IN THE FAIR WORK COMMISSION

Matter number: U2021/6095

KRYSTLE GIGGS
Applicant

ST JOHN AMBULANCE WESTERN AUSTRALIA LTD
Respondent

APPLICANT'S FURTHER WRITTEN SUBMISSIONS

Introduction

1. On 3 September 2021 we filed written submissions in the above proceedings (**First Submissions**).

2. These submissions are to be read as an addendum to the First Submissions. Their intention is to assist the court with reference to applicable case law.

3. On this note, although the issues and questions of law discussed in our First Submissions are largely novel and have not been directly considered by a court of law, it is our submission that, generally, the common law principles of employment law are applicable to and support our submissions.

Questions of Law – An Outline

4. In the First Submissions we submitted that the facts of this matter give rise to the following questions of law:

Lawful Authority

a. Do employers have the authority to direct an employee to submit to a medical intervention, such as an influenza vaccination, in the absence of an underlying statutory requirement for them to do so?

The role of the Employer

b. Does a requirement for an employee to receive an influenza vaccination or other medical intervention place the employer in the shoes of either;

i. a medical body; or

ii. an enforcer of Public Health legislation?

c. Does the Respondent in this case, and do employers generally, hold the qualifications, skills, information and/or knowledge relevant to the risks and benefits of such medical intervention to mandate it within their workplaces?

d. Does the Respondent's direction amount to a hazard under the *Occupational Health and Safety Act 1984*?

e. Is the direction by an employer to mandate an influenza vaccination in these circumstances a measure within the meaning of the *Occupational Health and Safety Act 1984*? If not, then what degree of risk, if any, is permissible?

The rights of the Employee

f. Is the Respondent's direction precluded by the employees' right to informed consent?

g. Is the Respondent liable to compensate an employee who is subject to such a requirement for any adverse reaction, injury or death which eventuates from such requirement? If not, is such a requirement appropriate?

On Lawful Authority

5. Whether the Respondent has the right to direct Mrs Giggs to submit to a medical intervention in the absence of an underlying statutory requirement for her to do so is a question which can be approached through an analysis what makes an employer's direction 'lawful'.

6. Generally, to be lawful, a direction must not be inconsistent with any law, modern award or enterprise agreement. The primary source of lawfulness is the scope of the contract of services.[1]

7. As noted in our First Submissions, the direction for Mrs Giggs to receive a vaccination has no lawful basis, given that:

a. the Employer's direction asserts a medical intervention for employees in ordinary circumstances which is additional to and more onerous even than the requirement placed on that same class of employee under emergency legislation specifically designed to deal with (and cover the field with respect to) emergency health crises;

[1] *R V Darling Island Stevedoring and Lighterage Co Ltd; Ex Parte Halliday 1938* (HCA) 60 CLR.

b. vaccination (and medical intervention generally) is not within the ambit of the *Occupational Health and Safety Act 1984* (**the OHSA**) or the *Occupational Safety and Health Regulations 1996* (**the OHSA Regulations**);[2] and

c. there is no express term in the contract of employment or enterprise agreement which obligates Mrs Giggs to receive an influenza vaccination, and it would be unreasonable to suggest that such an implied term exists given the wider public health legislative context which specifically excludes Mrs Giggs from such a requirement.

8. In *R V Darling Island Stevedoring and Lighterage Co Ltd; Ex Parte Halliday*[3] the High Court said (with emphasis added):

> An employer clearly has the authority to give directions and expect them to be obeyed, subject to such directions being lawful and reasonable.
>
> If a command **relates to the subject matter of the employment and involves no illegality**, the obligation of the servant to obey it depends at common law upon its being reasonable. **In other words the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of services and are reasonable**.

9. As is to be expected, and as you know, this High Court authority has been upheld consistently. In *Grant v BHP Coal Pty Ltd (No 2),*[4] the Federal Court of Australia again confirmed that a direction will be lawful to the extent that it falls within the scope of the contract of service and involves no illegality.

10. It is also worth looking at *Daniel Cole v PQ Australia Pty Ltd T/A PQ Australia*,[5] a case in which the Fair Work Commission explored the employer's right to direct an employee to attend a medical examination. In finding that the employer had no reasonable basis to assume that the employee had any illness that related to his capacity to perform the inherent requirements of his job, the Commission's decision included a useful outline of the matters that it would consider in deciding whether any requirement to attend a medical examination was reasonable:

[2] We rely on our arguments in the First Submissions in this regard.
[3] (1938) HCA 60 CLR at 35.
[4] [2015] FCA 1374.
[5] [2016] FWC 1166.

a. Is there a genuine need for the examination, such as long work absences, or absences without evidence of an injury/illness that relate to the employee's ability to perform the inherent requirements of their job?

b. Has the employee already provided adequate medical information that explained their absences and showed their fitness to perform their duties?

c. Is the industry or workplace particularly dangerous or risky?

d. Are there legitimate concerns that the employee's illness/injury could impact on others in the workplace?

e. The Commission also emphasised that where a medical assessment is required, the medical practitioner should be clearly advised of the employer's concerns, which must be focused on the inherent requirements of the job and the employee's ability to perform them.

11. Although this fact scenario and the questions considered are not exactly analogous to that of Mrs Giggs, it does convey the great care the Fair Work Commission took in determining whether it was appropriate for the employer in that case to direct an employee to undergo a medical examination. The questions above also ground that determination in a balanced consideration of the genuine need for such an examination with respect to the employee's job. We say that a medical intervention such as vaccination is an intrusive and invasive procedure, and a much more serious thing for an employer to mandate than an examination. The justification for which such a direction could be said to be lawfully made should therefore be even stricter, and considerably so, as should the clarity of its legality.

The Principle of Legality

12. Indeed, the issue of whether an employer can direct an employee to attend a medical examination has been explored quite extensively, and can provide guidance here despite, as we noted above, the requirement to undergo a medical intervention being a much more onerous one. In particular, in *Grant v BHP Coal Pty Ltd*,[6] Dowsett, Barker and Rangiah JJ referred to the 'principle of legality', exploring its limits with reference to other authorities. They said (with emphasis added:

> 87. In Starr v National Coal Board [1977] 1 All ER 243, Scarman LJ at 249 described **a person's right to personal liberty as a fundamental right**

[6] [2017] FCAFC 42 at 87 – 88.

which would be infringed by requiring the person to undergo a medical examination. It is settled that statutory provisions are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect: see, for example, Coco v The Queen (1994) 179 CLR 427 at 437; X7 v Australian Crime Commission (2013) 248 CLR 92 at [21], [86] and [158]. That principle is known as the principle of legality.

13. If the fundamental right of personal liberty would be infringed by attending a medical examination, then requiring an employee to undergo vaccination must be considered a much more egregious infringement of this right. We also note the established precedent that statutory provisions, such as, say, the duty of an employer to provide a safe working environment, are not to be construed as abrogating fundamental rights in the absence of "clear words or necessary implication" to that effect. We refer to our First Submissions here, in which we submitted that, in the case of Mrs Giggs and the Respondent, there are not only no "such clear words or necessary implication" in the statute (given that medical interventions are not within the ambit of the OHSA or the OHSA Regulations), but a specific statutory carve out in the *Visitors to Residential Aged Care Facilities Directions (No 7)* (**WA Directions**) which excludes Mrs Giggs from such a procedure. It would be an extraordinary submission, in this instance, to say that a direction to undergo a medical intervention is therefore lawful and reasonable.

14. Of course, there are limits to the principle of legality, which were helpfully explored at 88 by his Honours as follows:

> However, the limits of the principle must be borne in mind. In Lee v New South Wales Crime Commission (2013) 251 CLR 196, Gageler and Keane JJ said (with emphasis added):
>
> > 313 ...The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration of rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; **it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.**

> 314 The principle of construction is fulfilled in accordance with its rationale **where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed…**

15. If the Respondent wishes to submit that an exception to the principle of legality should be made in Mrs Giggs' case, then it should indicate, with specificity, the "clearly identified legislative objects" they rely on for such an exception. In addition, they will need to show that the objects or terms or context of legislation make plain that the legislature "has directed its attention to the question of the abrogation or curtailment" of Mrs Giggs' right to undergo medical procedures at her own discretion. In other words, they must specifically point to authorisation within the OHSA and the OHSA Regulations for curtailing Mrs Giggs right to freely informed consent with respect to undergoing such a medical procedure, particularly given that the public health legislation in Western Australia does not authorise such a curtailment in her case, even in the case of a generational public health emergency.

16. So, with this in mind, we turn now to the scope of the OHSA and OHSA Regulations.

The scope of the OHSA Act and Regulations

17. We anticipate that the Respondent may point to either Section 19 or Section 22 of the OHSA as a justification for the direction for Mrs Giggs to undergo vaccination. Section 19, firstly, imposes the following duty on the Respondent:

> (1) An employer shall, so far as is practicable, provide and maintain a working environment in which his employees are not exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall:
>
> (a) provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, his employees are not exposed to hazards;
>
> …
>
> (**the S19 Safety Duty**)

18. Section 19(7) of the OHSA provides that an employer who contravenes the duty imposed by s 19(1), and by that contravention causes the death of, or serious harm to, an employee, commits an offence and is liable to a fine of $200,000.

19. Section 22 of the OHSA creates an additional duty for employers such that:

> [an employer] shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that persons who are at the workplace or use the means of access to and egress from the workplace are not exposed to hazards.
>
> (**the S22 Safety Duty**)

20. In our First Submissions, we outlined the broad factual similarities between our case and that of *Glover v Ozcare [2021] FWC 2989* (**Glover**). We argued, for various reasons we won't repeat here, that the key questions of law we posed in our First Submissions were not addressed in Glover. It is worth noting that the Respondent in Glover argued that if they did not mandate flu vaccination, they would be in breach of these sections of the OHSA. Although we do not ask the court to adjudge general or hypothetical questions, we submit that it is likely that many employers who consider mandating vaccination are and will continue to rely on, and/or refer to, this section of the OHSA in Western Australia, and equivalent sections of work health and safety legislations in other states, in doing so.

21. So, particularly in our case, the nature and extent of both the S19 and S22 Safety Duties are relevant to determining whether they could be said to necessitate or obligate a direction issued from employers to employees to mandate medical intervention. If they could, then the Safety Duties could be said to provide lawful authority for such a direction. In our First Submissions, we argued that a proper statutory interpretation of the OHSA and OHSA Regulations more broadly could not lead to the conclusion that such a direction is within their scope generally, including within the scope of the safety duties. We now point to case law to support the submission that the S19 and S22 Safety Duties in particular are not intended to obligate employers to mandate medical interventions. Therefore, they can not provide the lawful basis or authority for such a direction.

The Section 19 Safety Duty and the Section 22 Safety Duty

22. Helpfully, the Supreme Court of Western Australia has committed to detailed discussion of the nature and extent of both the S19 Safety Duty as well as the S22 Safety Duty in both *Western Power Corporation v Shepherd [2004]* at 23 – 42 (**Western Power Corporation**), as

well as in *Silent Vector Pty Ltd v Shepherd & Anor [2003]* at 8 – 12 (**Silent Vector**).[7, 8] Given the common effect of the two sections, there is an overlap between their terminology (and, resultantly, their application). In Western Power Corporation, Barker J emphasised, in adjudging "the nature and extent of the s19(1)(a) duty" that:[9]

> it must be observed that the duty imposed by s 19(1)(a) is not to be found in the general law, as, for example, is the duty of care that an employer owes an employee for the purposes of the common law of negligence. Rather, it is a duty created by Parliament, through statute, to achieve what the Parliament considers to be a desirable standard of occupational safety and health in Western Australia.

23. He continued, at 24, by defining the "very particular" terms "practicable" and "risk" (terms which Pullin J also deemed it necessary to define in Silent Vector, at 8, and which he defined in the same way, as follows):

> The term "practicable"…is defined by s 3 of the Act to mean:
>
> > "… reasonably practicable having regard, where the context permits, to:
> >
> > (a) the severity of any potential injury or harm to health that may be involved, and the degree of risk of it occurring;
> >
> > (b) the state of knowledge about:
> >
> > > (i) the injury or harm to health referred to in paragraph (a);
> > >
> > > (ii) the risk of that injury or harm to health occurring; and
> > >
> > > (iii) means of removing or mitigating the risk or mitigating the potential injury or harm to health;
> >
> > and
> >
> > (c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii);"
>
> The term "risk", referred to in the definition of "practicable", is defined by s 3 in the following way:

[7] WASCA 233 at 23 - 42.
[8] WASCA 315 at 8 – 12.
[9] *Western Power Corporation v Shepherd [2004]* WASCA 233 at 23.

> "'risk', in relation to any injury or harm, means the probability of that injury or harm occurring;"

24. His Honour continued, stating that:[10]

> as the authorities confirm, the duty imposed by s 19(1) is not, and is not intended to be, an absolute one. It is a duty only so far as it is "practicable" to provide and maintain a working environment to ensure employees are not exposed to hazards: Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249 at 251, per Brennan J; Interstruct Pty Ltd v Wakelam (1990) 3 WAR 100 at 109 - 110, per Wallace J (with whom Rowland J agreed at 121); Hamersley Iron Pty Ltd v Robertson, unreported; SCt of WA; Library No 980573; 2 October 1998 at 15 (in relation to the terms of a similar provision in s 9(1) of the Mines Safety and Inspection Act 1994 (WA)).

25. In Silent Vector, a similar conclusion is drawn with respect to the Section 22 duty, such that:[11]

> "the section does not impose strict liability on the appellant: Wylie v South Metropolitan College of TAFE [2003] WASCA 34 at [45]. The word "probability", which is used in the definition of the word "risk" and which is, in turn, used in the definition of "practicable", means no more than the likelihood of injury occurring: Hamersley Iron Pty Ltd v Robertson, unreported; SCt of WA (Steytler J); Library No 980573; 2 October 1998 at 18 per Steytler J".

26. So, in tandem, neither the Section 19 nor Section 22 duty is intended to be absolute nor unreasonably onerous. The requirement of 'reasonable practicability' is one that ensures that employers only need to do what is reasonable and practicable, "words which bear their ordinary meaning",[12] to ensure employer safety. They do not, therefore, need to do anything which is unreasonable, such as requiring an employee to undergo a medical intervention despite specialised public health legislation that doesn't. They also do not need to do anything impracticable such as requiring interventions of a kind they have no expertise or, critically, knowledge regarding.

On the Role of the Employer

[10] *Western Power Corporation v Shepherd [2004]* WASCA 233 at 27.
[11] *Silent Vector Pty Ltd v Shepherd & Anor [2003]* WASCA 315 at 11.
[12] *Silent Vector Pty Ltd v Shepherd & Anor [2003]* WASCA 315 at 10.

27. Knowledge, in particular, is an important consideration in our case. In Silent Vector, at 12, Pullin J notes that:

> The "state of knowledge" referred to in subsection (b) of the definition of "practicable" is that possessed by persons generally who are engaged in the relevant field of activity and not the actual knowledge, in fact, possessed subjectively by a specific defendant in particular circumstances: Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249 at 261 and Hamersley Iron Pty Ltd v Robertson (supra) at 22.

28. If the requisite "state of knowledge" is that "possessed by persons generally who are engaged in the relevant field of activity", it suggests that the "measures" the OHSA and OHSA Regulations intend to impose are measures specific to the relevant field of employment; measures which employers would have knowledge and expertise in due to the nature and function of their work.

29. Here, the Respondent does not have any knowledge with respect to vaccines or medical intervention, and so could not be said to have a "state of knowledge" in relation to it. The members of the employer's staff who sought to mandate this vaccination, and who sought to answer Mrs Giggs' questions in relation to it, had no medical training at all, let alone training in epidemiology or vaccinology. It must be asked, in those circumstances, whether the Respondent could conceivably have the requisite 'state of knowledge' to determine that vaccination is a 'reasonably practicable' 'measure' with respect to the Section 22 Safety Duty. We strongly submit that they could not.

30. This relates to the questions of law posed in our First Submissions with respect to the role of the employer in such a scenario as this. If either the Section 19 or the Section 22 Safety Duty could be said to necessitate, or to justify, a duty to protect from infectious disease to the extent of requiring staff to undergo a medical intervention, it must be asked, given that the Respondent in this case, and employers in most cases, do not have a requisite "state of knowledge" in relation to such an intervention, how it is that such a "measure" could be reasonably facilitated. We won't repeat the specific questions here from our First Submissions, referenced in paragraph 4(b) above, but we ask the Court to give careful consideration to whether such an interpretation is possible, practicable, reasonable and lawful, given those submissions as well as the case law extracted above.

Conduct of the Employee Outside of Working Hours

31. It is well established that the law is generally reluctant to permit employers to regulate the conduct of employees outside of working hours, whether through express direction, or impliedly. If the conduct of employees is something the law is reluctant to restrict, then it could be assumed that their medical choices would attract a similar (if not more pronounced) reluctance.

32. The cases on this issue have allowed employers, via policies, to regulate the out of hours conduct of employees only where there is a relevant link between the conduct of the employee and their "employment requirements" (ie; the nature of their work).[13]

33. For example, the courts have found that an employee in the banking trade can have their employment terminated for committing fraud offences in their private time,[14] and a member of the police force can be disciplined for behaviour in their private time which is "patently inconsistent with the desirable character of a police officer".[15]

34. In our First Submissions, we differentiated the facts of our case from the three other cases which concerned an employee's termination for refusal to undergo vaccination. As we explained, those cases did not directly consider the question of whether it is appropriate for employers to regulate their employees' personal medical decisions in this way. This case presents an opportunity to properly explore the question.

On the Rights of the Employee

35. We have noted above that the principle of legality protects an employee's right to personal liberty, particularly in circumstances where there is no clear statutory intention otherwise.

36. The direction by an employer that an employee must undergo vaccination raises other additional questions with respect to the rights of the employee too.

37. The basic common law duty of care implies that an employee who suffers injury either because of a vaccine, or due to pressure from their employer to receive one (bullying or harassment), could make a claim against their employer in tort. In Mrs Giggs case, she communicated her concerns about the procedure to her employer, which arguably lends to a suggestion that the risk was reasonably foreseeable.

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[13] *Graincorp Operations Ltd v Markham (2002)* 120 IR 253
[14] *Hussein v Westpac Banking Corporation (1995)* 59 IR 103
[15] *Wickham v Commissioner of Police [1997]* SASC 6497

38. The High Court expressed the implied duty of care in *Hamilton v Nuroof (WA) Pty Ltd*[16] as a "duty to take reasonable care to avoid exposing the employees to unreasonable risks of injury." The court added that "the degree of care and foresight required from an employer must naturally vary with the circumstances of each case".

39. The question here is whether an employer could reasonably be expected to take reasonable care, and to have reasonable foresight, in the circumstances of mandating a medical intervention. Again, there is a lack of clarity as to the employer's role which informs this question.

40. In Mrs Giggs' case, for example, the Respondent mandated a medical intervention despite a lack of expertise in medicine. It could be said, as well, that the Respondent has coerced Mrs Giggs into undergoing that procedure, or put her under economic duress to do so, by asserting that, if she does not undergo vaccination, she will be terminated. In this circumstance, the Respondent has stood in the shoes of a medical provider by asserting that:

    a. there is a medical risk to the employee (the presence of influenza); and

    b. that if the employee undergoes vaccination that risk will be negated; and

    c. that if the employee undergoes vaccination they will not suffer any injury or adverse impact (or at least, this is implied in the direction to mandate vaccination, in that it would be counterproductive for an employer to mandate such a procedure if they suspected that it may harm their employee, and we do not suggest that the Respondent would do such a thing in any case).

41. There is an important question, then, as to whether the employer can be held liable for negligence in the case of an adverse reaction to vaccination.

42. And, in general, if the employer is not liable in this scenario, then who is?

43. Usually, an implied duty of care arises out of an implied term in the employment contract too, but there is uncertainty around the issue of mandatory vaccination because in previous cases such a direction has not being justified via employment contracts, but via external statute (either work health and safety legislation or a public health statute).

44. It is worth noting that WorkCoverWA has not issued specific guidance as to whether workers compensation will be available to employees who suffer an adverse reaction to a

[16] (1956) 96 CLR.

vaccination which has been required by their employer. For comparison sake, in New South Wales, iCare notes that for a vaccine injury to be covered under workers compensation, it will need to be satisfied that:[17]

> the vaccine injury arose out of, or in the course of, the worker's employment; and
>
> the worker's employment was a substantial contributing factor to the vaccine injury or was the main contributing factor to a disease injury; …

45. It is difficult to imagine the criteria by which it will be determined whether a vaccine injury arose out of, or in the course of, a worker's employment, given that vaccination is a private medical procedure usually undergone in a doctor's office, outside of work hours. Similarly, it is hard to imagine how a worker's employment could be deemed "a substantial contributing factor" to a vaccine injury, given a vaccine is not a part of someone's employment, but a personal medical requirement the Respondent is choosing to burden the employee with. There is a real risk here that, if employers mandate medical interventions, and these interventions lead to harm, employees will be left with no recourse in terms of insurance or compensation for said harm. This is an unacceptable position for employees to be placed in, particularly when coupled with the economic duress employees are being subject to if they refuse, and the arguable breach of informed medical consent as a result (as discussed in our First Submissions).

Conclusion

46. The relative novelty of employers implementing (or purporting to implement) vaccination as a medical intervention means that there is a lack of specific precedent informing the questions we have posed to the court. However, the case law does deal with some of the core related areas of employment law which we say apply favourably to our submissions.

47. For example, the case law extensively deals with what it is that makes an employer's direction "lawful" and "reasonable". In our favour, the precedent quite clearly defines lawful directions as those which are related to the scope of the contract of services and which involve no illegality. The characterisation of the "principle of legality", discussed extensively in *Grant v BHP Coal Pty Ltd [2017]* FCAFC 42 and other cases above, is

[17] '*iCare updates COVID-19 information on adverse reactions to vaccinations',* https://www.icare.nsw.gov.au/news-and-stories/2021/icare-updates-covid-19-information-on-adverse-reactions-to-vaccinations#gref, dated 24.08.2021, accessed 13.09.2021.

favourable to our argument that a direction to receive a vaccine in the absence of a law authorising this direction is arguably unlawful.

48. The reluctance of the courts to intrude in the personal lives of employees is also in our favour.

49. Regarding the OHSA and Regulations, our argument that those instruments are intended to cover the field and clearly do not include within their ambit vaccination as a 'measure' is likely to be countered by the assertion that the employer has a duty under ss19 and 22 of the OHSA to ensure a safe working environment, such a duty justifies such a (therefore) 'lawful and reasonable' direction (a similar argument to that made in Glover).

50. However, as extracted above, the cases which explore the ambit of the Section 19 and Section 22 Duties do not support the assertion that a direction to receive a vaccine (or medical procedure) is a "practicable" means of mitigating risk. A proper construction of ss19 and 22 on the available case law is much more narrow, confined to measures taken within the workplace (and which the OHS Act and Regs specifically include), rather than measures at large.

51. On the qualifications of an employer, and whether a vaccine can be a "measure", there is a live problem for employers if they assert that they can be, because the definition of "practicable", "risk" and (in particular) "state of knowledge" within the case law suggests issues with the applicability of this responsibility onto employers in the case of vaccines (and that the duty to implement measures is not intended to extend to medical intervention generally).

52. Finally, a lack of clear avenue for compensation, and the flippant dismissal of informed consent, leaves the rights of employees, particularly if they were to suffer an adverse reaction, in a tenuous position.

53. On all the facts here, in addition to the statute properly interpreted with reference to the case law, the direction for Mrs Giggs to receive an influenza vaccination cannot be said to be lawful or reasonable.

23 September 2021

Serene Teffaha

Advocate & Paid Agent for the Applicant