

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 1519/20
Applicant: Jason Burnie
Respondent: Ku-ring-gai Council
Date of Determination: 7 May 2020
Citation: [2020] NSWCC 141

The Commission determines:

1. The respondent's application for leave to cross-examine the applicant is declined.

A statement is attached setting out the Commission's reasons for the determination.

Rachel Homan
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

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Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. These proceedings concern an Application to Resolve a Dispute by which Mr Jason Burnie (the applicant) seeks compensation in respect of a psychological injury which he alleges occurred in the course of his employment with Ku-ring-gai Council (the respondent). In particular, the applicant claims that he was subjected to repeated adverse conduct by management including, regular and repeated derogatory comments and directions to perform tasks that were unreasonable.
2. At teleconference on 16 April 2020, the respondent foreshadowed an application to cross-examine the applicant. Noting that the Commission was operating under a protocol whereby conciliation conferences and arbitration hearings were being conducted by telephone in response to the COVID-19 situation, the respondent was directed serve and file before 30 April 2020 a brief written statement outlining:
 - (a) whether an application to cross-examine the applicant was made; and if so,
 - (b) the matters on which the respondent wished to cross-examine the applicant;
 - (c) why the cross-examination was considered necessary, and
 - (d) whether any such cross-examination could be performed by telephone or whether other arrangements to cross examine by video or in person were considered necessary.
3. On 30 April 2020, the respondent filed a written application to cross-examine the applicant. The respondent indicated that its two main witnesses had given evidence in written statements disputing that comments or statements attributed to them by the applicant in his written statement were made by them at all. The respondent also noted an inconsistency in the history given to the medicolegal experts qualified in this case compared to the evidence of the applicant's treating practitioners. The respondent said there were significant factual disputes giving rise to an issue as to the applicant's credibility.
4. On these, and other unidentified matters of "significant factual dispute", the respondent applied for leave to cross-examine the applicant. The respondent also requested that consideration be given to cross examination in person given the limitations of video-based testimony.
5. The applicant was invited to respond to the application to cross-examine and responded on 5 May 2020. The applicant opposed an open ended cross-examination. It was submitted that any cross-examination should be limited to particular issues of fact that the Arbitrator considered could only be resolved by hearing oral evidence from the applicant.

FINDINGS AND REASONS

6. There is no legal right to cross-examination in Commission proceedings. The decision to allow or not allow cross-examination is at the discretion of the Arbitrator. In *Aluminium Louvres & Ceilings Pty Limited v Xue Qin Zheng (Zheng)*¹ Bryson JA, with whom Handley HA and Bell J agreed, said:

¹ [2006] NSWCA 34.

“There is no legal right to cross-examine an applicant or other witness in the Workers Compensation Commission, and decisions whether to allow cross-examination or to limit it are discretionary decisions, which must be made in a context of the legislation and the practices which the Commission follows, and, at least as importantly, in the context of the facts and circumstances of the case under consideration.” [at 37]

7. The *Guideline to the Practice of the Conciliation/Arbitration Process in the Workers Compensation Commission* states:

“Questioning or cross-examination of witnesses (including parties) will be permitted in very limited circumstances and only if the Arbitrator is of the view that it is necessary to come to a decision. Circumstances where cross-examination may be allowed could include where:

 - contradictory evidence requires to be clarified or tested, or
 - adverse matters material to the decision should be put to a witness when there has been no previous opportunity for these to be answered.”
8. The respondent has identified the purpose of the cross examination proposed as being to “test” the applicant’s evidence in circumstances where his credit is in issue. It is not, however, necessary to allow cross-examination before an adverse finding of credit can be made: *Halilovic v Paper Australia Pty Limited*².
9. The Commission is not bound by the rules of evidence and its proceedings are to be conducted with as little technicality as the proper consideration of the matter permits. In *Zheng, Bryson, JA* said at [25]:

“The requirements of the rules for information to be lodged in advance and for statements revealing the cases of parties to be made in advance, taken with the width of the sources of information on which the Commission is authorised to act and the ways in which it authorised to proceed, mean that assumptions upon which common law trials are conducted should not be readily carried over when testing contentions that a hearing before an Arbitrator was not conducted in a fair way.”
10. The obligation to accord procedural fairness requires that a party be given notice of the case that is put against him or her, and a reasonable opportunity to put evidence and submissions before a tribunal concerning that case³.
11. In the present case, the applicant’s written evidence is set out in written statements signed by him on 20 August 2019 and 28 January 2020. The first statement was prepared by an investigator procured by the respondent. The applicant’s evidence has been responded to in a series of written statements signed by five witnesses attached to the Reply. In addition, the respondent relies on a series of text messages between the applicant and one of its witnesses.
12. In the circumstances, I am satisfied that through the exchange of documents that has already taken place, the respondent has had an opportunity to respond to the applicant’s evidence. The applicant has also been placed on notice of the case against him. I am not persuaded it is necessary, in order to accord procedural fairness to either party, or for the Commission to come to a decision on the factual disputes, for the applicant’s evidence to be “tested” under cross-examination.
13. Given the respondent’s submission that a face to face hearing is required in order facilitate a cross-examination of the applicant, it is also relevant to consider the protocol issued under *e-bulletin No. 98 - March 2020 Protocols for telephone conciliations, arbitrations and*

² [2008] NSWCCPD 80.

³ *New South Wales Police Force v Winter* [2011] NSWCA 330 at [84].

mediations. That document indicates that given the current national health emergency, face-to-face conciliation and arbitration will only be held in exceptional circumstances and only if approved by the President of the Commission.

14. Having regard to the facts and circumstances of this case as well as the legislation and practices which the Commission follows, I am not satisfied that leave should be granted to the respondent to cross-examine the applicant. I am further satisfied that it is appropriate that the matter proceed by way of telephone conciliation and arbitration in accordance with the current protocol.
15. The respondent's application is declined.

