

CITATION: *Spinosa v Victims Assist Queensland* [2016] QCAT 173

PARTIES: Donato Spinosa
(Applicant)
v
Victims Assist Queensland
(Respondent)

APPLICATION NUMBER: GAR 214-15

MATTER TYPE: General administrative review matters

HEARING DATE: 27 January 2016

HEARD AT: Brisbane

DECISION OF: **Member Rogers**

DELIVERED ON: 2 March 2016

DELIVERED AT: Brisbane

ORDERS MADE:

1. The decision of Victims Assist Queensland dated 13 August 2015 is confirmed.
2. The Queensland Police Service Report No QP1500032100, found at pages 30, 31 and 32 of the material filed by the Scheme Manager of Victims Assist Queensland on 12 October 2015, be provided to Mr Spinosa.

CATCHWORDS: GENERAL ADMINISTRATIVE REVIEW – EXTERNAL REVIEW OF DECISION – Where allegation of harassment– Where person claimed psychological injuries – Where no charges laid – Where claim made under *Victims of Crime Assistance Act* 2009 (Qld) – Whether offence occurred - Whether ‘act of violence’ committed – Whether claim can be sustained

Victims of Crime Assistance Act 2009 (Qld) ss 21, 25, 125

Criminal Code Act 1899 (Qld) s 359B

Commonwealth Criminal Code 1995 (Cth) s

474.17

APPEARANCES and REPRESENTATIVES:

APPLICANT: Donato Spinosa appeared in person

RESPONDENT: Victims Assist Queensland represented by Ms A Freeman of Counsel

REASONS FOR DECISION

- [1] Mr Spinosa enrolled at Griffith University in July 2012. He was studying part-time to complete the degree of Bachelor of Multimedia Arts and attended the Nathan campus of the University about three days a week. He was achieving at a high level and had a Grade Point Average of 5 at the end of his first semester of study.
- [2] In the first semester of 2014, he was undertaking a subject involving group work. Issues arose between Mr Spinosa, a tutor and other persons within the group. Mr Spinosa made a complaint to the University about these issues. In June he was advised in writing that the complaint had been investigated and no further action would be taken. Professor Finger, Dean of the Faculty, investigated the complaint.
- [3] He lodged a complaint with the Ombudsman and the University¹ about the complaints procedure on 5 August 2014. He then lodged a complaint with the Queensland Police Service ('the police') against a student and Professor Finger in August 2014 alleging, against Professor Finger, unlawful stalking and unlawful use of a carriage service to menace and harass. A decision was made by the police that the complaints were unfounded and no further action was taken.²
- [4] The University determined on 5 November 2014 to permanently exclude Mr Spinosa from the University for breaches of the Student Charter. It was found he had made offensive statements about senior staff at the University, including Professor Finger.³
- [5] Mr Spinosa sought the assistance of his doctor, a counselling service and a psychologist to treat the psychological trauma, which he said resulted from the unlawful conduct of Professor Finger. He also took legal advice.
- [6] In May 2015 he applied to Victims Assist Queensland for assistance under the *Victims of Crime Assistance Act 2009* (Qld) ('the Act') for his medical fees paid so he could continue to receive psychological support.

¹ Queensland Police Service Statement of Witness of Donato Spinosa dated 23 February 2015 at [16], [25].

² Queensland Police Service Report No QP1500032100 printed 10 May 2015.

³ Submission of Respondent dated 25 January 2016.

- [7] On 4 June 2015 a decision was made by the Scheme Manager of Victims Assist to refuse the application. This was internally reviewed on 13 August 2015 and the original decision was affirmed.
- [8] Mr Spinosa has now applied to this Tribunal for a review of that decision.
- [9] At the start of the hearing the Scheme Manager indicated two documents could not be provided to Mr Spinosa without an order of the Tribunal. The first was a Statement of Witness made to the Queensland Police Service on 23 February 2016. Mr Spinosa indicated that he already had in his possession a copy of that Statement and I declined to make an order in relation to that document. I ordered the second document, a Queensland Police Service Report No QP1500032100 found at pages 30, 31 and 32 of the material filed by the Scheme Manager on 12 October 2015, be provided to Mr Spinosa.
- [10] The Act gives the Tribunal jurisdiction to conduct a review of a decision by the Scheme Manager.⁴
- [11] The review process is conducted by a fresh hearing on the merits of the application.⁵ For this reason the actions of the officers of Victims Assist Queensland have no bearing on the Tribunal's decision in this application. On review, the Tribunal may confirm or amend the decision under review; set aside the decision and substitute its own decision; or set aside the decision and return the matter to the decision maker.⁶
- [12] In exercising its review jurisdiction, the Tribunal must decide the review in accordance with the Queensland Civil and Administrative Tribunal Act 2000 (Qld) ('the QCAT Act') and the enabling Act under which the reviewable decision was made.⁷ This means the Tribunal has no powers greater than the original decision maker.
- [13] The events leading to this application are generally accepted. The reasons for the rejection of the application are based on the legal requirements of the Act. The Scheme Manager says Mr Spinosa's experience does not meet the threshold required by the Act and the legislation does not allow a payment to be made in these circumstances. Mr Spinosa says he is the victim of an offence, there is no requirement that a person be charged or convicted of an offence for an application to be successful, he is in need of treatment and he is therefore entitled to a payment for his medical costs. He is not seeking any other payment.
- [14] I have decided the Act does not allow for a payment to be made for Mr Spinosa and I will now explain why.

⁴ *Victims of Crime Assistance Act* 2009 (Qld) s 125.

⁵ QCAT Act s 20.

⁶ *Ibid* s 24.

⁷ *Ibid* s 19.

- [15] The Act establishes a scheme for the payment of financial assistance to a victim of an act of violence.⁸
- [16] Part 2 of the Act sets out the meaning of an act of violence. It is defined as a crime committed in Queensland directly resulting in injury to a person irrespective of where the injury happened.⁹ The “crime” is an act or omission whether or not, among other things, the person who did the act or omission has been identified, arrested, prosecuted or convicted in relation to the act or omission. “Injury” can include mental illness or disorder.
- [17] I am satisfied that Mr Spinosa experienced depression, anxiety and stress.¹⁰ I accept the submission of Mr Spinosa that it is not necessary to establish that a person has been charged with, or convicted of, an offence for a successful claim to be made. The issue to be determined is whether Mr Spinosa was “the victim of an act of violence”.
- [18] In his application received at the Tribunal on 11 September 2015, Mr Spinosa said he was seeking ‘*financial assistance and financial assistance for counselling*’. He further indicated he wanted ‘*disciplinary action taken against the assessors*’ and ‘*to have the organization to be held accountable for deceiving the public*’. These latter requests related to the decision making of Victims Assist. Mr Spinosa did not pursue them at the hearing and I will not take them any further.
- [19] Mr Spinosa relies on a series of communications between himself and Professor Finger to establish that an offence was committed. On 30 June 2014, Professor Finger spoke with him by telephone about the investigation. The conversation must have become heated because Mr Spinosa states ‘*Professor Finger indicated in the phone call that he may take legal action and that is could be in the \$100,000s of dollars*’.¹¹ Following that call there was an email exchange. Professor Finger said “*I have sought legal advice in relation to potentially defamatory statements made by you...*” He alleged Mr Spinosa had spoken to him in ‘*threatening and bullying tones*’ and sought an apology. Mr Spinosa responded by email stating ‘*I do not want to talk to you*’ and ‘*Do not call me GO AWAY*’.
- [20] Mr Spinosa then intentionally missed ten phone calls he knew to be from Professor Finger on 30-31 July. On 1 August 2014 he received an email from Professor Finger saying he had left several phone messages and he received a phone message from Professor Finger saying he would take legal action against Mr Spinosa for defaming his good name and asking him to respond and provide an apology.¹²

⁸ The Act s 21.

⁹ Ibid s 25

¹⁰ Report of Ms Peterson, Psychologist, dated 3 February 2015.

¹¹ Queensland Police Service Statement of Witness of Donato Spinosa dated 23 February 2015 at [12].

¹² Ibid at [22].

- [21] Following this message, Mr Spinosa made a complaint to the police based in what he believed to be unlawful stalking by Professor Finger and using a carriage service to menace and harass.
- [22] The offence of stalking is found in s 359B of the *Criminal Code* 1899 (Qld) ('the Criminal Code') and it has two distinct elements. First, it is necessary to prove the defendant engaged in conduct, intentionally directed at the complainant, on more than one occasion and that the conduct included contacting a person in any way.¹³ Secondly, the conduct must cause either fear of violence to or against the property of the stalked person or detriment reasonably arising in all the circumstances to the stalked person.¹⁴
- [23] Reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving is not stalking.¹⁵
- [24] While it is not necessary for there to be a conviction against an offender for Mr Spinosa to have access to the assistance he is seeking, it is necessary for me to be satisfied that a crime in fact occurred.
- [25] I accept the conduct complained of could have met the requirements of the first element of the offence. However, I am not satisfied the conduct caused the required consequences of either fear or detriment.
- [26] The conduct did not cause fear of violence to Mr Spinosa, or his property. He did not argue that it did. He merely argued that he had made it very clear that he did not want to be contacted, he was contacted, and he says that was against the law.
- [27] It is not against the law to contact someone who has told you they don't wish to be contacted. The conduct of Professor Finger is not a crime unless it can be shown to be in contravention of the Criminal Code.
- [28] Turning to the detriment requirement, the evidence does not establish Mr Spinosa's detriment. His psychological condition was in fact caused by the conduct of Professor Finger on 30 July 2014 – 1 August 2014. It is clear from the evidence that he had been engaged in conflict for about twelve months prior to the telephone calls and messages. He had concerns about his study group, the subject of the investigation, and he was also trying to raise workplace health and safety issues, which he says were not being handled properly.
- [29] The report of Ms Peterson, psychologist, dated 2 February 2015 refers to 'the incident' and Mr Spinosa's exclusion from University as the reason for his condition. In a further report dated 26 May 2015, Ms Peterson states:

¹³ Criminal Code s 359B(c).

¹⁴ Ibid s 359B(d).

¹⁵ Ibid s 359D.

Donato has stated that the incident which occurred at Griffith University in 2014 involving senior staff and a student has caused him sleep disturbance and he feels traumatised. ... He further states that he is experiencing flashbacks of the incident and that is making it hard for him to focus on his studies and day to day functioning.

The causation of his condition as identified in these reports appears to be his exclusion from University together with a specific incident rather than the series of missed phone calls relied on in this claim.

- [30] Mr Spinosa argues that he was predominantly referred to the psychologist for injuries resulting from his interaction with Professor Finger and he should be allowed to raise other issues. I accept that he is able to raise all the issues that are concerning him at the time of the consultation, however the circumstances and documentary evidence contradict Mr Spinosa's assertion that it was his interaction with Professor Finger that was the primary reason for his referral.
- [31] I have not given weight to Mr Spinosa's evidence of the comments of his treating doctor, Dr Funch, that the actions of Professor Finger were a threat. These comments did not form part of a written report or oral evidence by Dr Funch.
- [32] Finally, I am satisfied that Professor Finger had a legitimate interest in giving Mr Spinosa information. I have serious concerns about whether his conduct in conveying that information was in fact reasonable. However, given the previous patterns of communication between the parties, the seriousness of the message to be conveyed and the duration of the conduct for two days, I am not satisfied the conduct would be considered unreasonable and therefore it is probable the exclusionary factor would apply in this case.
- [33] I am satisfied, on the balance of probability, that Professor Finger did not commit an offence in his interaction with Mr Spinosa. I am supported in this view by the decision of the Queensland Police Service that the complaint was unfounded.
- [34] Mr Spinosa argues that I should not give weight to the outcome of his police complaint. He says his complaint was not properly investigated and he is concerned that Professor Finger was not interviewed before a decision was made. Professor Finger was entitled to refuse to participate in an interview. The officer must decide whether to allocate resources to pursue a complaint and the prospects of a conviction are a relevant consideration.
- [35] If I had found a crime had been committed, any crime is not sufficient for the purposes of the Act, I still need to find the conduct constituted an

'offence committed against the person of'¹⁶ Mr Spinosa. This issue was considered in the case of *RZ*¹⁷ where it was said

'In determining whether it is a personal offence one looks therefore to the conduct establishing the commission of the offence, not its consequences.

There is no evidence of intent to harm the person of Mr Spinosa. The conduct complained of was unwanted communication by Professor Finger to convey the information that he intended to take legal action unless he received an apology. The fact of harm, namely a psychological injury requiring treatment, even if caused by the conduct, does not change the nature of the conduct itself. The consequences cannot be considered when deciding if the offence was an '*act of violence*'. I cannot find an '*act of violence*' has occurred and therefore this is not an injury for which assistance can be given under the Act.

[36] Mr Spinosa also argues that Professor Finger committed the Commonwealth offence of '*Using a carriage service to menace, harass or cause offence*'.¹⁸ The reasoning adopted in my previous paragraph must also be applied here. Even if it could be found that Professor Finger had committed an offence under this section, for the purpose of the Act it still needs to be established that the conduct complained of meets the definition of an '*act of violence*.' It is easy to imagine situations where an offence under this section would in fact meet the test for an act of violence. Each situation must be considered in its own particular circumstance. I have considered the frequency, duration and content of the communications relied on. There is no evidence the missed calls and telephone messages were intended to harm the person of Mr Spinosa. I find that the conduct complained of does not constitute an '*offence committed against the person of someone*.'

[37] I find Mr Spinosa was not the victim of an act of violence and he is therefore not entitled to assistance under the Act. For these reasons the review application is dismissed.

¹⁶ The Act s 25(8).

¹⁷ *RZ (by his litigation guardian) v PAE* [2007] QCA 166 at [13].

¹⁸ *Commonwealth Criminal Code* 1995 (Cth) s 474.17.