

Article Information

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Freedom to hire: discrimination damages awarded for failure to hire because of a candidate's political activities

An individual's right to be "political", regardless of their work situation, has been in the headlines recently with respect to the idea of freedom of speech for government-employees. But what about freedom to be hired? A recent Queensland decision where a former politician was denied a job because of his political activities is an interesting development.

In 2012, Liberal Campbell Newman became the Queensland Premier. He appointed Dr Chris Davis, a physician and geriatrician-turned MP, to the position of Assistant Health Minister.

By 2014, Dr Davis and the government of the day had fallen out, particularly over the issue of employment terms for doctors in public hospitals. Dr Davis resigned from Parliament, and later announced his intention to join the Labor party and recontest the next election.

That was not to be, and in August 2014, he applied for a 0.5 FTE role as a Specialist Geriatric Medicine Senior Medical Officer at the Royal Brisbane and Women's Hospital, a public hospital within the scope of the "Metro North Hospital and Health Service" (MNHHS). There were two applicants, but only Dr Davis was a qualified geriatrician. He was, in effect, the only candidate.

After some delay, the MNHHS told Dr Davis that they could not continue with the recruitment process, because of a change of internal governance structure, and that the role would be filled in-house.

Dr Davis commenced proceedings in the Queensland Civil and Administrative Tribunal (QCAT), alleging that, by not employing him, MNHHS had unlawfully discriminated against him, on the basis of his political activities. Member Endicott of QCAT agreed, finding that there was no other explanation available as to why MNHHS did not follow its usual internal recruitment process, particularly when other staff members had expressed concern with the lack of due-process being afforded to Dr Davis.

Importantly, at trial, the key decision-makers at MNHHS were either not called as witnesses, or simply asserted that they had no memory of discussions about why certain things were done. Similarly, other witnesses professed to having made no notes of discussions concerning Dr Davis, when they were otherwise found to be conscientious note-takers. Those who had notes, or gave evidence of what they did recall, gave evidence that supported the finding that the decision not to proceed with the recruitment process for Dr Davis was due to his political activities. The evidence was that the situation was described internally as "tricky" and as causing "complications" and that there were "unexpected hurdles" for Dr Davis to overcome. The decision to not proceed in the normal way was made by executives at the highest level, who would not normally be involved in a recruitment process prior to the interview stages.

Member Endicott concluded that Dr Davis' non-appointment was on the basis of his prior political activity, and in particular that he was openly opposed to the then government's policies with respect to health care. This was a contravention of the *Anti-Discrimination Act 1991* (Qld). She then had to consider the issue of compensation.

Dr Davis was awarded \$50,000 as general damages plus \$4,410 in interest. This related to Dr Davis' un-diagnosed mental health condition arising from the conduct, and his general hurt and distress.

It is not clear why the proceedings took until 2018 to be heard, but the four-year period between the job not being offered and the trial being held meant that Dr Davis' economic loss was considerable. The Tribunal concluded that even though Dr Davis was able to, and did, continue in private practice during that period, the contract he had sought with MNHHS would have allowed him to continue to work in private practice, so those earnings were not to be discounted from any award of past economic loss. He was awarded \$830,824.83 for past economic loss, plus \$78,928.35 for loss of superannuation contributions. He also was awarded \$78,784.62 in interest. These figures were based on what he would have earned if he had been appointed to the position.

Dr Davis was further awarded damages for future economic loss, based on his plans to work until he was 69 years of age, reduced by 50% for contingencies, resulting in an amount of \$407,823.89.

Dr Davis had also sought aggravated damages, because he saw the MNHHS' actions as being an "abuse of power". QCAT disagreed, finding that while what happened was regrettable, there was no evidence that the conduct was in some way retribution for Dr Davis' public criticism of the government.

In total, Dr Davis was awarded \$1,450,771.69 by QCAT.

A case like this demonstrates how important it is to firstly know the law and what is and is not acceptable, but also how important it can be to get professional advice early if there is any question as to whether a decision to not employ someone could be in breach of anti-discrimination legislation.

If you are concerned that your pre-employment recruitment processes may not be legally compliant, contact our [Employment Relations & Labour team](#) for advice.