

FEDERAL COURT OF AUSTRALIA

Health Services Union v Jackson (No 2) [2015] FCA 670

Citation: Health Services Union v Jackson (No 2) [2015] FCA 670

Parties: **HEALTH SERVICES UNION v KATHERINE JACKSON; KATHERINE JACKSON v HEALTH SERVICES UNION**
ROBERT ELLIOTT v HEALTH SERVICES UNION; HEALTH SERVICES UNION v ROBERT ELLIOTT, MICHAEL WILLIAMSON and KATHERINE JACKSON

File numbers: VID 1042 of 2013
NSD 1501 of 2013

Judge: **TRACEY J**

Date of judgment: 22 June 2015

Catchwords: **PRACTICE AND PROCEDURE** – application for permanent stay of proceedings – whether proceedings brought for improper purpose – whether proceedings should be stayed due to unavailability of evidence

Legislation: *Federal Court of Australia Act 1976* (Cth) s 37M
Civil Procedure Act 2005 (NSW) s 56

Cases cited: *Clarke v State of New South Wales* (2006) 66 NSWLR 640 – cited
Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd (2009) 239 CLR 75 – cited
Palavi v Radio 2UE Sydney Pty Ltd [2011] NSWCA 264 – cited

Date of hearing: 22 June 2015

Date of orders: 22 June 2015

Place: Melbourne

Division: FAIR WORK DIVISION

Category: Catchwords

Number of paragraphs: 42

Counsel for the
Applicant/Cross-Claimant:

Mr MA Irving and Mr T Borgeest

Solicitor for the
Applicant/Cross-Claimant:

Holding Redlich

Counsel for the Respondent/
Third Cross-Respondent:

Mr M Robinson SC and Ms D Dinnen

Solicitor for the
Respondent/Third Cross-
Respondent:

Beazley Boorman Lawyers

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 1042 of 2013

**BETWEEN: HEALTH SERVICES UNION
Applicant**

**AND: KATHERINE JACKSON
Respondent**

**AND BETWEEN: KATHERINE JACKSON
Cross-Claimant**

**AND: HEALTH SERVICES UNION
Cross-Respondent**

JUDGE: TRACEY J

DATE OF ORDER: 22 JUNE 2015

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The respondent's application for a permanent stay of the proceeding be refused.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1501 of 2013

BETWEEN: ROBERT ELLIOTT
Applicant

AND: HEALTH SERVICES UNION
Respondent

AND BETWEEN: HEALTH SERVICES UNION
Cross-Claimant

AND ROBERT ELLIOTT
First Cross-Respondent

AND MICHAEL WILLIAMSON
Second Cross-Respondent

AND KATHERINE JACKSON
Third Cross-Respondent

JUDGE: TRACEY J

DATE OF ORDER: 22 JUNE 2015

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The third cross-respondent's application for a permanent stay of the proceeding be refused.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
FAIR WORK DIVISION**

VID 1042 of 2013

**BETWEEN: HEALTH SERVICES UNION
Applicant**

**AND: KATHERINE JACKSON
Respondent**

**AND BETWEEN: KATHERINE JACKSON
Cross-Claimant**

**AND: HEALTH SERVICES UNION
Cross-Respondent**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1501 of 2013

**BETWEEN: ROBERT ELLIOTT
Applicant**

**AND HEALTH SERVICES UNION
Respondent**

**AND BETWEEN: HEALTH SERVICES UNION
Cross Claimant**

**AND ROBERT ELLIOTT
First Cross-Respondent**

**AND MICHAEL WILLIAMSON
Second Cross-Respondent**

**AND KATHERINE JACKSON
Third Cross-Respondent**

JUDGE: TRACEY J

DATE: 22 JUNE 2015

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 These proceedings were commenced in the Court in 2013 and are fixed for hearing
commencing on 29 June 2015. The delay in commencing the trial is, in no small measure,
attributable to failures on the part of Ms Jackson to comply with procedural orders made by
the Court. There are, however, other reasons which were beyond her control including a
period of some months during which she was unable, for health reasons, to provide
instructions to her solicitor and counsel.

2 The pleadings alleged that Ms Jackson misused large sums of money drawn from the funds of
the Health Services Union (“the Union”) for various personal and political purposes.

3 The Union seeks orders in the nature of reparation.

4 By interlocutory application dated 5 June 2015 Ms Jackson has applied for a permanent stay
of both proceedings. The motion was supported by affidavits affirmed by her on 9 and
15 June 2015 and by affidavits affirmed by Kate Wilkinson and sworn by Jane Holt, both on
29 May 2015. Such an application was first foreshadowed in June 2014. It was also
foreshadowed at a directions hearing on 14 October 2014 and by her solicitor in
correspondence in February of this year. Given the imminence of the trial and the long delay
in moving for a permanent stay, it is necessary to deal immediately with the application.

5 Ms Jackson contends that the proceedings are prosecuted by the Union for an improper
purpose. She also alleges that the Union has perpetrated a deception upon the Court and that
the proceedings are “seriously and unfairly burdensome, prejudicial or damaging” or
“productive of serious and unjustified trouble and harassment” to her.

6 These quoted passages are drawn from the joint judgment of French CJ, Gummow, Hayne
and Crennan JJ in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75.

7 After quoting from the extra-curial writing of Master Jacob their Honours said (at 93-4) that:

“The term ‘abuse of process’, as used in Australia today, is not limited by the
categories mentioned above or those which constitute the tort. It has been said
repeatedly in the judgments of this Court that the categories of abuse of process are
not closed. In *Walton v Gardiner* the majority adopted the observation in *Hunter v
Chief Constable of the West Midlands Police* that courts have an inherent power to
prevent misuse of their procedures in a way which, although not inconsistent with the
literal application of procedural rules of court, would nevertheless be ‘manifestly
unfair to a party to litigation ... or would otherwise bring the administration of justice
into disrepute among right-thinking people’. This does not mean that abuse of
process is a term at large or without meaning. Nor does it mean that any conduct of a

party or non-party in relation to judicial proceedings is an abuse of process if it can be characterised as in some sense unfair to a party. It is clear, however, that abuse of process extends to proceedings that are ‘seriously and unfairly burdensome, prejudicial or damaging’ or ‘productive of serious and unjustified trouble and harassment’.”

- 8 The collateral purpose to which Ms Jackson refers is said, by her, to derive from her public exposition of what she described as corruption on the part of two other senior officials of the Union, Mr Michael Williamson and Mr Craig Thomson. She claims that the proceedings have been brought “to cause her financial ruin, and as a vehicle for the pursuit of an ongoing campaign of false smear and attack that has been and is being waged against her by those who now control the Union, and others, since August and September 2011.” More pithily in submissions, filed on 22 June 2015, she identifies the collateral purpose as “being the destruction of Kathy Jackson, financially and otherwise.”
- 9 Ms Jackson accepts that she bears the significant burden of establishing that the Union has pursued the proceedings for a sinister purpose. Ms Jackson advanced a good deal of material upon which she sought to found the inference that the Union had brought these proceedings for such a purpose.
- 10 She relied on a series of events dating back for many years with a view to establishing that those acting for the Union, as moving party in one of these proceedings, had strong political and other differences with her which had motivated them to seek her downfall by means of the prosecution of these applications.
- 11 She said that she had been a strong supporter of Mr Williamson but had fallen out with him in 2011 when she made complaints, as a whistle blower, about serious financial misconduct by him. She also made allegations of misconduct against Mr Thomson.
- 12 A significant difficulty which confronts her in the present application is linking the public disclosures which she had made in 2011 with the commencement of the present proceedings. Neither Mr Thomson nor Mr Williamson played any part in the Union’s decision to bring proceedings in this Court.
- 13 Counsel appearing for Ms Jackson on the present application drew attention to and placed particular reliance on a number of parts of her affidavit.
- 14 I have considered those parts and I have read the affidavits as a whole but I am not persuaded that the inference which I am asked to draw is open on this material. It is simply too tenuous

to forge the link between past political differences with other Union officials and the decisions of those presently in elected office in the Union who are responsible for the prosecution of these proceedings.

15 By way of illustration, I would refer to a number of the passages in Ms Jackson's affidavit to which I was taken by counsel who appeared for her.

16 At paragraph 188 of her affidavit of 9 June 2015, there is a transcript of a conversation, which had been intercepted on 2 March 2012, between Mr Brown, who is the principal officer of the Union responsible for the conduct of these proceedings, and Mr Williamson. The transcript was made available to the Royal Commission into Trade Union Governance and Corruption which is presently in session. The transcript reveals that at that time, in March 2012, Mr Brown and Mr Williamson appeared to be on amicable terms and were both opposed, for internal Union and other political reasons, to Ms Jackson's interests to the point where they discussed the means by which charges might be brought against her for alleged breaches of the Union's rules.

17 Ms Jackson asserted (at paragraph 191) that the intercept was proof that Mr Brown was actively conspiring with Mr Williamson to establish a rigged disciplinary process through the appointment as Union Ombudsman of a nominated individual who could be relied on to remove her from office. And she records at paragraph 223 of her affidavit, Mr Brown eventually did lay charges against her on 27 August 2012 and a disciplinary process followed.

18 While it may well have been the case, in the course of 2012, that Mr Brown thought it appropriate to pursue Ms Jackson for alleged breaches of the Union's rules, it does not follow that he was motivated by any ill feeling against her to prosecute the present proceedings which are of a different character.

19 A second example on which reliance was placed was drawn from the transcript of a telephone interception of a conversation between Mr Williamson and Mr Brown on 12 March 2012 in which Mr Williamson said: "And then there's a couple of other things you can drop on to the agenda. I saw Greg Combet yesterday and I was talking to him and I said, 'Mate, we're going to nominate her [Ms Jackson] for ACTU secretary'. He said, 'Oh, that would be fucking brilliant. That's all we would need.'" And he said, "No, what we need," he said,

“We need more intellectual geniuses like her in parliament. So because they fucking hate her.”

20 That, again, is a passage that indicates a view which Mr Williamson attributes, correctly or incorrectly, to the former ACTU secretary about the attitude of certain ACTU officials to Ms Jackson. It says nothing about any motivation that Mr Brown may have had, for pursuing these proceedings.

21 A final example is to be found in paragraph 604 of Ms Jackson’s affidavit in which she deposes that, after a period of ill health, she returned to her office in the Union on 7 September 2011 to find that her office had been ransacked and that a number of documents had been taken, including an exercise book in which she kept records of what is known in the proceeding as the NHDA fund.

22 Ms Jackson was not in a position to give any evidence about who might have been responsible for the removal of the exercise book, and the fact that it had been removed in 2011 can hardly have a bearing on a decision, taken some two years later to commence these proceedings. Furthermore they can say nothing about the motivation of those responsible for the commencement of the proceeding.

23 I note that Mr Brown has given evidence to the Royal Commission. Ms Jackson has filed, as an exhibit to one of her affidavits, his full witness statement. Mr Brown is recorded in that statement as giving evidence which is partially supportive of Ms Jackson and provides evidence of some balance in his approach to her. He says, for example, in paragraph 4 of the witness statement, that Ms Jackson was right to blow the whistle on Mr Williamson and that she had no doubt suffered at the hands of Mr Williamson and his supporters as a result of her having done so. It was wrong, he says, of them to have attacked her. This evidence, as counsel for Ms Jackson points out, remains untested.

24 Mr Brown also told the Royal Commission that he lauded Ms Jackson for her role in exposing the corruption of Mr Williamson, but he condemned her for breaching what he said were her obligations to the Union and its members. There were other passages in his statement that do indicate some balance in his approach and are not consistent with the malign purpose which is attributed to him and others who are now the guiding minds of the Union.

25 In short, there is simply not enough evidence to support the inference relied on by
Ms Jackson that these proceedings are being prosecuted with a view to procuring her
financial and other ruin. An adverse inference will not be drawn if other equally available
inferences are open in the circumstances.

26 The Union is prima facie entitled to recover funds which it complains Ms Jackson has utilised
for her own purposes, if, in fact, she has done so.

27 There is no basis for accepting that those in charge of the Union at the time these proceedings
were commenced, in the wake of the departure of Messrs Williamson and Thomson, would
wish to harm Ms Jackson because she had exposed Messrs Williamson and Thomson.
The Union pursued them for moneys, which it is claimed they misappropriated. There is no
reason why, in the interests of its members, the Union should not also pursue Ms Jackson for
funds which it claims she has misappropriated.

28 I stress that at the moment these are claims. There is no established case of misappropriation.

29 The second basis upon which Ms Jackson makes her present application is that she is
severely incommoded by the large number of lost or missing documents which she claims
would assist her case, but which are not available to her.

30 Counsel refers to what he says are “gaping holes” in the material and has provided a lengthy
table as an attachment to his written submissions. That table identifies categories of
documents which it is said Ms Jackson requires to defend her claim. An analysis of the table
discloses a number of things which, when one gets to the end of the analysis, establishes that
the gaping hole is not as large as claimed.

31 The evidence establishes that some of the documents that might fall within some of the
categories were lost in a flood which engulfed the branch offices in 2010. Some more
material was lost or mislaid in 2012 when, following a merger between various branches,
some 91 boxes of material, not all of it by any means even potentially relevant to the present
cases, were moved from Melbourne to Sydney. When subsequently sought, 77 of those
boxes could not be found.

32 It is important, however, to note that this occurred in 2012, well before these proceedings
were commenced and that it is primarily a matter of speculation as to whether any of the
material in any of the 77 boxes might be of relevance to the issues which will fall for
determination at trial.

- 33 A number of the categories of documents appearing in the table were not sought by way of discovery by Ms Jackson, despite the extensive discovery process which has been going on for over a year in the lead up to the hearing. Some of the material in the list has been made available to those advising Ms Jackson. Some of the material is not in the possession of the Union and therefore cannot be discovered. But the Union has gone to some effort to fill the void by issuing subpoenas to third parties who may have the counterfoils or copies of the particular documents and other relevant documents that it would appear at one point were in the possession of the Union, but are no longer.
- 34 The final observation that I would make in relation to the missing documents is that, in some instances at least, the absence of these documents will not operate to the benefit of the Union. The Union will bear the onus at trial of making good its claims, and the absence of some of these documents will undermine its capacity to make good its case. Put shortly, the absence of the documents cuts both ways forensically.
- 35 One of the categories of documents that is missing are minutes of meetings of various councils of the Union, which Ms Jackson says will record the authorisation of payments made to her or drawn down by her from Union funds.
- 36 I would simply make this observation, having regard to the pleadings in the case: even if the relevant minutes were to be produced and be available to the parties and the Court, it would not guarantee a good defence to Ms Jackson if the expenditure authorised or purportedly authorised in any resolution was of such a character that it could not be approved consistently with the Union rules. In other words, it is not certain that, were resolutions produced, they would provide Ms Jackson with a good defence. They may or may not.
- 37 The circumstances in which a proceeding might be stayed because of the unavailability of documents are limited. There is no doubt that the Court has the power to protect its processes from abuse and any abuse of process can be prevented by the Court, acting, if need be, of its own motion.
- 38 I refer to s 37M of the *Federal Court of Australia Act 1976* (Cth) and to the equivalent provision in the *Civil Procedure Act 2005* (NSW), s 56(3), which was dealt with by Allsop J when president of the New South Wales Court of Appeal in *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264 at [93]-[95].

39 These powers were considered by Johnson J in *Clarke v State of New South Wales* (2006) 66 NSWLR 640 at 666. His Honour there expounded a number of principles. They included the caution that the power is to be exercised sparingly. He referred to the possibility of staying proceedings in which a party to those proceedings intentionally destroyed material which was significant to the determination of the case and where such destruction occurred after the proceedings had commenced. He said that, in such a case, a clear foundation would appear to exist for the court to call in aid its power to stay or dismiss the proceedings. Even then, it would involve the exercise of a discretionary power of the court which would be informed by value judgments, having regard to the whole of the circumstances.

40 These present cases do not involve any intentional destruction of documents after proceedings had been commenced and Ms Jackson has failed to establish that the non-availability of the material that is missing has been deliberately hidden or destroyed for the purpose of preventing her making good her defence.

41 The highest point reached by her submissions is that there are documents that are missing and the reason for them being missing is unexplained. Whether those documents had the potential to be significant in the determination of these proceedings must be a matter of speculation. As a result, the evidence does not allow me to infer that the documents had been intentionally destroyed by anyone acting for or on behalf of the Union in these proceedings, after they had been commenced, in order to disadvantage Ms Jackson.

42 For these reasons, the application will be refused.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tracey.



Associate:

Dated: 2 July 2015