment" within the meaning of s 17(3)(c). For the purpose of determining the present application, I accept that it can. However, the respondents submitted that the reason for subjecting the applicant to the expulsion process had nothing to do with the fact that she is a woman.

65 The notice to convene the meeting of equity partners dated 24 January 2019 that is in evidence is signed by Mr Britten-Jones and includes detailed reasons why he intends to propose the resolution to expel the applicant from the partnership. It is not necessary to set his reasons out in detail but they refer, amongst other things, to the complaints of bullying made against the applicant and her response to them when they were raised by Mr Britten-Jones and Mr Grieve during the course of the meeting on 22 November 2018. In his reasons, Mr Britten-Jones says the applicant denied the complaints of bullying, and insisted on formally responding to them, which led him to ask Mr Capelin to arrange for an independent investigator to be engaged to undertake an investigation into the complaints. It was as a result of Mr Capelin doing so that Ms Thew was engaged.

66 Mr Britten-Jones' reasons also refer to Mr Davis' correspondence to which I have previously referred including his letter of 14 January 2019 making allegations of bullying against Mr Britten-Jones and threats to sue the complainants for defamation. According to Mr Britten-Jones' reasons, these threats against the complainants may well be seen as a continuation of the applicant's bullying behaviour, a breach of the Fair Work Act 2009 (Cth), and a breach of the applicant's fiduciary duties to the partners. It is not necessary or appropriate to draw any conclusions as to the correctness of those statements, but when one has regard to Mr Davis' correspondence I think there is some force in what Mr Britten-Jones said on this topic.

67 In his reasons, Mr Britten-Jones also sets out why it is he says that he has lost trust and confidence in the applicant as a partner and why he sees no solution other than for her to be expelled from the partnership. He also states that the partners will need to decide for themselves whether they retain sufficient trust and confidence in the applicant for her to remain as their partner. He then goes on to consider the financial impact of the applicant's departure on the other partners.

68 Mr Britten-Jones' reasons conclude by noting that the applicant will be given an opportunity to address the meeting and make written and oral submissions to the partners before they make their decision.

69 Counsel for the applicant, submitted that there was a prima facie case of direct discrimination against the respondents based on an inference arising out of the partners' prior treatment of male partners. When I asked counsel from what facts that inference should be drawn he submitted:

The facts...are that my client is, on any view of it, a strong female partner in a leadership position. She has been treated entirely differently to male partners who have been facing similar or identical allegations. The only distinguishing feature between them is one of sex. That's the –

that's the inference we ask your Honour to draw from what's put. I can't put it much higher than that, but we say that's – that's the only inference that can be drawn. A male partner – a male partner in the same position would not have faced an expulsion motion on such a flimsy pretext as this. And the evidence shows, in fact, that that's not what happened to the male partners who are the direct comparators.

70 The male partners who counsel submitted had faced similar or identical allegations are referred to in the applicant's confidential affidavit. I am not satisfied that the other cases described by the applicant in that affidavit are cases of which it may be said that the male partners faced (in counsel's language) similar or identical allegations. The allegations made in those cases do not appear to be the same or similar to those made against the applicant.

71 Moreover, it seems to me that the applicant's response to the complaints made against her and the correspondence in which she engaged following her receipt of the Ms Thew's report, are likely to distinguish the applicant's circumstances from those of the male colleagues to whom she has referred.

72 I am therefore not prepared to infer, even on a prima facie basis, that the applicant's circumstances are either "the same or not materially different" to that of any of the other partners whom she has identified.

73 There is also nothing in the evidence to suggest that Mr Britten-Jones' or any other respondent's treatment of the applicant had anything to do with the fact that she was a female partner of the firm.

74 Evidence given by Mr Morris indicates that since 2016 the firm has appointed 22 new partners, 10 of whom are women. In 2018 five appointments were made and three of those appointments were women. Of course, it does not follow that the applicant may not have been the subject of unlawful discrimination on account of her being a woman. However, that evidence, as general as it is, does not suggest to me that the partnership would be inclined to expel, or take steps to expel, a partner for the reason, or for reasons that include, that the partner is a woman.

75 It is important to bear in mind that the applicant need only establish a prima facie case. But to do this she must show a sufficient likelihood of success to justify the grant of an interlocutory injunction that would prevent her partners from considering any motion to expel her from the partnership until termination of her complaint or further order. In my opinion the applicant has failed to do so.

76 So far as the allegations made against the respondents based on s 94 are concerned, there was some debate before me as to whether or not conduct constituting victimisation could provide a basis for civil proceedings. The respondents submitted that recent decisions suggest that the Court has no jurisdiction to deal with victimisation in civil proceedings. Reference was made to *Walker v State of Victoria* [2012] FCAFC 38 at [98]-[100]; *Chen v Monash University* [2016] FCAFC 66 at [123]; *Chen v Birbilis* [2016] FCA 661 and *Hazledine v Arthur J Gallagher Australia & Co (Aus) Limited* [2017] FCA 575 at [6]; and *Winters v Fogarty* [2017] FCA 51 at [24] (with respect to

determining such a question on an interlocutory basis).

77 It is not necessary in my view to embark on a consideration of those authorities. Mr Britten-Jones' notice to convene a meeting was circulated to the partners on 23 January 2019. In his reasons Mr Britten-Jones refers to what he characterises as the applicant's "retaliatory allegations of bullying" made against him in the correspondence from Mr Davis. In particular, Mr Britten-Jones stated in his reasons that the applicant "... made an allegation of bullying against me [and is] threatening to sue both of the complainants ... for defamation ...".

78 There is no reference in Mr Britten-Jones' reasons to any complaint or proposed complaint by the applicant to the Commission and nothing in the document to suggest that Mr Britten-Jones issued the document on the ground that the applicant had made, or proposed to make, a complaint under the SD Act or that she had made any allegation that Mr Britten-Jones (or any other respondent) had done any act that may be unlawful by reason of a provision of Part II of the SD Act.

79 I do not think there is any arguable basis for drawing an inference that Mr Britten-Jones issued the notice of meeting on any of the grounds referred to in s 94(2) of the SD Act. In the circumstances, I am not satisfied that the applicant has any arguable case that he or any other of the respondents have committed an act of victimisation against the applicant within the meaning of s 94(2) of the SD Act.

80 Counsel for the applicant also made submissions which sought to justify the continuation of the interlocutory injunction on the basis that the respondents had breached, or were threatening to, breach fiduciary duties owed by them to the applicant. In essence, these submissions were founded on vague allegations of bad faith made against Mr Britten-Jones and, perhaps, other partners of the firm who it was suggested were seeking to procure a resolution of the partners expelling the applicant from the partnership for some improper purpose.

81 There is some evidence to suggest that Mr Britten-Jones, Mr Grieve and perhaps other partners of the firm may wish to see the applicant leave the firm for reasons that are unrelated to any of the allegations of bullying that were made against her. The suggestion was said by the applicant's counsel to find support in some documents that are referred to in the affidavit by Mr Davis that he made following an inspection of documents produced to him by the respondents.

82 I do not regard the evidence on this issue as persuasive. It is essentially secondary evidence of the contents of fragments of documents that could easily have been put into evidence by the applicant following the issue of a notice to produce. I raised this with counsel for the applicant during the hearing, even suggesting that he make a call for the documents that Mr Davis referred to in his affidavit. That suggestion was not taken up.

83 In any event, to the extent that there is any force in the suggestion that Mr Britten-Jones, or any other partner, may wish to see the applicant leave the firm for reasons other than set out in Mr Britten-Jones' notice of meeting, there is no reason to think that it has anything to do with the applicant's sex.

84 The principal difficulty I have with the applicant's claim to interlocutory relief based on breach of fiduciary duty is the absence of any evidence to suggest that Mr Britten-Jones or any other partner wishes to see the applicant expelled from the partnership for some improper purpose. The only improper purpose that the applicant has identified is expulsion of the applicant for the reason, or reasons that include, the fact that the applicant is a woman or that she had made or may make a sexual discrimination complaint against the partners. For reasons I have already explained, I do not think the evidence provides any support for either of those contentions.

Balance of Convenience

85 In my view the balance of convenience weighs heavily against the applicant being granted the interlocutory injunction she seeks. The partnership agreement confers on the partners of the firm the right to expel a partner if a resolution is passed by not less than 75% of those partners who are present at a partnership meeting either in person or by proxy. The right to expel a partner is an important one, particularly for the partners of a law firm who have important legal and ethical obligations and responsibilities to clients, staff and each other. It is not suggested by the applicant in her evidence or otherwise that she will not be given the opportunity to address her partners in writing and in person to explain why she says she should not be expelled if such a motion is put to the partnership.

86 There may well be cases in which it is appropriate to grant an interlocutory injunction restraining the partners from exercising their right to convene a meeting for the purpose of determining whether or not a partner should be expelled where there is a prima facie case that the convening of such meeting or the passing of such a resolution, would be unlawful. For the reasons I have explained, I am not satisfied that the applicant has demonstrated a sufficiently arguable case that either the convening of a meeting to consider whether or not to expel the applicant from the partnership, or the passing of a resolution to that effect, would be unlawful or in breach of any of her rights.

Disposition

87 The applicant's application for a continuation of the existing interlocutory injunction is refused. The injunction granted by Jagot J on 18 February 2019 will be discharged.

88 The parties have requested that they be given an opportunity to be heard on the question of costs. For that reason, I do not propose to make any order for costs at this stage.

89 Orders accordingly.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas.

Associate:

Dated: 24 May 2019

SCHEDULE OF PARTIES

NSD 214 of 2019

Respondents

Second Respondent: Shannon Adams

Third Respondent: Florian Ammer

Fourth Respondent: Michael Bacina

Fifth Respondent: Andrea Beatty

Sixth Respondent: Donna Bengé

Seventh Respondent: Megan Calder

Eighth Respondent: Tim Capelin

Ninth Respondent: Tim Clark

Tenth Respondent: Tim Coleman

Eleventh Respondent: James Dickson

Twelfth Respondent: Peter Dwyer

Thirteenth Respondent: Geoff Emmett

Fourteenth Respondent: David Ey

Fifteenth Respondent: Anne Freeman

Sixteenth Respondent: Mark Gordon

Seventeenth Respondent: Sebastian Greene

Eighteenth Respondent: Gordon Grieve

Nineteenth Respondent: Tom Griffith

Twentieth Respondent: Chris Hartigan

Twenty First Respondent: Sina Kassra

Twenty Second Respondent: Tim Lange

Twenty Third Respondent: Michael Lhuede

Twenty Fourth Respondent: Martin Lovell

Twenty Fifth Respondent: Simon Morris

Twenty Sixth Respondent: Ian Nathaniel

Twenty Seventh Respondent: Tim O'Callaghan

Twenty Eighth Respondent: Andrew Rankin

Twenty Ninth Respondent: Robert Riddell

Thirtieth Respondent: Andrew Robertson

Thirty First Respondent: Thomas Russell

Thirty Second Respondent: Greg Taylor

Thirty Third Respondent: Simon Venus

Thirty Fourth Respondent: Simon Ward

Thirty Fifth Respondent: Ashley Watson

Thirty Sixth Respondent: Greg Whyte

Thirty Seventh Respondent: Ted Williams

Thirty Eighth Respondent: Mark Williamson

Thirty Ninth Respondent: Bruce Cameron

Fortieth Respondent: Michael Coker

Forty First Respondent: James MacDonald

Forty Second Respondent: Alasdair McLean

Forty Third Respondent: Hugh Scales

Forty Fourth Respondent: MJC Legal Pty Ltd ACN 127 069 229 as trustee of the MJC Legal Trust

Forty Fifth Respondent: JAM Legal Pty Ltd ACN 127 357 046 as the trustee of the JAM Legal Trust

Forty Sixth Respondent: ARM Legal Pty Ltd ACN 600 054 037 as trustee of the ARM Legal Trust

Forty Seventh Respondent: HS Legal Pty Ltd ACN 127 356 852 as the trustee of the HS Legal Trust

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Prepared on 29 October 2026 · Esheria